IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, Plaintiff, v. GEORGIA-PACIFIC CORPORATION, Defendant.	Civil Action No.: 96-164 Filed: 4/8/96

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On March 29, 1996, the United States filed a civil antitrust Complaint,} which alleges that Georgia-Pacific Corporation's ("Georgia-Pacific") proposed acquisition of the gypsum business of Domtar Inc. ("Domtar") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that the combination of the third and fourth largest gypsum board sellers in the Northeast Region would lessen competition substantially in the production and sale of gypsum board in the Northeast Region. As defined in the Complaint, the Northeast Region encompasses Washington, D.C. and the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey,

Pennsylvania, Delaware, Maryland, and Virginia. The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) a permanent injunction preventing Georgia-Pacific from acquiring control of Domtar's gypsum business, or otherwise combining such business with Georgia-Pacific's own business in the United States.

When the Complaint was filed, the United States also filed a proposed settlement that would permit Georgia-Pacific to complete its acquisition of Domtar's gypsum business, but require certain divestitures that will preserve competition in the Northeast Region. This settlement consists of a Stipulation and Order and a proposed Final Judgment.

The proposed Final Judgment orders Georgia-Pacific to divest to one or more purchasers its Buchanan, New York and Wilmington, Delaware gypsum board plants, and certain related tangible and intangible assets. Georgia-Pacific must complete the divestiture of these plants and related assets within one hundred and fifty (150) calendar days after the date on which the proposed Final Judgment was filed (i.e., March 29, 1996), in accordance with the procedures specified therein.

The Stipulation and Order and proposed Final Judgment require Georgia-Pacific to ensure that, until the divestitures mandated by the proposed Final Judgment have been accomplished, the two gypsum board plants and related assets to be divested will be maintained and operated as an independent, ongoing,

economically viable and active competitor. Georgia-Pacific must preserve and maintain the gypsum board plants to be divested as saleable and economically viable, ongoing concerns, with competitively sensitive business information and decision-making divorced from that of Georgia-Pacific's gypsum board business. Thus, subject to Georgia-Pacific's obligation to preserve the assets to be divested, the two plants will be operated independent of, and in competition with, Georgia-Pacific, pending divestiture. Georgia-Pacific will appoint a person or persons to monitor and ensure its compliance with these requirements of the proposed Final Judgment.

The United States and Georgia-Pacific have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Georgia-Pacific, Domtar and the Proposed Transaction

Georgia-Pacific, based in Atlanta, Georgia, is a diversified producer of building products and pulp and paper, with net sales of over $12 billion for its 1994 fiscal year. Operating ten gypsum board plants in the United States, Georgia-Pacific is the nation's third largest gypsum products manufacturer, with an annual capacity to produce approximately 3.1 billion square feet

of gypsum board. In 1995, Georgia-Pacific's United States gypsum board sales totaled about $251 million.

Domtar, Inc., a Canadian corporation headquartered in Montreal, Canada, operates its gypsum business in the United States through its wholly owned subsidiaries, Domtar Gypsum, Inc., and Domtar Industries, Inc., with offices in Ann Arbor, Michigan. The fourth largest producer and seller of gypsum board in the United States, Domtar has the annual capacity to produce about four billion square feet of gypsum board in North America. In 1995, Domtar's United States gypsum board sales totaled about $221 million.

On November 8, 1995, Georgia-Pacific agreed to acquire certain stock and all the gypsum manufacturing operations of Domtar and its subsidiaries in a cash transaction valued at $350 million. For $280 million, Georgia-Pacific will acquire Domtar's nine U.S. gypsum board plants, one gypsum linerboard paper mill, and two plants producing gypsum joint treatment. Georgia-Pacific also proposes to acquire for $70 million Domtar's forty-nine percent interest in a gypsum quarry in Mexico, four Canadian gypsum board plants, one Canadian gypsum plaster plant, one Canadian gypsum joint treatment plant and a Canadian gypsum products warehouse. This transaction, which would take place in a concentrated oligopolistic industry, precipitated the government's suit.

B. The Transaction's Effects in the Northeast Region

The Complaint alleges that the manufacture of gypsum board constitutes a line of commerce, or relevant product market, for antitrust purposes, and that the Northeast Region constitutes a section of the country, or relevant geographic market. The Complaint alleges the effect of Georgia-Pacific's acquisition may be to lessen competition substantially in the manufacture and sale of gypsum board in the Northeast Region.

Gypsum board consists of processed gypsum rock sandwiched between sheets of liner board paper. Sometimes called drywall, wallboard or sheetrock, gypsum board is used to construct and repair interior walls and ceilings in residential and commercial buildings. No good economic functional substitutes exist for gypsum board.

Gypsum board customers in the Northeast Region have been served almost exclusively by gypsum board manufacturing plants located in the Region. Gypsum board is a bulky, fragile and heavy product and is cumbersome and expensive to ship long distances. It is generally sold on a delivered price basis, and freight is an important cost component. As a result, competition is regional, with producers selling the majority of gypsum board to buyers within a 500 mile radius of the producing plant. Domtar services the Northeast Region from its Newington, New Hampshire and Camden, New Jersey gypsum board plants, and Georgia-Pacific serves the Region from its Buchanan, New York and Wilmington, Delaware plants.

