UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. LUDOWICI-CELADON COMPANY, JAMES M. WILLIAMS, R. E. STURTEVANT, A.N. SORENSON, HORACE WHITE, J.W. STEPHENS, ARTHUR W. APPLEWHITE and GEORGE J. LAWLER, d/b/a APPLEWHITE & LAWLER COMPANY, GEORGE T. STAFFORD, F.W. HOLCOMB, A.B. BYRNES, A.B. SANDOZ, GEORGE S. MEARS, R.T. COLE, H.F. BEYER, ALFRED LO CASCIO, and B.A. CAMPBELL, Defendants.	)	Civil Action No. 05-C-6134 Judge: Milton I. Shadur Date: March 28, 2006

PLAINTIFF'S RESPONSE TO PUBLIC COMMENTS

The United States hereby responds to the comments received from the public regarding the proposed termination of the Final Decree in this matter.

I. BACKGROUND

The United States tentatively consented to termination of the Final Decree (the "Decree") entered by the United States District Court for the Northern District of Illinois on March 18, 1929 in the above-captioned matter, subject to notice and a period for public comment. The parties to this matter published public notices in the Chicago Tribune, Professional Roofing, and

the Federal Register. The 60-day public comment period ended on January 17, 2006. The United States received 98 comments from the public. Copies of these comments are attached hereto as Attachment 1.

Ninety-five of the comments were on a form prepared by the Committee to Preserve America's Historic Roofing Tile ("Committee"). According to its website, the Committee is "composed of tile recycling and application companies" and "dedicated to both restoring and preserving the authentic Ludowici tile which adorns the majority of the historic clay rooftops in America." The Committee posted on its website a form petition opposing termination of the Decree. The Committee's website allowed people to attach their name to this petition and email it to the Antitrust Division. This website also allowed people to add additional comments to the form petition. Some people provided additional substantive comments, which will be addressed below, while others added information unrelated to this proceeding[1] or did not add any further information to the petition.

[1] For example, the United States received a comment that states, in part, that Ludowici's "employees have made numerous false accusations to local individuals in the industry in an effort to defame the reputations of my husband and the company that he works for." (Comment from Gina L. Treuter dated Dec. 11, 2005.) A provision in the Decree states, in part, that Ludowici is enjoined from, "[p]reventing, or attempting to prevent, the sale of roofing tile manufactured by competitors of [Ludowici-Celadon] by means of false and/or unfair statements relative to the quality, durability and/or workmanship of roofing tile manufactured by such competitors." (Decree, ¶ 3(b).) However, Ms. Treuter's husband works for a company that previously distributed Ludowici roofing tile, not a competitor of Ludowici. Consequently, the statements contained in Ms. Treuter's comment are not the type of conduct the Decree intended to address.

The petition and the comments added made essentially three claims:

(A) The Decree is still necessary because Ludowici Roof Tile, Inc. ("Ludowici"), successor in interest to defendant Ludowici-Celadon Co. ("Ludowici-Celadon"), maintains a dominant position in the clay roofing tile industry;[2] and

(B) Ludowici has violated the Decree by:

(1) enacting a policy relating to the sale of certain clay roofing tile pieces called "trim" pieces; and

(2) terminating one of its distributors because that distributor sells clay roofing tile from manufacturers that compete with Ludowici.

After further investigation and analysis, the United States determined that the actions described in the comments do not violate the Decree and do not warrant revoking the United States' tentative consent to terminate the Decree. Because the United States received no information causing it to reconsider its position, it now consents to such termination and recommends that the Court enter an order terminating the Decree.

II. PLAINTIFF'S RESPONSE TO THE PUBLIC COMMENTS

A. Ludowici's Power in the Market

The Committee's petition stated that, while the clay tile industry has become more competitive and the size of Ludowici's market position has diminished, in specific areas "Ludowici continues to dominate in terms of market-share, sales penetration, and positioning

[2] The Decree defines "roofing tile" as "tile produced from shale or clay and used as a covering for pitched roofs, cornices and other exposed surfaces of buildings and structures."

