THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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:

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.[1]

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

[1] 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").[2]

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

[2] 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.[3]

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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[3] *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 purchaser will adequately redress the competitive harm alleged in the Complaint and restore competition to the market for the sale of newsprint in North America.

The United States and the NAA employed the same general economic model to examine the competitive effects of the merger. Accurate data about prices, manufacturing costs, the elasticity of demand and other factors can allow economists to model whether merging firms have an added incentive to exercise market power by reducing capacity after a merger. The United States and the NAA both attempted to determine whether the merger will cause the combined AbitibiBowater to eliminate newsprint capacity earlier than Abitibi and Bowater would have if they had remained independent competitors.

Although the United States and the NAA used a similar framework to model competition, the results differed significantly because of several important differences in the data. First, the United States had more complete and accurate data. Unlike the NAA, the United States was able use compulsory process to gather information. See, e.g., 15 U.S.C. 1311-14 (empowering the Antitrust Division to subpoena documents and take oral testimony). In this case, the United States had access to extensive and mill-by-mill data on sales (including exports), production volumes, capacities and costs. The NAA, on the other hand, had to rely on less accurate and publicly available information relating to mill capacities, prices and costs in assessing the profitability of and competitors' likely response to a post-merger price increase. Second, the United States conducted its own analysis of the effect of price changes on the demand for newsprint, using confidential information, in addition to considering estimates provided by others. Based upon its analysis, the United States believes that the estimate used by NAA understates the sensitivity of newsprint consumption to changes in price. In other words, the

United States believes that if the price for newsprint rose, customers would purchase less newsprint than the NAA estimates. Third, the United States and the NAA viewed 2007 differently. While the NAA assumed that the newsprint market in 2007 was in equilibrium – which would allow that year's prices to be used as a reference point from which to measure future changes – the United States' investigation revealed that much of 2007 was a period of instability. Unexpectedly large declines in demand for newsprint created excess capacity and caused prices to fall dramatically. The fact that AbitibiBowater and other firms responded to declining demand for newsprint by closing mills that were consistently losing money is discussed in further detail in the following section.

The United States is confident that at the time it negotiated the proposed Final Judgment the divestiture of the Snowflake mill was in the public interest, based upon the best information available at that time. The United States remains confident that the divestiture of the Snowflake mill is in the public interest and adequately remedies the harms alleged in the Complaint.

1. AbitibiBowater's recently announced decision to reduce excess newsprint capacity, and industry-wide price increases, do not mean that the parties have exercised market power

The NAA's argument, that the Snowflake mill divestiture is insufficient to prevent the combined firm from exercising market power by shutting additional capacity in order to raise prices, assumes that the combined firm's post-merger capacity reductions are the result of the merger. The NAA's suggestions to the contrary, events since the filing of the proposed Final Judgment appear to be unrelated to any exercise of market power. The ongoing sharp decline in demand for newsprint in North America, increases in the prices of key inputs into the production of newsprint, and the continued decline in the value of the United States dollar all have disrupted the supply and demand equilibrium for newsprint. Industry observers expect disruptions to continue as North American demand for newsprint declines. Manufacturers will respond by intermittently closing capacity, which will cause the market price to lurch from one equilibrium to another as it adjusts to these shocks to supply. Thus, in a market with declining demand, prices can be expected to fall when the decline in demand creates excess supply and increase when unprofitable capacity is closed in response to that decline in demand. In the remainder of this section, we will discuss the effects of these trends on the newsprint market and show that a careful analysis suggests that the NAA's claims are unfounded.

Demand for newsprint in the North American market "has declined over the last several years at a rate of approximately 5 to 10 percent per year because of a significant decline in demand for newspapers. . . . This decline in the demand for newsprint is projected to continue, and the resulting excess newsprint capacity will likely lead Defendants and their competitors to close, idle or convert more newsprint mills." (Complaint at ¶ 17; *see also* CIS at 5.) As North American demand continues to decline, notwithstanding the merger, all firms, including AbitibiBowater, will eventually have to close inefficient newsprint capacity. In its Comment, the NAA ignores the possibility that AbitibiBowater's post-merger decision to close some of its inefficient capacity was a natural reaction to the continued decline in demand for newsprint and may in fact be perfectly consistent with a competitive market.

The pressure to close inefficient capacity also intensified in 2007 because the prices of key production inputs—specifically, recycled fiber, wood pulp and energy — rose sharply. This increase in input costs has raised the costs of all producers and put upward pressure on the price of newsprint. Further, the United States dollar has lost value relative to the Canadian dollar, which has the effect of raising the costs of Canadian producers of newsprint—the bulk of North American newsprint capacity is located in Canada—and hence the price of newsprint.

