

Pass the Salt: DOJ Requires Stone Canyon to Divest Its Evaporated Salt Business to Obtain Merger Clearance

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Earlier this week, Stone Canyon Industry Holdings LLC ("Stone Canyon") and its portfolio company SCIH Salt Holdings Inc. ("SCIH") reached a settlement agreement with the Department of Justice ("DOJ") to resolve its investigation of SCIH's proposed acquisition of Morton Salt Inc. ("Morton"). Under the terms of the settlement agreement, which is subject to Tunney Act review, Stone Canyon and SCIH are required to divest all assets relating to evaporated salt in order to proceed with the Morton acquisition. This settlement agreement is noteworthy in that the divestiture was of the buyer to divest *its own* assets in order to proceed with the transaction, and the DOJ and the parties reached agreement without a divestiture buyer identified.

SCIH is an industrial holding company incorporated in Delaware and the corporate parent of US Salt LLC ("US Salt"), one of the largest suppliers of evaporated salt in the United States. In October 2020, SCIH entered into an agreement to acquire Morton from its parent company K+S Aktiengesellschaft for approximately \$3.2 billion. Morton is the largest supplier of several types of evaporated salt in the United States.

On April 19, 2021, the DOJ filed a civil complaint that accompanied the settlement alleging that the proposed acquisition would substantially lessen competition for the sale of three different types of evaporated salt. In defining the relevant product markets, the DOJ indicated that a thorough analysis of the substitutability of products in real-world realities yield at least three product markets:

- *Pharmaceutical-grade salt* is evaporated salt used in the pharmaceutical industry for various life-saving treatments and products, including dialysis fluid, intravenous saline solution, and other medical products. The DOJ alleged that other types of evaporated salt were not substitutes because pharmaceutical-grade salt must contain higher percentages of sodium chloride and cannot contain additives such as anti-caking agents found in other types of evaporated salt.
- *Round-can table salt* is evaporated salt that is processed for human consumption is regulated by the Food and Drug Administration. The DOJ alleged that table salt has no close market substitutes due to its high purity requirements and the presence of anti-caking agents to prevent clumping and evaporation.
- *Bulk evaporated salt* is evaporated salt sold in bulk form used in the manufacturing of chemicals for cleaning products and as an essential ingredient in nearly all processed pre-packaged foods. Again differentiating this type of salt from others, the DOJ alleged that other types of evaporated salt are not realistic substitutes because they are priced higher and packaged in much smaller quantities, or lack the purity levels that would allow for chemical and food-production end-uses.

The DOJ alleged that the transaction would create a combined firm with a monopoly in each of the three product markets. US Salt and Morton are the two largest suppliers of pharmaceutical-grade salt in the United States, with Morton having a market share of around 77 percent and US Salt a share of around 23 percent. Similarly, US Salt and Morton are the largest suppliers of round-can table salt, holding a combined 90 percent of the market in the United States. Finally, US Salt and Morton are two of only three suppliers of bulk evaporated salt in the northeastern United States. The DOJ alleged that the transaction would eliminate head-to-head competition between the two entities and harm customers in these separate product markets.

To resolve the DOJ's allegations of competitive harm, Stone Canyon and SCIH agreed to divest its entire evaporated salt business, including US Salt and all other assets used in the production of evaporated salt products, in order to proceed with the transaction. Notably, this is an instance where the DOJ permitted the acquiring party to divest *its own* assets, as opposed to assets of the target company, in order to

obtain merger clearance.

Interestingly, the parties reached the terms of divestiture prior to identifying a buyer for the divestiture assets. Pursuant to the terms of the settlement agreement, the divestiture assets must be acquired by a buyer that can and will be used as part of a “viable, ongoing business in the production and sale of evaporated salt products” and must sufficiently remedy the competitive harms alleged in the complaint. While the DOJ usually requires prior identification of an acceptable buyer, it has in limited circumstances foregone this initial identification if it determines, as it appears to be the case here, that the divestiture package is “sufficient to attract a purchaser in whose hands the assets will effectively preserve competition, and that there will be a sufficient number of acceptable potential purchasers for the specified asset package.”¹

The DOJ’s complaint serves as reminder that the antitrust enforcers conduct thorough analysis of the substitutability of products in real-world realities when defining product markets. Additionally, the required divestiture reinforces the notion that in order to obtain antitrust clearance, parties may be required to divest their own assets—including potentially an entire line of business—to obtain antitrust clearance. Should you have any questions about this, or any other antitrust or competition law question, please feel free to contact the attorneys listed above.

¹ U.S. Dep’t of Justice Antitrust Division, Merger Remedies Manual (2020).

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