UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Department of Justice Antitrust Division 450 Fifth Street N.W., Suite 8700 Washington, DC 20530 Plaintiff v. AMCOR LTD., 109 Burwood Road Hawthorn VIC 3122 Australia and RIO TINTO PLC, 2 Eastbourne Terrace London W2 6LG United Kingdom and ALCAN CORPORATION, 8770 West Bryn Mawr Avenue Chicago, IL 60631 Defendants.	CASE NO.: Case: 1:10-cv-00973 Assigned To : Kollar-Kotelly, Colleen Assign. Date : 6/10/2010 Description: Antitrust JUDGE: DATE STAMP:

COMPLAINT

The United States of America ("United States"), acting under the direction of the Attorney General, brings this civil antitrust action against defendants Amcor Ltd. ("Amcor"), Rio Tinto plc ("Rio Tinto"), and Alcan Corporation to enjoin Amcor's proposed acquisition from Rio Tinto of the Alcan Packaging Medical Flexibles business

("Alcan Packaging") and to obtain other equitable relief. The United States complains and alleges as follows:

I. NATURE OF THIS ACTION

1. Defendants Amcor Ltd. and Rio Tinto plc entered into an asset purchase agreement dated December 21, 2009, pursuant to which Amcor agreed to acquire the Alcan Packaging Medical Flexibles business from Rio Tinto for $65 million.

2. Amcor and Alcan Packaging are two of the three leading suppliers of vented bags for medical use in the United States.

3. The proposed acquisition would eliminate competition between Amcor and Alcan Packaging. For significant customers, Amcor and Alcan Packaging are the two best sources of vented bags for medical use. Elimination of the competition between Amcor and Alcan Packaging likely will result in Amcor's ability to raise prices to these customers. In addition, by eliminating Alcan Packaging, the transaction increases the likelihood of coordinated interaction between Amcor and the other leading supplier of vented bags for medical use. As a result, the proposed acquisition likely would substantially lessen competition in the development, production, and sale of vented bags for medical use in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

II. THE DEFENDANTS

4. Amcor is organized under Australian law and is headquartered in Melbourne, Australia. Amcor is a global packaging manufacturer that had total sales of AUD $9.53 billion for the fiscal year ending in June 2009. That same year, Amcor had approximately $170 million in U.S. sales of flexible packaging for medical use.

5. Rio Tinto is organized under the laws of and headquartered in the United Kingdom. Its 2009 sales totaled approximately $44 billion. Rio Tinto acquired Alcan Corporation in 2007.

6. Alcan Corporation is a wholly owned subsidiary of Rio Tinto. Alcan Corporation is a Texas corporation headquartered in Chicago, Illinois. Alcan Packaging develops, produces, and sells flexible packaging for medical use in the United States. In 2008, Alcan Packaging sold approximately $115 million of flexible packaging for medical use.

III. JURISDICTION AND VENUE

7. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

8. Defendants themselves, or through wholly owned subsidiaries, produce and sell vented bags for medical use in the flow of interstate commerce. Defendants' activities in the development, production, and sale of vented bags for medical use substantially affect interstate commerce. This Court has subject-matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a) and 1345.

9. Defendants have consented to venue and personal jurisdiction in the District of Columbia. Venue is therefore proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(c). Venue is also proper in the District of Columbia for defendants Amcor and Rio Tinto under 28 U.S.C. § 1391(d).

IV. TRADE AND COMMERCE

A. Background

1. Overview of Flexible Packaging for Medical Use

10. Flexible packaging is any package the shape of which can be readily changed. Flexible packaging is distinguishable from rigid packaging such as trays, bottles, vials, and other hard plastic or glass containers. Flexible packaging for medical use includes bags, pouches, tubing, forming films, rollstock, and lidding, made in different styles and using different materials. Packaged products include items ranging from scalpels, intravenous tubes, and syringes to large surgery trays and kits.

11. Generally, flexible packaging is produced by a "converter," which makes the flexible packaging according to a common production blueprint. The basic production steps can be described as: (1) the processing of resins into plastic film, either by "casting" or "blowing" (which is the extrusion of resin pellets through a die); (2) the conversion of the film by laminating multiple sheets together, applying coatings, and/or printing on the sheets; and (3) the finishing of the product by slitting and placing it on large rolls, or forming it into bags, pouches or other constructions.

12. If a converter performs all three of the process steps in-house, it is considered to be vertically integrated. Many converters purchase film that is blown or cast by another company and simply convert and finish the film, however. Also, many large medical device manufacturers have the capability to form the packaging product themselves and, instead of purchasing "converted products" (*e.g.*, bags or pouches), purchase "rollstock," which is film supplied as a roll.

