

**THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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UNITED STATES OF AMERICA,  Plaintiff,  v.  ABITIBI-CONSOLIDATED INC. and BOWATER INC.,  Defendants.	CASE NO: 1:07-cv-01912  JUDGE: Collyer, Rosemary M.  DECK TYPE: Antitrust  DATE STAMP:
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**RESPONSE OF PLAINTIFF UNITED STATES TO  
PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT**

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (“APPA” or “Tunney Act”), 15 U.S.C. § 16(b)-(h), the United States hereby files the Comment received from members of the public concerning the proposed Final Judgment in this case and the Response by the United States to the Comment. The United States will move the Court for entry of the proposed Final Judgment after the Comment and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

The United States filed a civil antitrust Complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25, on October 23, 2007, alleging that the merger of Abitibi-Consolidated Incorporated (“Abitibi”) and Bowater Incorporated (“Bowater”) would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and an Asset Preservation Stipulation and Order (“Stipulation”) signed by plaintiff and defendants consenting to the entry of the proposed Final Judgment after

compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed a Competitive Impact Statement (“CIS”) in this Court on October 23, 2007, published the proposed Final Judgment and CIS in the *Federal Register* on November 8, 2007, see *United States v. Abitibi-Consolidated Inc. and Bowater Inc.*, 72 Fed. Reg. 63187 (November 8, 2007); and published summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in *The Washington Post* for seven days beginning on November 18, 2007, and ending on November 24, 2007. The 60-day period for public comments ended on January 7, 2008, and one comment was received as described below and attached hereto.

**I. BACKGROUND: THE UNITED STATES’ INVESTIGATION AND THE PROPOSED RESOLUTION**

On January 29, 2007, Abitibi and Bowater announced plans to merge into a new company to be called AbitibiBowater Incorporated (“AbitibiBowater”). Over the next nine months, the United States Department of Justice (the “Department”) conducted an extensive, detailed investigation into the competitive effects of the proposed transaction. As part of this investigation, the Department obtained substantial documents and information from the merging parties and issued 37 Civil Investigative Demands to third parties. In response, the Department received and considered more than 150,000 pages of material. The Department conducted more than 60 interviews with customers, competitors and other individuals with knowledge of the industry. The sole commenter here, the Newspaper Association of America (the “NAA”), represents newspaper publishers in the United States. During the course of the Department’s investigation into the proposed merger, the NAA shared with the investigative staff its concerns

about the impact of the proposed merger on competition; the investigative staff carefully analyzed its concerns and submissions, as well as the data, market facts and opinions of other knowledgeable parties.

The Department concluded that the combination of Abitibi and Bowater likely would lessen competition in the North American newsprint market. Newspapers are printed on newsprint, the lowest quality and generally the least expensive grade of groundwood paper. Newspaper publishers, who buy more than 80 percent of all newsprint sold in the United States, have no close substitutes to use for printing newspapers because of newsprint's price and physical characteristics. Because publishers' newsprint presses are optimized to use newsprint, switching to another grade of paper would be costly. A small but significant increase in price likely would not cause customers to switch sufficient newsprint tonnes to other products or otherwise curtail their newsprint usage so as to render the increase unprofitable.

As explained more fully in the Complaint and CIS, the merger of Abitibi and Bowater would substantially increase concentration and lessen competition in the production, distribution and sale of newsprint in North America. After conducting a detailed analysis of the merger, the Department filed its Complaint alleging competitive harm in the newsprint market in North America and sought a remedy that would ensure that such harm is prevented.

The proposed Final Judgment in this case is designed to preserve competition in the production, distribution and sale of newsprint in North America. It requires the divestiture of a newsprint mill that manufactures newsprint for sale in North America. Specifically, the proposed Final Judgment directs a sale of Abitibi's Snowflake, Arizona, newsprint mill ("Snowflake," or the "Snowflake mill") to a purchaser acceptable to the United States.

