UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. GEORGIA-PACIFIC CORPORATION, and FORT JAMES CORPORATION Defendants.	Civil Action No.: 00 2824 (RWR) Filed: January 25, 2001

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to 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 THIS PROCEEDING

On November 21, 2000, the United States filed a Complaint alleging that the acquisition of Fort James Corporation ("Fort James") by Georgia-Pacific Corporation ("Georgia-Pacific") would substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that the Defendants (Georgia-Pacific and Fort James) are the two largest producers of away-from-home ("AFH") tissue products in the United States. The proposed acquisition would result in Georgia-Pacific accounting for approximately 66 percent of the dollar sales of AFH tissue products sold in the United States, and would also result in

Georgia-Pacific controlling approximately 36 percent of North American tissue parent roll productive capacity. As alleged in the Complaint, the transaction will substantially lessen competition in the production and sale of AFH tissue products in the United States, thereby harming consumers. Accordingly, the prayer for relief in the Complaint seeks among other things: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) permanent injunctive relief that would prevent Defendants from carrying out the acquisition or otherwise combining their businesses or assets.

At the same time the Complaint was filed, the United States also filed a proposed settlement that would permit Georgia-Pacific to acquire Fort James, provided that Georgia-Pacific divest its AFH Tissue Business (as defined in the proposed Final Judgment) in order to preserve competition. The settlement consists of a proposed Final Judgment and a Hold Separate Stipulation and Order.

The proposed Final Judgment orders Defendants to divest the Georgia-Pacific AFH Tissue Business to an acquirer or acquirers approved by the United States. Defendants must complete the divestiture within one hundred twenty (120) calendar days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment, whichever is later. The United States may nominate a trustee to monitor the divestiture process at any point. If Defendants do not complete the divestiture within the prescribed time, then, under the terms of the proposed Final Judgment, this Court will appoint a trustee to sell the Georgia-Pacific AFH Tissue Business, if a monitoring trustee has not already been appointed. If a monitoring trustee has been appointed, that person shall monitor the divestiture by the Defendants and complete the divestiture if Defendants have not completed the divestiture within the prescribed time.

The Hold Separate Stipulation and Order, which this Court entered on November 21, 2000, and the proposed Final Judgment require Defendants to preserve, maintain and continue to operate the Georgia-Pacific AFH Tissue Business as an independent, ongoing, economically viable competitive business, with the management, sales and operations held separate from Georgia-Pacific's other operations.

The United States 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 this Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. The Defendants

1. *Georgia-Pacific Corporation*

Georgia-Pacific, a Georgia corporation with its principal place of business in Atlanta, Georgia, is the second largest forest products company in the United States, and also the second largest manufacturer of AFH tissue products in the United States. In 1999, Georgia-Pacific reported sales of approximately $18 billion, with $1.4 billion of sales in tissue products in the United States, $674 million of which was derived from sales of AFH tissue products in the United States.

2. *Fort James Corporation*

Fort James, a Virginia corporation with its principal place of business in Deerfield, Illinois, is the largest tissue manufacturer and the largest AFH tissue products manufacturer in the United

States. In 1999, Fort James reported sales of approximately $7 billion, with $3.1 billion of sales in tissue products in the United States, $1.3 billion of which was derived from sales of AFH tissue products in the United States.

B. The Proposed Acquisition

On or about July 16, 2000, Georgia-Pacific entered into an agreement with Fort James to purchase Fort James for cash and Georgia-Pacific stock with an aggregate value of approximately $11 billion. The proposed combination of Georgia-Pacific and Fort James precipitated the United States's antitrust suit.

C. The Competitive Effects of the Acquisition in AFH Tissue

1. *The AFH Tissue Market*

AFH tissue products are tissue products consumed primarily in commercial and other away-from-home establishments, such as office buildings, factories, restaurants, hospitals, schools, hotels and airports. The Complaint alleges that three separate categories of AFH tissue are relevant products (or lines of commerce) within the meaning of Section 7 of the Clayton Act: AFH bathroom tissue, AFH paper napkins, and AFH paper towels. There are no reasonably interchangeable substitutes for any of these relevant products to which a significant number of consumers would switch in response to a small but significant increase in price.

AFH tissue products differ from retail tissue products (those sold in grocery stores, club stores and other retail outlets) in numerous important respects, including significant physical differences, distinct distribution channels, branding, industry recognition, purchaser perception, and significant price differences. Because of these differences, a small but significant increase in the price of AFH tissue products would not cause a significant number of purchasers to switch to

retail tissue products. Additionally, AFH tissue products are often produced using distinct production equipment and processes, and a significant number of tissue product manufacturers produce only AFH or retail tissue products, but not both.

A significant amount of AFH tissue products are sold to national accounts, such as quick serve restaurants. Many national account customers require national suppliers of AFH tissue products to ensure consistent product quality and timely delivery. In addition, it is usually more efficient and less costly for national accounts and distributors servicing national accounts to deal with a single tissue supplier with the ability to supply all the customers's locations, rather than with several suppliers servicing only limited regions. Therefore, for many AFH tissue purchasers, the only reasonably acceptable suppliers for AFH tissue products are the few AFH tissue manufacturers capable of servicing national accounts.