(e.g.[,] US Midwest and Northeast clay tile rooftops)." This petition also stated that Ludowici uses its dominance to restrict, coerce, and manipulate trade practices.

In addition, one person added that:

> East of the Rockies[,] Ludowici owns approximately 80-90% of the market because they are one of the only ones in the clay tile market that sells in freeze-thaw conditions. Of the 5 or 6 companies that Ludowici list [sic] as competition east of the Rockies[,] only one will compete throughout the contries [sic] and they do not actively pursue jobs east of the Rockies.

(Comment of Dow Staubmueller dated Dec. 15, 2005.)

Similarly, one comment stated that, "Ludowici has the majority of the clay rooftile [sic] market in the areas of the country that have freeze thaw conditions." (Comment of Doug Straubmueller dated Dec. 15, 2005.) Finally, one comment stated that Ludowici "continues to dominate the overall clay tile market of the North, Midwest and East as well as the public, institutional and commercial markets in most states east of the Rocky Mountains." (Comment of Douglas A. Treuter dated Dec. 15, 2005.)

However, there is no indication that Ludowici maintains market dominance in any particular area of the United States. To the contrary, the United States' investigation confirmed that there are a number of companies selling clay roofing tile that offer their products nationwide. Customers across the nation can choose from any of these companies when purchasing clay roofing tile.[3]

---

[3] In the clay roofing tile market, Ludowici's market share is less than five percent, based on sales volume. In addition to clay roofing tile, there are a number of other roofing alternatives available to customers. Because Ludowici's share of the clay roofing tile market is so small, the United States did not consider Ludowici's market share in a potentially broader market.

While Ludowici does account for a higher percentage of the sales of the grade of clay roofing tile used in areas with freezing and thawing conditions, the United States has determined that there are several competitors that manufacture and sell clay roofing tile that can be utilized in a climate that must withstand freezing and thawing conditions. These companies include, but are not limited to: (1) Altusa Roof Tiles; (2) Boston Valley Terra Cotta; (3) Gladding McBean; (4) Maruhachi Ceramics of America; (5) Santa Fe Tile Corporation; and (6) U.S. Tile. All of these companies compete nationwide. In addition to these manufacturers, specialty clay tile importers also supply clay roofing tile from various manufacturers in Europe, South America, Central America, and Asia. Customers that would like to purchase clay roofing tile that can be used in an area with freezing and thawing conditions benefit from competition and are not limited to only Ludowici clay roofing tile.

Finally, a few comments also suggested that Ludowici controls the market for used clay roofing tile because the majority of existing clay tile roofs have Ludowici tile on them. (See, e.g., comment from Michael Lukis dated Dec. 17, 2005, comment from David J. Karel dated Dec. 22, 2005, and comment from Lee Russ McGee dated Jan. 11, 2006.) However, Ludowici does not compete in the market for used clay roofing tile. Thus, even assuming that a market existed for used clay roofing tile, Ludowici is not a participant in that market.

Accordingly, while the United States has carefully considered the statements made in the public comments, it has determined that Ludowici does not have a dominant position that would enable it to restrict trade or competition. For the reasons articulated in the United States Response to Motion of Defendant Ludowici Roof Tile, Inc. to Terminate Final Decree, which was filed in this matter on November 5, 2005, the United States remains convinced that

termination of the Decree is in the public interest.

(B) Whether Ludowici Violated the Decree

(1) The Ludowici Roof Tile Trim Piece Sales Policy

The Committee's petition and some of the additional comments stated that a Ludowici policy relating to certain "trim" pieces violated the Decree. The petition and comments stated that clay roofing tile has a service life of over one-hundred years and that every tile rooftop includes essential "trim" pieces, which are high-wear pieces such as corners, edges, and special coverings. They also stated that trim pieces constitute a fraction of the overall cost and worth of a rooftop and that trim pieces tend to require earlier repair and replacement. Therefore, the petition and comments alleged that a market exists for clay tile salvage and restoration (used tile).

