

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA and
STATE OF TEXAS,

Plaintiffs,

v.

KIMBERLY-CLARK CORPORATION and
SCOTT PAPER COMPANY,

Defendants.

Civil Action No. 3:95 CV 3055-P

Filed: December 12, 1995

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

The United States and the State of Texas filed a civil antitrust Complaint on December 12, 1995, which alleges that Kimberly-Clark Corporation's proposed acquisition of Scott Paper Company ("Scott") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Kimberly-Clark and Scott are the nation's first and third leading sellers of facial tissue, and its leading sellers of baby wipes.

The Complaint alleges that the combination of these rivals would substantially lessen competition in production and distribution, and raise prices to consumers in retail sale, of

facial tissue and baby wipes in the United States. The prayer for relief seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) a permanent injunction preventing Kimberly-Clark from acquiring control of Scott's facial tissue and baby wipes businesses or otherwise combining them with its own business in the United States.

At the time the suit was filed, the United States and State of Texas also filed a proposed settlement that would permit Kimberly-Clark to complete its acquisition of Scott's other assets, but require divestitures of baby wipes and facial tissue assets in a way that will preserve competition in the markets. This settlement consists of a Stipulation and a proposed Final Judgment.

The proposed Final Judgment orders defendants to divest to one or more purchasers Scott's Scotties® facial tissue label, any two of four United States tissue mills currently operated by Kimberly-Clark or Scott, all of Scott's baby wipes labels, and Scott's wet wipes plant used to produce baby wipes and other products. Certain tangible and intangible assets that relate to these assets and labels must also be divested. Defendants must complete the divestiture of the Scott facial tissue business within 180 days, and the divestiture of the wet wipes business within 150 days, after December 12, 1995, in accordance with the procedures specified in the proposed Final Judgment.

The Stipulation and Final Judgment require Kimberly-Clark to ensure that, until the divestitures mandated by the Final

Judgment have been accomplished, Scott's facial tissue and baby wipes businesses and associated assets will be held separate from, and operated independently of, other, competing Kimberly-Clark facial tissue and baby wipes businesses. Kimberly-Clark must preserve and maintain these assets as saleable and economically viable, ongoing concerns, with competitively-sensitive business information and decision-making divorced from that of competing Kimberly-Clark businesses.

The United States, the State of Texas, Kimberly-Clark, and Scott have also stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, 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

A. *The Defendants and the Proposed Transaction*

Kimberly-Clark, based in Dallas, Texas, is a leading producer of consumer paper products, including disposable diapers, feminine care products, facial tissue and baby wipes. In 1994, Kimberly-Clark reported total sales of \$7.3 billion. Kimberly-Clark makes Kleenex® facial tissue and Huggies® brand baby wipes.

Scott, based in Boca Raton, Florida, is also a leading producer of consumer paper products, including bath tissue, facial

tissue and baby wipes. In 1994, Scott reported total sales of \$3.5 billion. Among its other brands, Scott makes and sells Scotties® facial tissue (recently renamed Scott®) and Baby Fresh® and Wash A Bye Baby® baby wipes.

On July 16, 1995, Kimberly-Clark agreed to acquire Scott for cash and stock in a transaction that would create a firm with global sales of about \$12 billion. This transaction, which would combine leading competitors in two major markets, precipitated the governments' suit.

B. The Transaction's Effects in the Facial Tissue Industry

Facial tissue is a soft, thin, pliable and absorbent sheet of paper, typically folded and packed in a box. It is primarily used to catch a sneeze, blow a nose, or remove make-up. There are no good substitutes for facial tissue.

For all practical purposes, the retail facial tissue market is dominated by three major firms--Kimberly-Clark, Scott and Procter & Gamble--which together account for nearly 90 percent of sales of facial tissue, a \$1.34 billion dollar market. Kimberly-Clark's popular Kleenex® is by far the leading brand of facial tissue sold, commanding 48.5 percent of all sales.

Scott's Scotties® facial tissue, a value brand offering consumers more product for the money, has a 7 percent share of sales, but significantly greater presence and consumer acceptance in the Northeast, where the brand was first introduced. Procter &

Gamble, the only other significant firm, makes Puffs®, which has about a 30 percent market share.¹

Scott's market share, however, understates its competitive significance. As a value brand, Scotties® has, in the past, imposed a significant constraint on Kimberly-Clark's prices for facial tissue. Kimberly-Clark's Kleenex® likewise has been a significant constraint on prices of Scotties® facial tissue.

The Complaint alleges that Kimberly-Clark's acquisition of Scott would remove these constraints, and provide Kimberly-Clark both the power and the incentive to increase unilaterally and profitably the price of either, or both, brands of facial tissue. Kimberly-Clark's acquisition of Scott would also increase the likelihood of cooperative increases in the price of consumer facial tissue, since the merger would leave Kimberly-Clark with a single significant rival, Procter & Gamble's Puffs®, in the facial tissue market.

Because entry into the facial tissue market is difficult, requiring a significant investment in plant equipment and brand building, successful new entry or repositioning after the merger is unlikely to restore the competition lost through Kimberly-Clark's removal of Scott from the marketplace.

C. The Transaction's Effect in the Baby Wipes Industry

Baby wipes are soft, moist and absorbent sheets of paper substrate, about the size of a wash cloth, that are packaged in a

¹ The approximate post-merger Herfindahl-Hirschman Index ("HHI") for the facial tissue market, based on 1994 dollar sales, would be 4031, with an increase in the HHI as a result of the merger of 705 points.

plastic tub or canister. Consumers use baby wipes to clean babies, especially during a diaper change. Stronger, softer and more convenient or sanitary than any alternative product, baby wipes are a popular staple of families with babies, and are bought by 95 percent of such households. There are no good substitutes for baby wipes.