The production of AFH tissue products is a two-stage process. First, "parent rolls" of tissue are produced on very large, expensive and complex machines ("tissue machines"), which are suitable only for making tissue paper. A tissue machine combines water and certain types and grades of pulp at the "wet end" of the machine and processes these materials into various types, grades and "basis weights" of tissue paper, which correspond to the particular physical properties required by the finished tissue product being produced. As tissue paper comes off the "dry end" of the machine, it is wound into a "parent roll" which can weigh several tons and measure eight to ten feet in diameter and up to 25 feet in length. Tissue parent rolls are subsequently converted by specialized machines into finished tissue products.

This manufacturing process permits supply substitution by a significant number of AFH tissue manufacturers among the three AFH tissue products. Thus, while each AFH tissue product

is a separate line of commerce and a relevant market for purposes of the Clayton Act, the ability of a significant number of suppliers to efficiently switch their production among AFH tissue products means that in each market the competitive effects will be similar. Thus, the Complaint alleges that AFH bathroom tissue, AFH paper napkins, and AFH paper towels can be usefully aggregated into what is referred to here as the "AFH tissue market."

The Complaint alleges that the relevant geographic market within the meaning of Section 7 of the Clayton Act is no larger than the United States, Mexico and Canada ("North America"), and may be smaller. AFH tissue products are light and bulky, and consequently, a relatively small amount of product will fill a truck, making shipping long distances uneconomical. Accordingly, the amount of AFH tissue products imported into the United States is negligible, and a small but significant increase in the price of any AFH tissue product would not cause a sufficient number of purchasers to switch to finished products manufactured outside the United States to make the price increase unprofitable. Parent rolls of tissue paper (those not yet converted into a final tissue product) can be shipped economically longer distances than finished tissue products, making it profitable to ship parent rolls from parts of Canada and parts of Mexico to converting facilities in parts of the United States for processing into finished goods.

2. *Anticompetitive Consequences of the Acquisition*

The Complaint alleges that Georgia-Pacific's acquisition of Fort James would enable Georgia-Pacific to unilaterally exercise market power in the market for AFH tissue products by reducing the output of those products and the output of the AFH parent rolls used to produce AFH tissue, causing the price for AFH tissue products sold in the United States to increase following the merger.

Georgia-Pacific has approximately 11 percent of North American capacity for the production of AFH tissue, and Fort James has approximately 25 percent. Hence, the acquisition would result in Georgia-Pacific accounting for approximately 36 percent of available North American AFH parent roll capacity. This increase in industry capacity controlled by Georgia-Pacific would give it sufficient capacity to profit from the increase in price caused by a unilateral reduction in output after this merger. While in other cases, this level of industry capacity might not allow for a profitable unilateral price increase resulting from an output reduction, two factors in this case give rise to a significant anticompetitive effect. Demand for AFH tissue products is relatively inelastic, and manufacturers of AFH parent rolls converted into products for sale in the United States are already operating at or near capacity and are not able to expand parent roll output quickly. The evaluation of the profit-maximization calculation for the merged firm, the low elasticity of parent roll demand, the contribution margin of parent rolls and the fact that competitors are operating at or very near their capacity and cannot timely increase that capacity led to the conclusion that the amount of capacity controlled post-merger would give Georgia-Pacific the opportunity and incentive to reduce output unilaterally and thereby increase its prices and profits at the expense of purchasers.

With respect to the sale of AFH tissue products, Georgia-Pacific and Fort James are the two largest producers of AFH tissue products in the United States. Georgia-Pacific has approximately a 23 percent market share of dollar sales and Fort James has approximately a 43 percent market share of dollar sales, resulting in the combined firm having approximately a 66 percent share of dollar sales in the United States following the merger. Moreover, only a few suppliers of AFH tissue products typically qualify as acceptable suppliers to national account

customers, due to needs relating to volume, uniform quality and consistency, timely delivery on a national basis, and distributional efficiencies. The loss of Fort James as one of the few competitors capable of competing for national accounts business will likely result in higher prices to these customers.

Entry is unlikely to be timely, likely or sufficient to prevent the exercise of market power that Georgia-Pacific would be able to engage in following the merger. Entry into AFH tissue products business would require a high sunk capital investment in equipment and facilities. AFH parent roll making machines are expensive and require extensive environmental permitting to install. Design and construction is also lengthy. The time required from initial planning for a new machine to final construction is more than two years. Furthermore, a successful new entrant would require converting lines to produce finished tissue products, a reliable distribution system and an extensive sales force. As a result of these factors, new entry into the AFH tissue products business, especially entry that would replace lost competition in sales to national accounts, is not likely to occur.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment requires that Georgia-Pacific divest its AFH Tissue Business to a purchaser or purchasers, approved by the United States, that can compete effectively in the AFH tissue business and thereby remedy the anticompetitive effects alleged in the Complaint. Specifically, the proposed Final Judgment requires Georgia-Pacific to divest as an ongoing business virtually all of the tangible and intangible assets of Georgia-Pacific Tissue LLC (defined in the proposed Final Judgment), the Georgia-Pacific business unit responsible for its AFH tissue manufacturing, marketing and sales. The divestiture includes all customer lists and