13. The seeming simplicity of the production process is misleading. A single piece of film – the starting point for the conversion process – itself may contain as many as eleven or more separate layers that have been formed together during the extrusion process. The combination of layers in the film, with each layer extruded from a specific type of resin, provides the finished structure with the particular characteristics needed to properly contain the product for which that flexible package is intended. Furthermore, manufacturing a converted product from these films is difficult because the manufacturer must balance the package's ability to maintain its seal with its ability to open easily.

14. Producers of flexible packaging sell their packaging to medical device manufacturers that package their products for wholesale distribution or sale to end-users in the medical industry. End-users include hospitals, doctors' offices, and laboratories.

15. Sterilizable flexible packaging for medical use ("medical flexibles") is different from other types of flexible packaging for several reasons. First, medical flexibles must be able to withstand the sterilization process because the medical device is sterilized after it has been placed in the package. The most common sterilization process is the forcing of ethylene-oxide gas into and out of the package (known as "EtO sterilization"), which requires a "vented" or "breathable" package that incorporates some porous material. This porous material must act as a vent for the EtO gas to enter and exit but also must maintain the sterile barrier. The most widely used venting material is Tyvek, a durable, effective, Dupont-patented plastic material.

16. Second, medical flexibles must conform to strict quality and qualification requirements. Before a medical device manufacturer purchases any medical flexible product, it first must "qualify" the particular product. The product qualification process

is meant to guard against the risk of the package's failure. A failure of the package could expose the medical device to microbes, bacteria, or particulates, which could cause a patient's injury, sickness, or even death. The risks associated with packaging failure dictate a rigorous product qualification process, whereby the customer performs numerous tests, including quality testing, sterilization testing, seal strength testing, aging simulations, and shipping and handling simulations.

17. Sterilization testing during qualification is especially rigorous. The EtO sterilization process is an aggressive process that forces gas into and out of the flexible packaging through the venting material. During this process, the gas may not be able to escape quickly enough through the venting material, bursting the seams of the packaging. In addition, EtO sterilization can weaken the plastic films of the packaging, weaken seals, cause discoloration of the package, and cause other types of harm to the package. Producing medical flexible packaging that can withstand this process is difficult, and even products from large, established suppliers may fail customers' sterilization tests.

2. Vented Bags for Medical Use

18. Vented bags for medical use are formed by sealing two pieces of film rollstock together on three sides, leaving the fourth side open for filling and sealing. There are two different styles of EtO-sterilizable vented bags for medical use: (1) "header bags," which are sealed on one end by a long, thin venting strip running the length of the bag, and (2) "patch bags" or "breather bags," which have one or more circular venting patches on the sides of the bag instead of a strip over the end. Both styles of vented bag perform the same functions for the same end uses, and are generally considered to be

interchangeable. As with medical flexibles generally, Tyvek is the leading venting material for vented bags for medical use.

19. Each manufacturer produces vented bags for medical use with a range of features and characteristics. These include, among others: size, ease of opening, film composition, film gauge, seal strength, venting style, and venting design. Customers decide which vented bag for medical use to purchase by weighing the relative importance of these features.

20. Despite their generic name, vented bags for medical use are specialized, hard-to-make products. Because Tyvek is expensive, vented bags for medical use incorporate as little Tyvek into their design as possible. Minimizing the use of Tyvek, however, makes it more likely that, during sterilization, the EtO gas may not escape quickly enough through the venting material, bursting the seams of the packaging and breaking the sterile barrier. Designing and producing vented bags for medical use that strike the proper balance between using as little Tyvek as possible and providing sufficient venting for the EtO gas to escape is difficult and requires specialized knowledge and processes.

B. Relevant Market

21. The development, production, and sale of vented bags for medical use to U.S. customers is a line of commerce and a relevant market within the meaning of Section 7 of the Clayton Act.

22. Vented bags for medical use have specific end-uses, for which other types of medical flexibles cannot be used. Vented bags for medical use typically are used to accommodate larger and heavier items, such as surgical gowns and surgical kits and

trays. Other types of flexible packaging, such as vented pouches for medical use, cannot handle these larger, heavier items because they are designed differently. Therefore, the relevant product is vented bags for medical use.

23. U.S. customers have unique qualification requirements that allow producers to price discriminate against them without regard to prices of foreign producers. Based on the locations of customers for vented bags for medical use, the relevant geographic market is the United States.

24. A small but significant increase in the price of vented bags for medical use to U.S. customers would not cause those customers to turn to other types of flexible packaging or to engage in arbitrage by purchasing through customers located outside of the United States, or otherwise to reduce purchases of vented bags for medical use, in volumes sufficient to make such a price increase unprofitable.