Kimberly-Clark and Scott are the nation's two largest and most significant manufacturers of baby wipes. Scott's Baby Fresh® and Wash A Bye Baby® baby wipes account for about 31 percent of all baby wipes sold, while Kimberly-Clark's Huggies® baby wipes commands nearly 25 percent of all sales. They are each other's primary competitor and most significant constraint on prices for baby wipes. Kimberly-Clark and Scott aggressively compete in pricing, promotion, and product innovation.

Following its acquisition of Scott, Kimberly-Clark would control nearly 60 percent of all baby wipes sold,² and leave it seven times larger than its next largest competitor in a market with \$500 million in annual sales. By eliminating Scott, the Complaint alleges, Kimberly-Clark would acquire market power that would enable it unilaterally to increase prices to consumers of either, or both, Huggies®, Baby Fresh® and Wash A Bye Baby® wipes. New market entry is difficult, time-consuming and unlikely, and hence cannot be expected to constrain the unlawful effects of Kimberly-Clark's acquisition of Scott.

² The approximate post-merger HHI for the relevant market based on 1994 dollar sales would be over 3137, with a change in the HHI concentration index resulting from the merger of 1501 points.

D. Harm to Competition as a Consequence of the Acquisition

The Complaint alleges that the transaction would have the following effects, among others: competition generally in the facial tissue and baby wipes markets will be substantially lessened; actual and potential competition between Kimberly-Clark and Scott in the market for facial tissue and baby wipes will be eliminated in the United States; prices for facial tissue and baby wipes in the United States are likely to increase; and product innovation in facial tissue and baby wipes in the United States will suffer.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in production and retail sale of branded baby wipes and facial tissue in the United States. Within 150 days after filing the proposed Final Judgment, defendants must divest Scott's wet wipes plant in Dover, Delaware; grant a 25-five year, royalty-free, exclusive and assignable, perpetually renewable license for the baby wipes labels produced at that plant; and divest other associated assets -- sell, in essence, the entire Scott baby wipes business and brands. Within 180 days after filing the proposed Final Judgment, defendants must similarly divest Scott's Scotties® brand facial tissue business, grant a 25-year, royalty-free, exclusive and assignable, perpetually renewable license for the Scotties® facial tissue label, and divest any two of four tissue mills specified in the Final Judgment and associated assets. These businesses must be sold to a purchaser or purchasers who demonstrate to the sole satisfaction of the United States and the State of Texas that they will be an economically viable and effective competitor, capable of

maintaining or surpassing Scott's market performance in the sale of branded baby wipes and consumer facial tissue in the United States.

Until the ordered divestitures take place, defendants must take all reasonable steps necessary to accomplish the divestitures, and cooperate with any prospective purchaser. If defendants do not accomplish the ordered divestitures within the specified 150 and 180 day time periods, the Final Judgment provides for procedures by which the Court shall appoint a trustee to complete the divestitures. Defendants must cooperate fully with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that Kimberly-Clark will pay all costs and expenses of the trustee. The trustee's compensation will be structured so as to provide an incentive for the trustee to obtain the highest price for the assets to be divested, and to accomplish the divestiture as quickly as possible. After the effective date of his or her appointment, the trustee shall serve under such other conditions as the Court may prescribe. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee shall promptly file with the Court a report setting forth the trustee's efforts to accomplish the divestiture, explaining why the divestiture has not been accomplished, and making recommendations. The trustee's report will be furnished to the parties and shall be filed in the public docket, except to the extent the report contains information the trustee deems confidential. The parties will each have the right to make

additional recommendations to the Court. The Court shall enter such orders as it deems appropriate to carry out the purpose of the trust.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable 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 prima facie effect in any subsequent private lawsuit that may be brought against defendants. The proposed Final Judgment provides that nothing therein contained shall be construed to provide any rights to any third party.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the 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 the Court and published in the Federal Register.

Written comments should be submitted to:

Anthony V. Nanni
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

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.

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 of its Complaint against defendants Kimberly-Clark and Scott. The United States is satisfied, however, that the divestiture of the assets and other relief contained in the proposed Final Judgment will preserve viable competition in the production and sale of facial tissue and baby wipes that would otherwise be adversely affected by the acquisition. Thus, the proposed Final Judgment would achieve the relief the governments would have obtained through litigation, but

avoids the time, expense and uncertainty of a full trial on the merits of the governments' Complaint.

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-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 D.C. Circuit recently held, this statute 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, 1995-1 Trade Cas. (CCH) ¶71,027, at __ (Slip op. 26) (D.C. Cir. June 16, 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."³ 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.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas.

¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, 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) quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 1995-1 Trade Cas. at ___ (Slip. op. 22). Precedent requires that

the 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

³119 Cong. Rec. 24598 (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, 15 U.S.C. § 16(f), those procedures are discretionary. 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. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

undermine the effectiveness of antitrust enforcement by consent decree.⁴

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.' (citations omitted)."⁵

⁴United States v. Bechtel, 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 Microsoft, 1995-1 Trade Cas. at ___ (Slip op. 23) (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.'" (citations omitted).

⁵United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985).

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: December 12, 1995.

Respectfully submitted,

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