The petition and comments also alleged that Ludowici currently refuses to sell trim pieces without an order for "field tile" (large areas of new tile) and that this practice prevents the efficient reuse of high-quality clay roofing tile and undermines the business model of a sector of the restoration industry. The petition and comments finally alleged that Ludowici's policy violates the Decree, although the petition does not allege a violation of any specific provision.

The Ludowici Roof Tile Trim Piece Sales Policy ("Policy"), was instituted by Ludowici in April 2005.[4] Ludowici has stated that its Policy is:

---

[4] Although Ludowici states that the Policy was implemented in April 2005, it was not originally reduced to writing. Upon request of the United States in connection with this investigation, on February 3, 2006, Ludowici provided a memorialization of the Policy. That memorialization is quoted and referenced in this Response.

> only to sell roofing tile trim pieces as part of the sale of an entire new roof composed of Ludowici roofing tiles or as part of a repair job for an existing roof composed of Ludowici roof tiles.

(Ludowici Roof Tile Trim Piece Sales Policy.) According to Ludowici, the Policy applies to all Ludowici sales. (Id.)

Ludowici has also stated that:

> Ludowici has adopted this policy because producing individualized trim pieces slows Ludowici's production and prevents Ludowici from supplying complete shipments (field tiles with accompanying trim pieces) to its customers on a timely basis, putting Ludowici at a competitive disadvantage.

(Id.) Ludowici stated that it enacted the Policy because in the past used roofing tile sellers bought new Ludowici trim pieces and sold them with used Ludowici tile, but represented that the entire roof was covered by Ludowici's 75-year warranty. (Id.) Finally, Ludowici has stated that the Policy is necessary because certain used tile sellers were:

> free riding off of Ludowici's investments in trim production, marketing and sales, by buying Ludowici trim pieces to sell along their salvaged field tiles (which cost pennies on the dollar) and, because they do not have to cover manufacturing costs or marketing costs, undercutting Ludowici's prices in the marketplace.

(Id.)

The United States has determined that, for the reasons stated below, the Policy, in and of itself, does not violate the Decree. The provision of the Decree most relevant to the conduct discussed in the public comments relating to Ludowici's Policy is paragraph 3(g). Paragraph 3(g) enjoins Ludowici from "[a]dopting a policy . . . of selling, or offering for sale, roofing tile manufactured and/or sold by [Ludowici-Celadon] at unfair or discriminatory prices, terms and/or

conditions of sale with the intent to exclude competitors of [Ludowici-Celadon] from carrying on the manufacture and/or sale of roofing tile in competition with [Ludowici-Celadon]." (Decree, ¶ 3(g)). Therefore, to establish a violation of paragraph 3(g), the United States must show that the Policy: (1) constitutes an unfair or discriminatory condition of sale; and (2) was adopted with the intent to exclude competitors. The United States does not believe that the Policy violates paragraph 3(g) for two reasons.

First, the Policy is not unfair or discriminatory. The Policy is not discriminatory because Ludowici states that the Policy applies uniformly to every purchaser of clay roofing tile from Ludowici and treats every purchaser in the same manner, whether it sells used tile or new Ludowici tile. In addition, the Policy is not unfair because it does not prevent the used tile sellers from continuing to sell used Ludowici tile. Furthermore, there are other manufacturers that could make trim pieces to match the used Ludowici tile. Although none is currently selling such trim pieces, at least one manufacturer is currently working on doing so. Finally, Ludowici has stated that is has legitimate business justifications for the Policy and that selling trim pieces without field tile prevents Ludowici from effectively competing with other new tile manufacturers.

Second, even if the Policy is unfair or discriminatory, there is no indication that the Policy was designed with the intent of excluding competitors from carrying on the sale of roofing tile in competition with Ludowici. As discussed above, Ludowici has seemingly valid business justifications for its Policy. In addition, intent is often inferred from conduct and Ludowici's Policy does not seem to be designed simply to drive used tile sellers out of business. The actual effect of Ludowici's Policy could be to reduce Ludowici's sales in the long run.

