

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	Civil Action No. 80-2495
Plaintiff,)	Judge Johnson
)	
v.)	
)	
THE FLINTKOTE COMPANY, <u>et al.</u> ,)	Filed: February 27, 1981
)	Entered: May 26, 1981
Defendants.)	

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on September 30, 1980, and each defendant, having appeared by its respective counsel and having filed its answer to said complaint, and plaintiff and defendant The Flintkote Company, by their respective counsel, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence against or an admission by any party with respect to any issue of fact or law herein:

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby, ORDERED, ADJUDGED, AND DECREED:

I.

This court has jurisdiction over the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendant under Section 7 of the Clayton Act (15 U.S.C. §18).

II.

As used in this Final Judgment:

A. "Flintkote" means the defendant The Flintkote Company, a wholly-owned subsidiary of Genstar Ltd., a Canadian corporation.

B. "Gibbsboro plant" means the plant, real property, capital equipment, and any other interests, assets or improvements associated with the facility for producing dry-mixed concrete products which is located in Gibbsboro, New Jersey and owned by Flintkote, including but not limited to the registered trademarks "Home Crete" and "Tru-Bond" and any rights which Flintkote may have to the trademark "Easy Crete". For purposes of this Final Judgment, trademarks and other industrial property rights owned by or licensed to Flintkote prior to April 11, 1980 (including but not limited to the registered trademarks "Sakrete", "Ultracrete", "top 'n bond", "Camel-Bond" and "Flintkote", the trademarks "Pour 'n Fill" and "Hide 'n Style" and trade secrets, patent applications and patents relating to vinyl concrete) shall not be regarded as associated with any facility for producing dry-mixed concrete products.

C. "Milford plant" means the plant, real property, capital equipment, and any other interests, assets or improvements associated with the facility for producing dry-mixed concrete products which is located in Milford, Virginia and owned by Flintkote.

D. "White Marsh plant" means the plant, real property, capital equipment, and any other interests, assets or improvements associated with the facility for producing dry-mixed concrete products which is located in White Marsh, Maryland and owned by Flintkote.

E. "Dry-mixed concrete products" means packaged combinations of (1) dry sand with dry portland or masonry cement or (2) dry sand and dry stone with dry portland cement which combinations are standard in the trade. The term "dry-mixed concrete products" includes products generally referred to in the trade as sand mix, concrete or gravel mix, mortar mix and vinyl concrete but does not include products generally referred to in the trade as special mixes, such as those made to meet a customer's specifications or the requirements of a particular industry.

F. "Independent buyer" means a person not owned by Flintkote, directly or indirectly, or, in the case of an individual, a person who is not an officer, director, employee or agent of Flintkote, which either (1) is known by, or hereafter becomes known by, Flintkote to be a manufacturer of dry-mixed concrete products in any of the states of Virginia, Maryland, Delaware, West Virginia, Pennsylvania, New York, New Jersey, Connecticut, Rhode Island, Massachusetts or in the District of Columbia or (2) hereafter expresses in a writing addressed and delivered to Flintkote a good faith intention to commence such manufacture, provided that such person within a reasonable period of time (e.g., one year) thereafter proceeds in good faith to do so, as evidenced by acquiring an interest in real estate for that purpose and commencing the construction of a facility for producing dry-mixed concrete products. At the date of entry of this Final Judgment, the independent buyers are those persons listed on Schedule I attached hereto.

G. "Dedicated product" means one or all of the products which Flintkote shall make available to independent buyers pursuant to Section VIII of this Final Judgment.

H. "Person" means any individual, partnership, association, firm, corporation, proprietorship, joint venture, or other legal or business entity.

III.

This Final Judgment shall apply to the defendant Flintkote, its parent Genstar, to their subsidiaries, successors and assigns, to each of their officers, directors, agents and employees, and to all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

A. Flintkote shall divest itself within six (6) months of the date of entry of this Final Judgment of its entire interest in the Gibbsboro plant. Divestiture shall be made to a person or persons approved by plaintiff or, failing such approval, by the court and shall be made in a way that does not restrict or impair the ability of the purchaser to operate the Gibbsboro plant as a going concern in the manufacture and sale of dry-mixed concrete products.