Finally, the adjustment of the newsprint market to these disruptive market conditions will not be instantaneous or smooth. Because newsprint mills have very significant fixed costs and relatively smaller incremental costs, newsprint manufacturers may not be able to respond to declining demand by gradually withdrawing capacity. The market therefore can be expected to swing between periods of overcapacity and shortage as companies retire paper machines or entire paper mills. As these swings occur, there will not be smooth changes to the industry's overall capacity or its price levels. For example, while the price of newsprint has risen in the past six months, it is at the time of this filing at or below its *lowest* level in 2006 when input prices were lower. Further, the United States' investigation has found that the price is so low that many newsprint producers' mills do not cover their costs. Indeed, the three mills that AbitibiBowater closed after the merger were unprofitable.

In summary, the NAA's conclusion that recent newsprint capacity closures and price increases necessarily are anticompetitive actions driven by the merger is misguided and fails to account for significant market facts affecting the supply and demand equilibrium of the North American newsprint market.

2. The United States has provided sufficient explanation of why the proposed divestiture is an adequate remedy to the harm alleged in the Complaint, and entry of the proposed Final Judgment will be in the public interest

The proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint, and its entry, therefore, will be in the public interest. The purpose of Tunney Act review is not for the Court to engage in an "unrestricted evaluation of what relief would best serve the public," *BNS*, 858 F.2d at 462 (citing *Bechtel Corp.*, 648 F.2d at 666) or to determine the relief "that will best serve society," *Bechtel Corp.*, 648 F.2d at 666. Instead, the purpose of Tunney Act review is simply to determine whether the divestiture of the Snowflake mill is within the reaches of the public interest, "even if it falls short of the remedy the court would impose on its own." *AT&T*, 552 F.Supp. at 151. In other words, the purpose of Tunney Act review is to determine whether the divestiture is a "reasonably adequate" remedy for the harms alleged in the Complaint. *SBC Commc'ns*, 489 F.Supp. 2d at 17.

Subsections (A) and (B) of 15 U.S.C. § 16(e)(1) set forth a number of factors for courts to consider when assessing the competitive impact of proposed final judgments. Many of those factors are not at issue here.[4] Instead, the second argument in the NAA's Comment focuses on the competitive considerations relevant to the proposed Final Judgment, the divestiture it requires and the alternatives the United States considered.

The NAA questions whether the United States has adequately demonstrated to this Court that the divestiture eliminates AbitibiBowater's post-merger incentive to reduce capacity and raise prices to North American newsprint customers. It has. As explained previously, the United States conducted an extensive investigation and compiled comprehensive data on market shares, costs of production, estimations of rest-of-industry newsprint capacity and future reductions in

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[4] The NAA does not contest several factors listed for courts to consider under subsection (A). For instance, with respect to "provisions for enforcement and modification," 15 U.S.C. 16(e)(1)(A), the proposed Final Judgment contains the standard provisions that have been effective in numerous other cases brought by the United States. In particular, 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. With respect to "duration of relief sought," *id.*, the proposed divestiture is permanent. Finally, with respect to "whether its terms are ambiguous," *id.*, no term in the proposed Final Judgment is ambiguous.

newsprint demand gathered from public and non-public sources. This data was used in an economic model to determine if the merger would cause an anticompetitive increase in newsprint prices.[5] The United States concluded that a merger between Abitibi and Bowater, without a divestiture, would allow the merged firm to "close its capacity strategically, allowing the merged firm to raise newsprint prices and recoup its lost profits on the combined output." (CIS at 8.) But, as the United States concluded in the CIS, "[d]ivesting Snowflake . . . will reduce the capacity over which the merged firm could profit to a level at which it would not have the ability to close capacity strategically." (*Id.*) In other words, the United States' investigation found that without Snowflake, AbitibiBowater did not have enough newsprint capacity to benefit sufficiently from the post-merger price increase to offset the costs associated with shutting down profitable newsprint capacity.

The NAA further contends that the United States "has left the Court entirely in the dark with absolutely no basis for making a meaningful comparison between a Snowflake-only divestiture and any alternative course of action, including a full trial on the merits." (Comment at 18.) This is incorrect; in the CIS the United States addressed both alternatives. (CIS at 10-11.) As the United States noted in the CIS, a full trial on the merits would require significant time and expense, and the outcome would be uncertain. In light of such uncertainty, the United States'

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[5]To raise prices above competitive levels, the merged firm must create an artificial shortage by shutting down profitable newsprint mills. The merged firm has the incentive to follow this strategy when the costs of this strategy, which are the profits the merged firm forgoes by prematurely shutting down profitable newsprint mills, are less than its benefits, which are the increased prices the merged firm can expect to recoup across its remaining newsprint capacity. After completing its investigation, the United States concluded that without a divestiture AbitibiBowater would have the incentive to follow this strategy, that is, to create an artificial shortage by shutting down otherwise-profitable newsprint mills.

decision to take an adequate and available remedy and forgo the risk of trial is well within "the reaches of the public interest." *See SBC Commc'ns*, 489 F. Supp. 2d at 23 ("Success at trial was surely not assured, so pursuit of that alternative may have resulted in no remedy at all. While a trial may have created an even greater evidentiary record, that benefit may not outweigh the possible loss of the settlement remedies. . . .").