C. Market Participants

25. Amcor, Alcan Packaging, and one other competitor are the only significant competitors in the U.S. market for vented bags for medical use. Smaller suppliers are not significant competitors in the U.S. market for vented bags for medical use because their products generally serve niche applications, such as low-volume products, non-standard sizes, and small customers, and are not price competitive. Foreign suppliers are not significant competitors in the U.S. market for vented bags for medical use because currently they do not sell into the United States, and they would not do so in the event of a small but significant increase in price because of the qualification barriers they would face. Thus, there are no other providers of vented bags for medical

use to which a medical device manufacturer could turn if faced with a small but significant increase in the price of vented bags for medical use.

V. LIKELY ANTICOMPETITIVE EFFECTS OF THE PROPOSED ACQUISITION

A. How Competition Occurs in the U.S. Market for Vented Bags for Medical Use

26. Producers of vented bags for medical use must work closely with medical device manufacturers to ensure that their packaging material meets their customers' qualifications, that they meet the promised lead times, and that they continuously find ways to cut the customers' costs. Producers also must engage in research and development to deliver better packaging products in order to compete effectively.

27. Prices for vented bags for medical uses are customer-specific and based on, among other things, an individual customer's unique requirements and specifications. The price charged to one customer likely will be different from the price charged to another customer. Additionally, arbitrage is unlikely because customer-specific printing, branding, and labeling on vented bags for medical use prevents sales among customers.

28. Price competition in the market for vented bags for medical use occurs in two ways. First, customers may issue a request for proposal, through which they invite potential suppliers to bid on supplying packaging that meets the customers' specifications. Customers evaluate the competing bids on the basis of, among other things, compliance with their specifications, price, delivery times, and the services provided by each producer. Second, price competition may also occur less formally if a customer seeks or receives an offer from an alternative supplier and the incumbent is given a chance to respond.

29. Because of the risk-averse nature of medical device manufacturers, the time-consuming and difficult qualification process, and the high quality requirements, switching suppliers can involve significant time and expense. Consequently, competition tends to take the form of competition for a stream of new business, which the winner expects to keep for some years.

B. Likely Anticompetitive Effects in the U.S. Market for Vented Bags for Medical Use

30. The proposed acquisition of Alcan Packaging by Amcor likely would substantially lessen competition in the U.S. market for vented bags for medical use. Amcor, Alcan Packaging, and one other company are the three primary competitors in the U.S. market for vented bags for medical use. Currently, Amcor and Alcan Packaging account for 27 percent and 33 percent, respectively, of U.S. sales in the market for vented bags for medical use. If the transaction is not enjoined, three firms collectively would account for approximately 95 percent of sales of vented bags for medical use in the United States. Using a measure called the Herfindahl-Hirschman Index ("HHI") (explained in Appendix A), the HHI would increase by more than 1,790 points, resulting in a post-acquisition HHI of more than 4,830 points.

31. Due to Amcor and Alcan Packaging's collective overall expertise in meeting the needs of customers and other technical and commercial factors for vented bags for medical use, including, among other things, price, quality, ability to pass the customer's rigorous qualification procedures, delivery times, service, and technical support, Amcor and Alcan Packaging frequently are perceived by each other, by other bidders, and by customers as two of the three most significant competitors in the market.

32. Amcor's and Alcan Packaging's bidding behavior often has been constrained by the possibility of losing business to the other. For significant customers of vented bags for medical use, Amcor and Alcan Packaging are their two best substitutes. By eliminating Alcan Packaging, Amcor likely would gain the incentive and ability to profitably increase its bid prices, reduce quality, offer fewer and less attractive supply-chain options, reduce technical support, and reduce innovation below what it would have been absent the acquisition.

33. Customers have benefited from competition between Amcor and Alcan Packaging through lower prices, higher quality, better supply-chain options (including delivery times and volume-purchase requirements), technical support, and numerous innovations. The combination of Amcor and Alcan Packaging would eliminate this competition and future benefits to customers, and likely would result in harmful unilateral price effects.

34. In addition, by reducing the number of significant competitors in the U.S. market for vented bags for medical use from three to two, Amcor and the one other competitor would gain the incentive and likely ability to raise prices through coordinated interaction. The fringe competitors would be unable to render the coordination unprofitable by repositioning or expansion. Coordination would be more likely because, for example, the merger would make customer allocation easier. Each competitor could be reasonably certain as to the identity of the other's customers, making cheating easier to detect and discipline and, because each competitor is at or near capacity, the ability of each profitably to expand sales and steal business from the other would be limited.

35. Customers have benefited from competition between Amcor, Alcan Packaging, and the other significant competitor through lower prices, higher quality, better supply-chain options (including delivery times and volume-purchase requirements), technical support, and numerous innovations. The combination of Amcor and Alcan Packaging would eliminate this competition and future benefits to customers, and likely would result in harmful coordinated price effects.