B. Flintkote shall promptly begin to solicit offers to purchase the Gibbsboro plant by, among other things, advertising its availability in Concrete Products and the Wall Street Journal, and by sending written solicitations to each person listed on Schedule I attached hereto.

C. Flintkote shall furnish to all bona fide prospective purchasers (or to a trustee appointed under Section IV) on an equal and non-discriminatory basis all necessary information, including business records and such documents as have been released to Flintkote by defendants G.&W.H. Corson, Incorporated and IU International Corporation, regarding the Gibbsboro plant. Flintkote shall permit such prospective purchasers (or a trustee appointed under Section IV) to make such inspections as may be reasonably necessary, provided that Flintkote may schedule any such inspection in such a manner as will not unduly interfere with its business operations.

D. If Flintkote has not accomplished this divestiture within six (6) months, (1) Flintkote and plaintiff may, by a stipulation filed with this court prior to the expiration of such six (6) months, provide for Flintkote to have up to an additional six (6) months in which to consummate the divestiture or (2) Flintkote may petition this court for up to an additional six (6) months in which to consummate the divestiture. Plaintiff may oppose the petition and may petition this court for the appointment of a trustee.

E. If plaintiff petitions this court pursuant to Section IV.D. for the appointment of a trustee, then plaintiff and Flintkote shall promptly begin negotiations to identify a mutually acceptable candidate for trustee. Should the parties agree on such a candidate, the candidate's name will be submitted to the court; should the parties fail to agree on a candidate within fifteen (15) business days, then each party shall identify not more than two (2) candidates for trustee no later than two (2) weeks after such fifteen (15) business days and submit the names of such candidates to the court. After the names of such candidates have been submitted to the court, the court shall determine whether to grant the plaintiff's petition. If it grants the petition, it shall appoint a trustee from the candidates so named. Notwithstanding Flintkote's foregoing obligations, it may oppose the petition for appointment of a trustee under this Section IV.E.

F. If the six (6) months in which divestiture is to occur is extended as contemplated by Section IV.D. and divestiture is not effected within two (2) months prior to the end of such extension, then plaintiff and Flintkote shall promptly begin negotiations to select a mutually acceptable trustee. Should the parties agree on a trustee, the trustee's name will be submitted to the court for approval. Should the parties fail to agree on a trustee prior to the end of such extension, then each party shall nominate not more than two (2) candidates for trustee no later than two (2) weeks after the end of such extension. Thereafter, the court, upon application of either party, shall appoint a trustee from the candidates nominated by plaintiff and Flintkote.

G. The purpose of a trust established pursuant to Section IV.E. or F. shall be the prompt sale of the Gibbsboro plant in accordance with the provisions of this Final Judgment. Such sale must be approved by this court. The trustee shall have all powers necessary and proper to accomplish the purpose of the trust. The trustee shall serve at the expense of Flintkote on such terms and conditions as this court may set and shall account for all monies derived from the sale and all expenses incurred. After approval by this court of the account of the trustee, including fees for the trustee's services, all remaining monies shall be paid to Flintkote and the trust shall be terminated. Upon the appointment of a trustee, Flintkote shall use its best efforts to assist the trustee to accomplish the purpose of the trust. If the trustee has not sold the Gibbsboro plant within two (2) years after its appointment, the trustee shall thereupon promptly file with the court a report setting forth (1) the trustee's efforts to sell the plant, and (2) the trustee's recommendations. The trustee shall at the same time furnish a copy of its report to both parties, who shall each have the right to be heard and to make additional recommendations. The court shall thereafter enter such orders as it shall deem appropriate.