The Complaint alleges that Georgia-Pacific's acquisition of Domtar would increase the likelihood of coordinated pricing activity

among gypsum board in manufacturers serving the Northeast Region and will increase the likelihood of anticompetitive price increases for consumers there. The acquisition would increase concentration significantly in the already highly concentrated, difficult-to-enter Northeast Region. If the proposed acquisition were to proceed, Georgia-Pacific and the two largest producers in the Northeast Region, United States Gypsum Co. and National Gypsum Co., each with approximately 30 percent of the market, would control collectively about 90 percent of the gypsum board sales in the Northeast Region. Using the Herfindahl-Hirschman Index ("HHI") as a measure of market concentration (HHI is defined and explained in Appendix A to the Complaint), the acquisition increases the HHI by over 400 points to over a 2700 post-merger level in the Northeast Region.

The structure of the gypsum board industry is fertile grounds for anticompetitive coordination. For example, gypsum board is a homogeneous product, and price is an important dimension of competition. Capacity, production and pricing information is widely available and price changes are normally announced well in advance of implementation. In addition, at least once every generation this century, civil or criminal actions have exposed successful price-fixing agreements among the dominant gypsum board manufacturers. See United States v. Gypsum Industries Association, et al., E25-215 (S.D.N.Y. 1922); United States v. United States Gypsum Co., 333 U.S. 364 (1948); Wall Products Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971); United States v. United States Gypsum Co., et al., 600 F.2d 414 (3rd Cir. 1979).

New entry in the Northeast Region is unlikely to restore the competition lost through Georgia-Pacific's removal of Domtar from the marketplace. De novo entry into gypsum board manufacturing requires a significant capital investment and likely would take over two years before the gypsum board plant comes on-line.

Furthermore, manufacturers with gypsum board plants outside the Northeastern United States are unlikely to offer significant competition in the Northeast Region. With their capacity largely devoted to servicing the needs of customers concentrated around their plants, which are far from the Northeast, manufacturers outside the Northeast Region have neither the ability nor the incentive to ship sufficient quantities of gypsum board to defeat a small but significant nontransitory price increase in the Northeast Region. Collectively, the outside manufacturers represent less than six percent of the footage of gypsum board sold in the Northeast Region in 1995. Historically, whether in times of strong or weak demand, manufacturers located outside the Northeast have not had anything more than a small share of the sales in there.

D. Harm to Competition as a Consequence of the Acquisition

The Complaint alleges that the transaction would have the following effects, among others: competition generally in the Northeast Region will be lessened substantially; actual and potential competition between Georgia-Pacific and Domtar in the Northeast Region will be eliminated; and prices for gypsum board in the Northeast Region are likely to increase above competitive levels.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the production and sale of gypsum board in the Northeast Region by placing in independent hands the two gypsum board plants used by Georgia-Pacific to serve the Northeast Region prior to this acquisition. Within one hundred and fifty (150) calendar days after filing the proposed Final Judgment, Georgia-Pacific must divest its Wilmington, Delaware and Buchanan, New York gypsum board plants and related assets. Georgia-Pacific shall enter into a supply contract for gypsum rock and/or gypsum liner board paper which at the option of the purchaser(s) may be up to 10 years and sufficient to meet all or part of the Buchanan and Wilmington plants' requirements at terms reasonably related to market conditions. The plants and related assets will be sold to one or more purchasers who demonstrate to the sole satisfaction of the United States that they will be an economically viable and effective competitor, capable of maintaining or surpassing Georgia-Pacific's pre-acquisition market performance in the sale of gypsum board in the Northeast Region.

Until the ordered divestitures take place, Georgia-Pacific must take all reasonable steps necessary to accomplish the divestitures, and cooperate with any prospective purchaser. If Georgia-Pacific does not accomplish the ordered divestitures within the specified one hundred and fifty (150) calendar days, which may be extended by up to sixty (60) calendar days by the United States, the proposed Final Judgment provides for procedures by which the Court shall appoint a trustee to complete the divestitures. Georgia-Pacific must cooperate fully with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that Georgia-Pacific will pay all costs and expenses of the trustee. The trustee's compensation will be structured so as to provide an incentive for the trustee to obtain the highest price for the assets to be divested, and to accomplish the divestiture as quickly as possible. After the effective date of his or her appointment, the trustee shall serve under such other conditions as the Court may prescribe. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee shall file promptly with the Court a report which sets forth the trustee's efforts to accomplish the divestiture, explains why the divestiture has not been accomplished, and makes any recommendations. The trustee's report will be furnished to the parties and shall be filed in the public docket, except to the extent the report contains information the trustee deems confidential. The parties each will have the right to make additional recommendations to the Court. The Court shall enter such orders as it deems appropriate to carry out the purpose of the trust.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and

reasonable attorney's fees. Entry of the proposed Final Judgment neither will impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Georgia-Pacific or Domtar.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Georgia-Pacific have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person should comment within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

J. Robert Kramer
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against Georgia-Pacific. The United States is satisfied, however, that the divestiture of the assets and other relief contained in the proposed Final Judgment will preserve viable competition in the production and sale of gypsum board that otherwise would be affected adversely by the acquisition. Thus, the proposed Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the government's Complaint.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry

of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 1995-1 Trade Cas. (CCH) ¶ 71,027, at 74,822 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24598 (1973). Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 1995-1 Trade Cas. at 74,829-74,833. Precedent requires that:

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

United States v. Bechtel, 648 F.2d at 666 (citation omitted) (emphasis added).

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within

the range of acceptability or is 'within the reaches of public interest.'" (citations omitted). United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983).

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

Executed on: April , 1996

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