the sales and marketing force employment contracts and relationships of Georgia-Pacific Tissue LLC along with its current productive assets. The assets include four tissue making mills located in Menasha, Wisconsin; Flagstaff, Arizona; Alsip, Illinois; and Gary, Indiana; with total tissue machine capacity of approximately 368,000 tons per year. The assets to be divested also include five tissue converting facilities located in Neenah, Wisconsin; Bellemont, Arizona; Brattleboro, Vermont; Greenwich, New York; and LaGrange, Georgia; with total tissue converting capacity of approximately 560,000 tons per year.

Georgia-Pacific is also required to offer, at the purchaser's option, a supply contract to provide the purchaser with up to 120,000 tons per year of tissue parent rolls. The supply contract is limited to an initial term of three years, with two one year extensions possible if the United States concurs. The supply contract is intended to bridge the gap between the converting capacity and the parent roll capacity being divested, and provides adequate time for the purchaser to plan for and build a new tissue mill, which can take as long as five years. The supply contract replaces a similar agreement between Georgia-Pacific and Georgia-Pacific Tissue LLC, and is intended to ensure the continuation of the divested assets as an ongoing and viable business capable of competing effectively in the production and sale of AFH tissue products. Georgia-Pacific's compliance with the requirements of the Final Judgment will prevent an increase in market share in AFH tissue products as a result of its acquisition of Fort James, and preserve the competition that would have been lost as a result of the acquisition.

Defendants must use their best efforts to divest the Georgia-Pacific AFH Tissue Business as expeditiously as possible. The proposed Final Judgment provides that the Georgia-Pacific AFH Tissue Business be divested in such a way as to satisfy the United States, in its sole

discretion, that the acquirer(s) can and will use the assets as part of a viable, ongoing business, and that if there are multiple divestitures, that at least one of the purchasers will become, as a result of the divestiture, capable of competing effectively in supplying AFH tissue products to national accounts.

The United States may at any time nominate a trustee to monitor the divestiture. If Defendants do not accomplish the ordered divestiture within the prescribed time period, then the monitoring trustee will immediately assume the sole power and authority to accomplish the divestiture. If a monitoring trustee has not yet been appointed, the Court shall appoint a trustee upon application by the United States.

If a trustee is appointed, the proposed Final Judgment provides that Defendants must cooperate fully with the trustee and pay all of the trustee's costs and expenses. The trustee's compensation will be structured to provide an incentive for the trustee based on the price and terms of the divestiture and the speed with which it is accomplished. After the trustee's appointment becomes effective, the trustee will file monthly reports with the United States and this Court setting forth either the Defendants' or the trustee's efforts, whichever is applicable, to accomplish the required divestiture. If at the end of six months after a trustee has become responsible for selling the Georgia-Pacific AFH Tissue Business, the divestiture has not been accomplished, then the trustee shall, and the United States and Defendants may, make recommendations to this Court, which shall enter such orders as appropriate to carry out the purpose of the Final Judgment.

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 district court to recover three times the damages the person has suffered, as well as the costs of bringing a lawsuit and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no effect as *prima facie* evidence in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the proposed Final Judgment may be entered by this Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon this Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the *Federal Register*. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with this Court and published in the *Federal Register*. Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section

Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that this Court retains jurisdiction over this action, and the parties may apply to this Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States is satisfied, however, that the divestiture of the Georgia-Pacific AFH Tissue Business, and other relief contained in the proposed Final Judgment will establish, preserve and ensure a viable competitor in the relevant market identified by the United States. Thus, the United States is convinced that the proposed Final Judgment, once implemented by the Court, will prevent Georgia-Pacific's acquisition of Fort James from having adverse competitive effects.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment is "in the public interest." In making that determination, the court *may* consider--

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment 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) (emphasis added). As the Court of Appeals for the District of Columbia has held, the APPA permits a court to consider, 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).

In conducting this inquiry, "the 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."[1] Rather,

> 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.[2]

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may

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[1] 119 CONG. REC. 24,598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, those procedures are discretionary (15 U.S.C. § 16(f)). A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

[2] *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977); *see also United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462-63 (9th Cir. 1988), *quoting United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft*, 56 F.3d at 1458. Precedent requires 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 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.[3]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for 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.'"[4]

Moreover, the court's role under the APPA is limited to reviewing the remedy in

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[3] *United States v. Bechtel Corp.*, 648 F.2d at 666 (citations omitted) (emphasis added); *see United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. *See also United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

[4] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (*quoting Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978).

relationship to the violations that the United States alleges 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. Since 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 might have but did not pursue. *Id.*

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: January 25, 2001.
Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Competitive Impact Statement via First Class United States Mail and facsimile transmission, this 25th day of January 2001, on:

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