36. The proposed acquisition, therefore, likely would substantially lessen competition in the United States for the development, production, and sale of vented bags for medical use, which likely would lead to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation, in violation of Section 7 of the Clayton Act.

C. Entry or Expansion is Unlikely to Prevent Anticompetitive Harm

37. In order to compete effectively in the U.S. market for vented bags for medical use, a competitor must be vertically integrated. Other converters produce vented bags for medical use similar to those produced by Amcor and Alcan Packaging. Unlike Amcor, Alcan Packaging, and the other leading competitor, however, those companies are not vertically integrated (*i.e.*, they do not make their own films) and do not benefit from similar economies of scale or scope, and they therefore operate at a cost disadvantage.

38. Amcor and Alcan Packaging, as a consequence of the efficiencies they possess due to vertical integration, are able to offer vented bags for medical use to customers at lower prices and higher volumes than are the non-vertically integrated competitors. In order to compete effectively with Amcor and Alcan Packaging, other

converters must begin producing their own films and expand production to capture similar scale and scope benefits. Expanding to compete with the vertically integrated converters would require a significant capital investment and would take years, as the expanding company still would have to qualify each of its products at each new customer. These suppliers likely would not be able to expand to meet customers' required specifications or quality requirements cost-effectively within a commercially reasonable amount of time, and therefore would be deterred from attempting to expand.

39. Likewise, de novo entry into the market for vented bags for medical use would not be timely, likely, or sufficient to deter anticompetitive post-merger pricing. A new supplier would need to construct production lines capable of producing vented bags for medical use that meet the rigorous standards set forth by major buyers of such films. Construction of manufacturing facilities would require a significant capital investment and the entrant would have to be committed to research and development. In addition, the technical know-how necessary to design and successfully manufacture packaging that is able to pass customers' qualification tests is difficult to obtain and is learned through a time-consuming trial-and-error process.

40. Even after a new entrant has developed the capability to supply vented bags for medical use, the entrant's product must be qualified by potential customers, demonstrating that its products can meet rigorous quality and performance standards. For example, because the qualifying process for vented bags for medical use typically requires a simulated aging test, where sample products are packaged in the vented bag, sterilized, and then stored in an accelerated aging room for extended periods of time, the process can take many months. Further, initial attempts to qualify are not guaranteed to

be successful, and even current market participants have had to repeat the process multiple times. In such cases, the qualification process can take several years with no guarantee of success. Moreover, because customer specifications are unique, qualification with one customer does not guarantee qualification with another.

41. Even if a new entrant were to develop the capability to supply vented bags for medical use and can pass qualification tests, the new entrant still would face the same barriers to expansion as those faced by converters currently producing vented bags for medical use. In addition, in the medical industry, where the costs of packaging failure are high, medical device manufacturers are reluctant to work with suppliers that have not established reputations for quality, the establishment of which occurs gradually over many years.

42. As a result of these barriers, expansion by non-vertically integrated vented bag converters or entry by new firms into the market for the development, production, and sale of vented bags for medical use would not be timely, likely, or sufficient to prevent a likely exercise of market power by Amcor after the acquisition.

VI. THE PROPOSED ACQUISITION VIOLATES SECTION 7 OF THE CLAYTON ACT

43. Amcor's proposed acquisition of the Alcan Packaging business likely would substantially lessen competition in the development, production, and sale of vented bags for medical use in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

44. Unless enjoined, the proposed acquisition likely would have the following anticompetitive effects, among others:

(a) actual and potential competition between Amcor and Alcan Packaging in the market for the development, production, and sale of vented bags for medical use in the United States would be eliminated;

(b) competition in the market for the development, production, and sale of vented bags for medical use in the United States likely would be substantially lessened; and

(c) for vented bags for medical use in the United States, prices likely would increase, quality likely would decrease, supply-chain options likely would be less favorable, technical support likely would be reduced, and innovation likely would decline.

VII. REQUESTED RELIEF

45. The United States requests that this Court:

(a) adjudge and decree Amcor's proposed acquisition of the Alcan Packaging business to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

(b) enjoin defendants and all persons acting on their behalf from consummating the proposed acquisition of the Alcan Packaging business by Amcor, or from entering into or carrying out any other agreement, plan, or understanding, the effect of which would be to combine Amcor with the Alcan Packaging business;

(c) award the United States its costs for this action; and

(d) award the United States such other and further relief as the Court deems just and proper.

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APPENDIX A
DEFINITION OF HHI

The term "HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20%, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,000 and 1,800 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 1,800 points are considered to be highly concentrated. *See Horizontal Merger Guidelines* ¶ 1.51 (revised Apr. 8, 1997). Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission. *See id.*