

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 S.p.A. OFFICINE MACCAFERRI;)
 MACCAFERRI GABIONS)
 MANUFACTURING COMPANY, INC.;)
 and RIVER AND SEA GABIONS)
 (LONDON) LIMITED,)
)
 Defendants.)

Civil Action No.

B-86-612

FILED _____ ENTERED _____
LOGGED _____ RECEIVED _____

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AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND DEPUT

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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 *February 24, 1986* the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, 15 U.S.C. §25, challenging the February 15, 1983 acquisition of Terra Aqua Inc. ("Terra Aqua") by S.p.A. Officine Maccaferri ("Officine") through its subsidiary, River and Sea Gabions (London) Limited ("R&S"), as a violation of Section 7 of the Clayton Act, 15 U.S.C. §18. Also named in the Complaint was

Maccaferri Gabions Manufacturing Company, Inc. ("MGMC"), which is also controlled by Officine. The Complaint alleges that the effect of the acquisition may be substantially to lessen competition in the United States market for the manufacture and sale of gabions. The Complaint seeks the divestiture of Terra Aqua and a permanent injunction preventing defendants from carrying out any future acquisition of Terra Aqua.

Plaintiff and defendants 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 and enforce the proposed Final Judgment and to punish violations of the proposed Final Judgment.

II

EVENTS GIVING RISE TO THE ALLEGED VIOLATION

On or about February 15, 1983, Officine, through its subsidiary, R&S, acquired all of the capital stock of Terra Aqua for \$2.48 million in cash and notes. Prior to its acquisition by R&S, Terra Aqua operated as a division of Bekaert Steel Wire Corporation ("BSWC") and was engaged in the manufacture and sale of gabions from a facility located in Reno, Nevada. At the time of the acquisition, Officine competed directly with Terra Aqua through its subsidiary, MGMC, which manufactures gabions in Williamsport, Maryland.

Gabions are rectangular, compartmented containers fabricated from a triple-twisted hexagonal mesh of heavily galvanized steel wire. Gabions are designed to be filled with hand-size stones and wired together with other gabions to form a monolithic, flexible and permeable structure used in soil conservation and ecology projects. Gabions are also available with an additional polyvinyl chloride coating when they are used in corrosive conditions, such as salt water.

Gabion structures are well suited to soil conservation and ecology projects. Their applications fall within three broad categories: river training and flood control; consolidation and protection from erosion on such projects as roads, railways, airports and parks; and, shore and coastal protection. Gabions have unique uses and characteristics, including flexibility, permeability, durability, versatility and economy which differentiate them from other methods of erosion control.

From 1976 until early 1981, MGMC and BSWC conspired to fix the prices at which they sold gabions in the United States. On March 6, 1985, MGMC pled guilty to a criminal Information charging it with conspiring to fix prices and divide the United States gabion market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. MGMC and the United States agreed, among other things, to recommend jointly that MGMC be sentenced to

pay a \$500,000 fine as punishment for that offense. Subsequently, MGMC paid the United States \$115,340 in settlement of its claim for civil damages.

On March 8, 1985, BSWC and its Belgian parent company, N.V. Bekaert S.A. ("Bekaert"), were indicted for conspiring to fix prices and divide the United States gabion market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. On October 16, 1985, BSWC and Bekaert pled guilty to the offense charged in the Indictment. Bekaert paid a \$300,000 fine and BSWC paid a \$325,000 fine. Thereafter, BSWC paid the United States \$112,731 in settlement of its claim for civil damages.

Prior to the February 15, 1983 acquisition of Terra Aqua by R&S, the gabion market in the United States was highly concentrated. Officine, through its subsidiary, MGMC, had a market share of approximately 60 percent and Terra Aqua had a market share of approximately 40 percent. As a result of the acquisition of Terra Aqua by R&S, Terra Aqua and MGMC are under the common control of Officine and Officine has acquired a virtual monopoly in the United States gabion market. The Herfindahl-Hirschman Index, a measure of market concentration calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers, currently approaches 10,000.

Based upon the foregoing and other facts, the Complaint alleges that the manufacture and sale of gabions comprise a

relevant market for antitrust purposes, and that the effect of the acquisition may be substantially to lessen competition in the manufacture and sale of gabions in the United States in violation of Section 7 of the Clayton Act.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

Plaintiff and defendants have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the APPA. The proposed Final Judgment constitutes no admission by any party as to any issue of fact or law. Under the provisions of Section 2(e) of the APPA, entry of the proposed Final Judgment is conditioned upon a determination by the Court that the proposed Final Judgment is in the public interest.

The proposed Final Judgment requires defendants to divest their entire interest in Terra Aqua, with the exception of certain proprietary equipment installed by Maccaferri in late 1984, absolutely and unconditionally, by their own efforts within six months of the entry of the Final Judgment. If defendants cannot accomplish the required divestiture within the above time period, the proposed Final Judgment provides that, upon application by the plaintiff, the Court shall appoint a trustee who shall sell Terra Aqua.