Similarly, the United States need not rehearse every permutation of possible divestiture in order to demonstrate to this Court that the divestiture of Snowflake would adequately address the competitive harm alleged in the Complaint. The competitive harm that the United States alleged – and that the NAA acknowledges – is AbitibiBowater's incentive and ability to raise newsprint prices above competitive levels in the North American market. Any divestiture that removes either the combined firm's incentive or its ability to raise prices above competitive levels would therefore be an adequate remedy. Given AbitibiBowater's ownership of all or part of 19 paper mills in the United States and Canada (*see* Complaint ¶¶ 7 & 8), the United States could have selected different mills, individually or in combination, to remove the merged firm's ability and incentive to raise prices anticompetitively. In this instance, considering all the factors – including the inherent advantages of settlement and avoidance of the risk and uncertainty of litigation[6] – the United States reasonably chose to require the divestiture of one of "the largest and most profitable newsprint mills in the United States," which its analysis determined would deprive the merged firm of the scale needed to recoup its lost profits. (*See* CIS at 6, 11.) As

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[6] As noted previously, when making its public interest determination, this 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.

discussed above, given the continuing decline in demand for newsprint, the United States anticipated that AbitibiBowater would continue to close inefficient newsprint capacity. (*See* Complaint at ¶ 17, CIS at 5.) The United States determined that, coupled with the exit from the market of such inefficient capacity, the divestiture of the Snowflake mill will be sufficient to prevent AbitibiBowater from engaging in an anticompetitive closure of *efficient* capacity. Abitibi and Bowater, even before the merger, had the incentive to close money-losing mills. The question therefore is whether the merger somehow gave them the incentive to close profitable mills in order to raise prices above competitive levels. The United States determined that AbitibiBowater was not likely to have that incentive once it divested Snowflake.

Finally, the NAA suggests that the proposed Final Judgment should not be entered because Abitibi and Bowater previously had engaged in anticompetitive conduct of the sort alleged in the Complaint, which it alleges the United States did not properly account for in negotiating the proposed Final Judgment. This suggestion is misplaced for two reasons. First, as mentioned earlier, the United States spoke with a number of market participants, including the NAA, and examined historical data on prices and costs in the course of its investigation. The evidence does not support the NAA's claims that the parties' prior behavior was in fact anticompetitive. Second, the NAA's allegations about the parties' prior behavior are irrelevant because the prior behavior does not address whether, after Snowflake is divested, AbitibiBowater will have the incentive and ability to unilaterally raise price above competitive levels. (And as the United States has already explained, the answer to this question is likely to be "no.")

Ultimately, in making its public interest determination, the district court "must accord deference to the government's predictions about the efficacy of its remedies." *See SBC*

Commc'ns, 489 F. Supp. 2d at 17. As already has been demonstrated, the United States' analysis supports the conclusion that divestiture of the Snowflake mill is an appropriate remedy to the harms alleged in the Complaint.

IV. CONCLUSION

The issues raised in the NAA's public Comment were among the many considered during the United States' extensive and thorough investigation. The United States has determined that the proposed Final Judgment as drafted provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the Comment and Response are published.

Respectfully Submitted,

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Karl D. Knutsen
Ryan Danks
Rebecca Perlmutter
Michelle Seltzer (D.C. Bar No. 475482)
Trial Attorneys
United States Department of Justice
Antitrust Division, Litigation I Section
1401 H St., N.W., Suite 4000
Washington, DC 20530
Telephone: (202) 514-0976
Facsimile: (202) 307-5802

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2008, I caused a copy of the foregoing Response of Plaintiff United States to Public Comments on The Proposed Final Judgment in this matter to the following individuals by electronic mail:

Counsel for Defendant Abitibi-Consolidated Inc.
Joseph J. Simons, Esq.
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1615 L Street, NW
Suite 1300
Washington, DC 20036-5694
Telephone: (202) 223-7370
Facsimile: (202) 223-7470
Email: jsimons@paulweiss.com

Counsel for Defendant Bowater Incorporated
R. Hewitt Pate, Esq.
Hunton & Williams
1900 K Street, NW
Washington, DC 20006
Telephone: (202) 955-1921
Facsimile: (202) 857-3894
Email: hpate@hunton.com

Counsel for the Newspaper Association of America
Alan L. Marx, Esq.
King and Ballow
1100 Union Street Plaza
315 Union Street
Nashville, TN 37201
Telephone: (615) 726-5455
Facsimile: (615) 726-5413
Email: amarx@kingballow.com

Karl D. Knutsen