H. Nothing in this Final Judgment shall prohibit Flintkote from securing full payment for the purchase of the Gibbsboro plant by retaining, accepting, enforcing and settling a bona fide lien, mortgage, deed of trust or other form of security on all or any part of the Gibbsboro plant, provided that the purchaser of the Gibbsboro plant shall have requested that Flintkote extend credit to the purchaser in connection with that purchase. If, after divestiture of the Gibbsboro plant, Flintkote by enforcement or settlement of such security reacquires ownership or control of the Gibbsboro plant, Flintkote shall notify the plaintiff of such event and Sections IV, V, VI and VII shall again become

applicable to Flintkote with the same effect as if this Final Judgment were entered on the date of such reacquisition, except that a trustee shall promptly be appointed pursuant to the procedure set forth in Section IV.F.

I. At the request of the purchaser of the Gibbsboro plant, Flintkote will use its best efforts to negotiate with that purchaser a written contract pursuant to which Flintkote will purchase annually from that purchaser, at a reasonable market price and upon reasonable terms and conditions, up to 400,000 units of dry-mixed concrete products produced at the Gibbsboro plant. Agreement by that purchaser to such a contract shall not be a condition of Flintkote's (or the trustee's) sale of that plant.

V.

After the divestiture under Section IV is consummated, no officer, director, agent or employee of Flintkote shall, at the same time, be an officer, director or employee of the purchaser of the Gibbsboro plant.

VI.

A. Flintkote shall promptly report the details of any proposed sale of the Gibbsboro plant and produce all relevant documentation to the plaintiff.

B. Following the receipt of any plan of sale, plaintiff shall have fifteen (15) business days in which to object to the proposed sale by written notice to Flintkote or to request additional information from Flintkote. If plaintiff so requests additional information from Flintkote, then Flintkote shall promptly furnish to plaintiff all requested information that it can along with a statement identifying the requested information not furnished and the reasons the information was not furnished. Plaintiff shall have fifteen (15) business days from the date of its receipt of such response to so object to the proposed sale.

If plaintiff does not object to the proposed sale as provided herein, it may be consummated after notice of the proposed sale is given to the court. If plaintiff does so object, the proposed sale shall not be consummated until Flintkote obtains the court's approval of the proposed sale or until plaintiff withdraws its objection.

C. Flintkote shall maintain records of its efforts to sell the Gibbsboro plant, which shall include (1) identification of all persons to whom Flintkote has offered to sell the plant or who expressed to Flintkote an interest in purchasing the plant; (2) the terms and conditions of each offer to sell or purchase; and (3) all correspondence between Flintkote and the prospective purchasers.

D. At the conclusion of each sixty (60) day period from entry of this Final Judgment until divestiture has been completed, and at the time that Flintkote reports to plaintiff regarding a plan of sale, Flintkote (1) shall file with this court and serve on the plaintiff an affidavit as to the fact and manner of compliance with Sections IV.A., IV.B. and IV.C. and (2) shall furnish to plaintiff documents relevant thereto. Such affidavit shall include, among other things, a list of persons whom Flintkote contacted or who contacted Flintkote in connection with the contemplated sale of the Gibbsboro plant and a copy of any advertisement which Flintkote has placed in connection with the sale. Such documents shall include a description of the consideration offered by any prospective purchaser or the consideration which Flintkote has asked a prospective purchaser to provide and copies of the documents described in Section VI.C.

VII.

Flintkote shall not cause or permit the destruction, removal or impairment of any of the assets to be divested in

accordance with Section IV of the Final Judgment except in the ordinary course and operation of Flintkote's business and except for normal wear and tear. Prior to such divestiture, Flintkote shall continue the normal business operations of the Gibbsboro plant as presently conducted (including the continued use of the trademarks "Home Crete", "Easy Crete" and "Tru-Bond") and shall maintain the personnel, assets and working capital for the Gibbsboro plant at a level commensurate with its normal and seasonal level of business activity.

VIII.