Terra Aqua must be divested to a purchaser who can and will operate it as a viable, ongoing business that can compete effectively in the gabion market. The purchaser has the option to purchase Terra Aqua's plant in Reno or to remove the production equipment to a location of its choice. The defendants will take all reasonable steps necessary to accomplish divestiture and shall cooperate with bona fide prospective purchasers and the trustee.

If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which divestiture is accomplished. If after six months from the date of the trustee's appointment the required divestiture has not been accomplished, the trustee and the parties shall make recommendations to the Court and the Court shall enter such orders as it deems appropriate to effect divestiture.

The proposed Final Judgment provides that before divestiture the defendants must make certain improvements to the machinery that would have been made had defendants not installed proprietary equipment at the plant. Until the required divestiture has been accomplished, the defendants must properly maintain Terra Aqua's production equipment. Defendants are also enjoined from taking any action that would

reduce the scope of Terra Aqua's manufacturing or sales operations or product line or that would jeopardize the sale of Terra Aqua as a viable competitor in the manufacturing or sale of gabions. Also, the marketing organizations of Terra Aqua and defendants must be kept separate until divestiture of Terra Aqua is accomplished. Finally, there are post-divestiture restrictions on defendants' ability to manufacture in certain western states, to attempt to have gabion product standards written in such a way as to exclude gabions manufactured by Terra Aqua and to offer employment to Terra Aqua employees.

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 fees. Entry of the Final Judgment will neither impair nor assist the bringing of any private antitrust damages actions. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. §16(a)), the Final Judgment has no prima facie effect in any private lawsuit that may be brought against the defendants.

V

PROCEDURES AVAILABLE FOR MODIFICATION OF
THE PROPOSED FINAL JUDGMENT

As provided by the APPA, any person wishing to comment upon the Final Judgment may within the statutory 60-day comment period submit written comments to John W. Clark, Chief, Professions and Intellectual Property Section, Antitrust Division, United States Department of Justice, Washington, D. C. 20530. These comments and the Department's responses will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department, which remains free to withdraw its consent to the Judgment at any time prior to entry. The Judgment provides that the Court retains jurisdiction over this action, and any party may apply to the Court for any order necessary or appropriate for its modification, interpretation, or enforcement.

VI

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The Government's original divestiture plan included, in addition to what is included in the proposed Final Judgment, gabion production equipment installed by defendants in Reno in late 1984. During negotiations between the Department and defendants it became clear that defendants would not enter into a consent decree that included such a requirement because of the proprietary nature of the machinery. Defendants eventually

convinced the Department that the machinery was in fact proprietary, that it was installed to allow defendants to produce a uniform "Maccaferri" gabion and that the Terra Aqua machinery, at the time of its acquisition by R&S, was competitive. To assure the continued competitiveness of the Terra Aqua machinery, however, the proposed Final Judgment provides that, before divestiture, the defendants must make certain improvements to the machinery that would have been made had defendants not installed proprietary equipment at the plant.

An alternative considered by the Department to granting the purchaser of Terra Aqua the option of purchasing the Reno, Nevada land and building in which Terra Aqua's manufacturing facility is located (hereinafter the "Reno Property") was to insist on their divestiture. It was clear to the Department, however, that the gabion production equipment in Reno was readily moveable. Since the gabion market is both small and not well known, the Department believed that there was probably a small group of prospective purchasers. We were, therefore, concerned that requiring the divestiture of the Reno Property, which is worth more than the production machinery, would further limit the number of prospective purchasers. We decided, therefore, not to require the divestiture of the Reno Property, but to give a prospective purchaser the flexibility of either purchasing it or moving the production machinery to a location of its choice.

The Department also considered whether to agree to the defendants' request that a minimum price be set on the Reno Property in the event the purchaser of Terra Aqua decides to purchase it. The Department usually opposes such requests. In this case, because the value of the real estate is higher than the value of the gabion production machinery, we considered whether a minimum sales price would discourage potential purchasers not interested in producing gabions.

The defendants have subsequently informed the Department, however, that they plan to convert a portion of an existing Terra Aqua debt to a mortgage on the Reno Property. The Department believes that the existence of this assumed liability will effectively discourage a potential purchaser who is not interested in producing gabions from acquiring the Reno Property solely for the purpose of reselling its real property. We decided, therefore, not to accept, and defendants now have withdrawn, the request for a provision setting a minimum price on the Reno Property.

As the proposed decree will completely cure the anticompetitive consequences of the acquisition of Terra Aqua by R&S, the United States believes that entry of the proposed Final Judgment is in the public interest.

VII

DETERMINATIVE MATERIALS AND DOCUMENTS

There are no materials or documents that the United States considered determinative in formulating this proposed Final Judgment. Accordingly, none are being filed with this Competitive Impact Statement.

Dated: *February 24, 1986*

Respectfully submitted,

John F. Greaney

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing
Competitive Impact Statement upon the following counsel by
causing copies thereof to be deposited in the United States
mail, postage prepaid, on *February 24, 1988*:

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