In the Department's judgment, divestiture of the Snowflake mill to a qualified purchaser would remedy the violation alleged in the Complaint because the Snowflake mill, located in northeastern Arizona, is one of the most efficient and profitable newsprint mills in North America. Plans to improve the mill's efficiency in coming years with investments in energy and machinery are already underway. Snowflake's size and cost position ensure that its divestiture to a competitor of the merged firm will preserve competition in the North American newsprint market. Although entry of the proposed Final Judgment would terminate this action, the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and punish violations thereof.<sup>1</sup>

## **II. STANDARD OF JUDICIAL REVIEW**

Upon the publication of the Comment and this Response, the United States will have fully complied with the Tunney Act and will move for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. § 16(e), as amended.

The Tunney Act states that, in making that determination, the Court shall consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects

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<sup>1</sup> The merger closed on October 29, 2007. In keeping with the United States' standard practice, neither the Stipulation nor the proposed Final Judgment prohibited closing the merger. See ABA Section of Antitrust Law, *Antitrust Law Developments* 406 (6th ed. 2007) (noting that "[t]he Federal Trade Commission (as well as the Department of Justice) generally will permit the underlying transaction to close during the notice and comment period"). Such a prohibition could interfere with many time-sensitive deals and prevent or delay the realization of substantial efficiencies. In consent decrees requiring divestitures, it is also standard practice to include a "preservation of assets" clause in the decree and to file a stipulation to ensure that the assets to be divested remain competitively viable. That practice was followed here. Proposed Final Judgment § IV(K). In addition, the Stipulation entered by the Court in this case required AbitibiBowater to hold separate the Snowflake newsprint mill, pending the divestiture contemplated by the proposed Final Judgment.

of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, 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)(1)(A)-(B); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (concluding that the 2004 amendments “effected minimal changes” to scope of review under Tunney Act, leaving review “sharply proscribed by precedent and the nature of Tunney Act proceedings”).<sup>2</sup>

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, 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 Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995). 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) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Courts have held that:

[t]he 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

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<sup>2</sup> The 2004 amendments substituted “shall” for “may” in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006).

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.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted). *Cf. BNS*, 858 F.2d at 464 (holding that the court’s “ultimate authority under the [APPA] is limited to approving or disapproving the consent decree”); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to “look at the overall picture not hypercritically, nor with a microscope, but with an artist’s reducing glass”). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether “the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest’”). In making its public interest determination, a district court “must accord deference to the government’s predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations” because this may only reflect underlying weakness in the government’s case or concessions made during negotiation. *SBC Commc’ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be “deferential to the government’s predictions as to the effect of the proposed remedies”); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States’ prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Court approval of a consent decree requires a standard more flexible and less strict than that appropriate to court adoption of a litigated decree following 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.’” *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States “need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.” *SBC Commc’ns*, 489 F. Supp. 2d at 17.

Moreover, the Court’s role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to “construct [its] own hypothetical case and then evaluate the decree against that case.” *Microsoft*, 56 F.3d at 1459. Because the “court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States did not pursue. *Id.* at 1459-60. As this Court recently confirmed in *SBC Communications*, courts “cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.” *SBC Commc’ns* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing

or to require the court to permit anyone to intervene.” 15 U.S.C. § 16(e)(2). The language wrote into the statute what the Congress that enacted the Tunney Act in 1974 intended, as Senator Tunney then explained: “[t]he 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. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court’s “scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.” *SBC Commc’ns*, 489 F. Supp. 2d at 11.<sup>3</sup>

### III. SUMMARY OF THE COMMENT AND RESPONSE

During the 60-day comment period, the United States received one Comment, from the NAA. That Comment is attached to this memo. After reviewing the Comment, the United States continues to believe that the proposed Final Judgment is in the public interest. The Comment includes concerns relating to whether the proposed Final Judgment adequately remedies the harms alleged in the Complaint. The United States addresses these concerns below and explains how the remedy is appropriate.

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<sup>3</sup> See *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the “Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone”); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (“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.”); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) (“Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.”).