For so long as the Milford plant is under the direct or indirect ownership or control of Flintkote, Flintkote shall make available to independent buyers in accordance with the following procedures (1) for the period April 1, 1981 to December 31, 1981, 175,000 units of one or more dry-mixed concrete products, bagged sand or bagged blacktop produced at either the Milford plant or the White Marsh plant and (2) for each of the years 1982 through 1990, inclusive, 200,000 units of such products, sand or blacktop, in each case for delivery from Flintkote's White Marsh, Maryland, or Milford, Virginia, plant or plants, as the case may be, at which the particular dedicated product is produced:

A. Except for the year 1981, Flintkote shall, during or before the three (3) months immediately preceding each calendar year (hereinafter the "Offering Period"), solicit orders from independent buyers for all or part of the dedicated product for that year and offer to sell such dedicated product to the independent buyers at a reasonable price and on reasonable terms and conditions consistent with the price and delivery provisions of Section VIII. To satisfy its obligations under this subparagraph, Flintkote shall, among other things, send to each

independent buyer a notice soliciting such orders, making such offer and describing the terms of this Section VIII. and advertise the availability of the dedicated product in Concrete Products and the Wall Street Journal. Such advertisements of availability of the dedicated product shall appear monthly in Concrete Products during the Offering Period, and in the Wall Street Journal on the first and third Monday of each month during the Offering Period. The advertisements in each publication shall be in at least 10 point boldface print and shall occupy at least four square inches.

For the year 1981, Flintkote shall solicit such orders in the manner prescribed herein in the months of April and May, which two months shall constitute the Offering Period for 1981.

B. At its option, Flintkote may limit the purchases by independent buyers (1) of vinyl concrete in a given year to a maximum of 25 percent of the units of dedicated product to be made available in that year, (2) of dedicated products to be delivered from the Milford plant to 23,000 units in any month (or to the ratable portion of 23,000 units for part of a month) and (3) of dedicated products to be delivered from the White Marsh plant to 27,000 units in any month (or to the ratable portion of 27,000 units for part of a month).

C. A particular dedicated product which is at the time being produced by Flintkote at both the White Marsh plant and the Milford plant is herein called a "two-plant product". Subject to Section VIII.B., a two-plant product shall be made available for delivery from either plant, or both, at the option of the independent buyer(s). Should Flintkote determine in good faith that it cannot make that two-plant product available from the plant so specified by the independent buyer(s),

then Flintkote may make that two-plant product available from the White Marsh plant, if the independent buyer(s) specified the Milford plant, or vice-versa. In each such circumstance Flintkote will absorb any increased transportation costs that would not otherwise have been incurred by the independent buyer(s).

D. Any independent buyer who wishes to purchase dedicated product offered pursuant to Section VIII.A. shall submit to Flintkote either a written acceptance of Flintkote's offer or a written offer expressing the independent buyer's willingness to purchase during that year a specified quantity of the dedicated product at a specified price and on specified terms and conditions. Any such acceptance or offer must be submitted before the end of the calendar month immediately following the Offering Period. Flintkote shall enter into final agreements seriatim to sell to one or more of those independent buyers at a reasonable market price all dedicated product so offered for which Flintkote received either such acceptances or such offers to buy at a reasonable market price and on reasonable terms and conditions consistent with the price and delivery provisions of Section VIII. Such agreements shall be entered into in the order in which these acceptances or offers are received. Flintkote shall not in any event be obligated to enter into any agreement with any independent buyer to sell more dedicated product in a particular year than the number of units of dedicated product for that year which remain uncommitted immediately before that agreement is made. Nor shall Flintkote in any event be obligated to sell or agree to sell on credit to any independent buyer whose credit standing is determined in good faith to be unsatisfactory on the basis of Flintkote's credit standards as previously applied to comparable customers for comparable sales.

E. The dedicated product shall be made available in whatever bag size is specified by the independent buyer(s), provided such size is within a range from 20 pounds to 90 pounds, inclusive, for dedicated product to be produced at the Milford plant and within a range from 10 pounds to 90 pounds, inclusive, for dedicated product to be produced at the White Marsh plant. The legends appearing on bags of dedicated product shall be as specified by the independent buyer(s), provided that such legends do not violate any statutory or other legal requirements, or use any trademark which is the property of Flintkote, either as the trademark owner or as the trademark licensee. Flintkote may require any independent buyer to obtain and furnish to Flintkote in timely fashion bags to contain dedicated product. Flintkote may require that those bags conform to reasonable and appropriate quality, safety and other requirements (including specification requirements so that the bags may be filled efficiently at the White Marsh or Milford plant, as the case may be) and that those bags be suitably weather-wrapped on pallets for outdoor storage.

F. The price at which Flintkote may sell dedicated product shall be as follows:

1. To the extent that an agreement to sell dedicated product to an independent buyer calls for Flintkote to deliver that product in a standard bag size of the same weight as is then produced at the plant at which such dedicated product is to be produced, the price for any delivery pursuant to that agreement shall be no greater than the lowest price (including all applicable discounts, whether appearing on a price list or not, and pallet or freight allow-

ances or concessions) at which Flintkote shall have agreed during the three months immediately preceding that delivery to sell a similar quantity of the same product to another Flintkote customer for delivery on a comparable basis in the same geographic delivery zone specified by the independent buyer or on an F.O.B. basis, as the case may be.

2. To the extent that an agreement to sell dedicated product to an independent buyer calls for Flintkote to deliver that product in a bag size other than one described in 1. above, then the price for any delivery pursuant to that agreement shall be a reasonable one agreed upon by Flintkote and the independent buyer.
3. An independent buyer which has agreed to purchase dedicated product from Flintkote under this Section VIII. shall have the option at all times during which that dedicated product is to be purchased to have the product either delivered by Flintkote or made available on an F.O.B. basis.

G. Flintkote's obligations under Sections VIII.A. and VIII.D. shall be satisfied for any Offering Period if Flintkote and one or more independent buyers, prior to the commencement of the Offering Period, execute supply contracts for the entire amount of the dedicated product for the calendar year following that Offering Period, provided such contracts comply with the requirements of Sections VIII.C., F. and J.

H. Any supply contract entered into between Flintkote and an independent buyer may provide that Flintkote's obligations are subject to force majeure.

I. Flintkote shall record (and shall maintain the data so recorded): (1) the total units of dry-mixed concrete products produced by each of the Milford and White Marsh plants, by product and calendar year up to and including 1990; and (2) the total units of dedicated product sold to each independent buyer from each of the Milford and White Marsh plants, by product, for each calendar year up to and including 1990. Flintkote shall also maintain copies of all correspondence regarding dedicated product which Flintkote sends to or receives from any person to whom Flintkote offers to sell or sells dedicated product pursuant to Section VIII., or sends to or receives from any person who contacts Flintkote in connection with a contemplated purchase of dedicated product pursuant to Section VIII. At the end of each calendar year, Flintkote shall report to plaintiff the identity of each independent buyer, the number of units and type of product purchased by each independent buyer, and the Flintkote plant which provided the products purchased.

J. Flintkote is enjoined from directly or indirectly entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan, program or conspiracy to:

1. share in the profit realized by any independent buyer from the resale of dedicated product purchased from Flintkote;
2. provide for the price of dedicated product sold by Flintkote to any independent buyer to vary in relation to the selling price or margin or net realization of the independent buyer on its resale of dedicated product;
3. furnish to or receive from any independent buyer to which Flintkote has sold or contracted to sell dedicated product any information pertaining to:

- a. the cost of production or of sale to others of dedicated product (other than information necessary to comply with Section VIII. C.); or
- b. the sale price or the price realized by the independent buyer from the resale of dedicated product purchased from Flintkote.

IX.

Flintkote is enjoined from acquiring, directly or indirectly, without plaintiff's consent any equity interest in any person engaged in the manufacture of dry-mixed concrete products, if such person owns a facility for the manufacture of dry-mixed concrete products located in: Virginia, Maryland, the District of Columbia, Pennsylvania, New Jersey, Delaware, New York, Connecticut, Rhode Island or Massachusetts. Flintkote is further enjoined from acquiring, directly or indirectly, without plaintiff's consent the assets of any facility that manufactures dry-mixed concrete products located in the geographic areas enumerated in this Section.