***A. Summary of Comment Submitted by the NAA***

The NAA is an association whose members include daily and Sunday newspapers in the United States who purchase a significant proportion of North America's newsprint production. In its Comment of January 2, 2008, the NAA expressed concerns relating to whether the proposed Final Judgment adequately remedies the alleged harms. The NAA argued in its Comment that the Court should not enter the proposed Final Judgment without a hearing for two reasons: (1) the newly merged AbitibiBowater, despite its agreement to divest the Snowflake mill, "has already begun to exercise the market power created by the merger to anticompetitively raise newsprint prices to North American newsprint customers;" and (2) the United States "has not provided the Court with any factual or economic analysis to demonstrate that the proposed remedy will eliminate the incentive for AbitibiBowater to reduce industry capacity and raise prices to North American newsprint customers." (NAA Comment at 2.)

***1. The NAA's argument that AbitibiBowater has already begun to exercise market power and anticompetitively raise newsprint prices***

The NAA notes that a little more than five weeks following the merger that created AbitibiBowater, the combined firm announced that it would remove 600,000 metric tonnes of newsprint capacity from the North American market and would raise newsprint prices by \$60 per metric tonne, to be implemented in three \$20 price increases. The NAA further notes that "[m]ost" North American newsprint manufacturers not only joined AbitibiBowater's price increase but also implemented a "previously stalled" price increase of \$25 per metric tonne. The NAA estimated that, taken together, these two price increases constitute a 15 percent price increase as compared to the pre-merger, October 2007, price for newsprint. The NAA also noted that, at the time AbitibiBowater announced the removal of 600,000 metric tonnes of newsprint

capacity from the North American market, it also announced that “more mills could close in Canada later [in 2008].” (Comment at 7.)

The NAA claims that these post-merger actions by AbitibiBowater demonstrate that the United States “severely underestimated the risk that the merger posed to competition in the North American newsprint market and severely underestimated the incentive and ability of the merged firm to remove capacity from the market to raise the price of newsprint well above competitive levels.” (Comment at 7.) Accordingly, the NAA contends that a “significantly larger divestiture” than the Snowflake mill is required to prevent “the substantial anticompetitive price increases that are already occurring and will continue to occur as a result of the merger.” (Comment at 7.)

**2. *The NAA’s argument that the United States has not provided adequate factual or legal analysis upon which to base a public interest determination***

The NAA concedes that in the Complaint, the United States “correctly identifies the competitive harm produced by the merger.” (Comment at 9.) The NAA argues, however, that the United States has not provided the Court with a factual or legal analysis to demonstrate that the divestiture of the Snowflake mill will “eliminate the incentive to reduce industry capacity and raise prices to North American newsprint customers,” and thus has provided the Court with no basis by which to determine if the proposed remedy is in the public interest. (Comment at 9.) Specifically, the NAA argues that, other than noting that Snowflake is “among the largest and most profitable mills in the United States,” the United States “provided no further explanation for its decision that Snowflake was both a sufficient remedy and the best solution, no detail

regarding under what ‘circumstances’ this conclusion was reached, and no scale against which it measured Snowflake as the best alternative.” (Comment at 17.)

The NAA contends that the proposed Final Judgment should not be entered because the United States has not explained to the Court “why the remedy it proposes restores or preserves competition.” (Comment at 19.) In particular, the NAA criticizes the United States for failing to reference in the Complaint or CIS what the NAA describes as historical anticompetitive behavior of Abitibi and Bowater, and it contends that absent such references, it is impossible for the Court to determine if and how much of a factor such conduct played in the United States’ evaluation and settlement of the merger. The NAA also criticizes the United States for failing to discuss the anticipated effects of alternative remedies actually considered.

***B. Response of the United States to the NAA’s Comment***

The divestiture of the Snowflake mill adequately remedies the harm alleged in the Complaint. In negotiating this remedy, the United States carefully considered the capabilities and economic viability of the Snowflake mill as well as other assets of the merging parties; the extent of industry excess capacity; the history of declining demand for newsprint, and the forecasts for that decline to continue; the costs of production of all newsprint mills in North America; and the financial viability of the merging parties and their competitors. After considering these issues, the United States analyzed the merger using a comprehensive data set of prices, sales, production volumes and costs, capacities and forecasts of North American newsprint demand. In its analysis, which drew upon non-public information unavailable to the NAA, the United States concluded that the divestiture of the Snowflake mill to a viable qualified