X.

A. Flintkote shall require, as a condition of the sale or other disposition of all, or substantially all, of the total stock or assets of its dry-mixed concrete products business, that the acquiring party agree to be bound by the provisions of this Final Judgment. The acquiring party shall file with the court, and serve on the plaintiff, its consent to be bound by this Final Judgment.

B. As a condition of the sale of the White Marsh and Milford plants to the same person, Flintkote shall require that the acquiring party agree to be bound by the provisions of Section VIII. The acquiring party shall file with the court, and serve on the plaintiff, its consent to be bound by Section VIII.

XI.

For the purpose of securing or determining compliance with this Final Judgment, and subject to any legally recognized privilege:

A. Any duly authorized representative or representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Flintkote made to its principal office, be permitted:

1. access during the office hours of Flintkote, which may have counsel present, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Flintkote relating to any matters contained in this Final Judgment; and
2. subject to the reasonable convenience of Flintkote and without restraint or interference from it, to interview officers or employees of Flintkote, who may have counsel present, regarding any such matters.

B. No information or documents obtained by the means provided in Section XI hereof shall be divulged by a representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

C. If at the time information or documents are furnished by Flintkote to plaintiff, Flintkote represents and identifies in writing the material in any such information or documents of

a type described in Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Flintkote marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) days' notice shall be given by plaintiff to Flintkote before divulging such material in any legal proceeding (other than a grand jury proceeding) to which Flintkote is not a party.

XII.

Jurisdiction is retained by this court for the purpose of enabling any of the parties to this Final Judgment to apply to this court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XIII.

Except to the extent a shorter period is specified herein, this Final Judgment shall be in effect until December 31, 1990, at which time this Final Judgment shall terminate.

XIV.

Entry of this Final Judgment is in the public interest.

Judge Johnson
UNITED STATES DISTRICT JUDGE

Schedule I

Ace Crete Products, Inc.
Bayville, NJ

Bell Concrete
Middlesboro, KY

Buffalo Dry Mix Co.
Steelman Avenue
Buffalo, NY

Burrell Construction & Supply Co.
One Fifth Street
New Kensington, PA 15068

Capital Quikrete
5401 Kirby Road
Clinton, MD 20735

Cisco Company
P. O. Box 134
Highway 460
Founding Mill, VA 24637

Cleveland Builders Supply Co.
Cleveland, OH

Connecticut Dry Mix Co.
Green Hollow Road
Wauregan, CT 06387

Construction Products, Inc.
P. O. Box 368
Hocksett, NH 03106

Cushing Redi-Mix
Sacandaga Road
Scotia, NY

W. F. Saunders & Sons, Inc.
Drawer A
Nedrow, NY 13120

Set Products
2224 Fairhill Road
Cleveland, OH 44106

Stamm Supply, Inc.
357 Main Street
Turbotville, PA 17772

Union Sand & Supply Co.
Painesville, OH

B. Vitalini, Inc.
12 South Free Street
Milford, MA

Watta-Crete Company, Inc.
Clayton Road
Canaan, CT 06018

James River Limestone Co.
Buchanan, VA 24066

F. B. Jones Co.
69 Norman Street
Everett, MA 02148

Lee Lime Corporation
P. O. Box 803
Lee, MA 01238

Multi-Crete Sales Co.
Utica, NY 13501

Pennsylvania Supply
Harrisburg, PA

Quikrete Co.
6225 Huntley Road
Columbus, OH 43229

Quikrete Div.-Package Pavement Co.
Stormville, NY

Quikrete of Virginia
3412 Virginia Beach Blvd.
Norfolk, VA 23502

Quikrete of West Virginia
Charleston, WV 25103

Ralph Coal & Supply Co.
Toledo, OH

Redi-Crete Corp.
150 Gold Mine Road
Flanders, NJ