There is significant competition in the roofing tile industry. Ludowici's share of the clay roofing tile market is less than 5 percent, based on sales volume. Several other companies manufacture and sell new tile that competes with Ludowici tile. If Ludowici trim pieces will not be available to someone who may want to purchase used Ludowici tile in the future, customers may simply decide to buy from another manufacturer when purchasing a new roof. Moreover, other companies have the ability to manufacture trim pieces that can be used with Ludowici used tile. Thus, Ludowici's potential customers could simply turn to Ludowici's competitors. It would be irrational for Ludowici to enact its Policy, unless Ludowici actually had a legitimate business reason to do so.

(2) Refusing to Sell to Those Selling Competing Products

Three commenters, who all work for The Roof Tile and Slate Company ("RTSC"), stated that Ludowici recently told RTSC that Ludowici was no longer going to permit RTSC to sell Ludowici tile because RTSC sells used Ludowici tile and other products that compete with Ludowici products. (Comment from Jana Kay dated Dec. 12, 2005, comment from Doug Straubmueller dated Dec. 15, 2005, and comment from Douglas A. Treuter dated Dec. 15, 2005.) Such conduct arguably could violate paragraph 3(c) of the Decree, which prohibits Ludowici from requiring persons engaged in buying, selling, or installing roofing tile to exclusively purchase, use, or install Ludowici roofing tile as a condition of the sale, use, or installation of Ludowici roofing tile. (Decree, ¶ 3(c).)

The United States investigated the claims made by the employees of RTSC and determined that while Ludowici did terminate RTSC as a distributor of Ludowici roofing tile, there was a business dispute between Ludowici and RTSC that led to the termination. Moreover,

Ludowici continues to distribute roofing tile through many other companies that carry competing products, and the United States has learned of no other distributor that has been terminated by Ludowici because that distributor sells roofing tile that competes with Ludowici products. Accordingly, the United States has concluded that the termination of RTSC as a distributor of new Ludowici roofing tile does not constitute a violation of the Decree.

While the United States has carefully considered Ludowici's Policy and the statements of the RTSC employees, the United States does not believe that Ludowici has violated the Decree. Accordingly, for the reasons articulated in the United States Response to Motion of Defendant Ludowici Roof Tile, Inc. to Terminate Final Decree, the United States remains convinced that termination of the Decree is in the public interest.

III. LEGAL STANDARD GOVERNING THE COURT'S PUBLIC INTEREST DETERMINATION

The Court has jurisdiction to terminate the Decree pursuant to Paragraph 7 of the Decree, Rule 60(b)(5) of the Federal Rules of Civil Procedure, and "principles inherent in the jurisdiction of the chancery." United States v. Swift & Co., 286 U.S. 106, 114 (1932); see also In re Grand Jury Proceedings, 827 F.2d 868, 873 (2d Cir. 1987). Where, as here, the United States has tentatively consented to a proposed termination of a decree, the issue before the Court is whether termination is in the public interest. E.g., United States v. W. Elec. Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993); United States v. W. Elec. Co., 900 F.2d 283, 305 (D.C. Cir. 1990) ("W. Elec. I"); United States v. Loew's, Inc., 783 F. Supp. 211, 213 (S.D.N.Y. 1992); United States v. Columbia Artists Mgmt., Inc., 662 F. Supp. 865, 869-70 (S.D.N.Y. 1987) (citing United States v. Swift & Co., 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,702-03, 65,706 (N.D. Ill. 1975)); cf.

United States v. Am. Cyanamid Co., 556 F. Supp. 361, 367 (S.D.N.Y.), rev'd on other grounds, 719 F.2d 558 (2d Cir. 1983).

A district court applies the same public interest standard in terminating a consent decree as it does in reviewing the entry of an initial consent decree in a government antitrust case. See 15 U.S.C. § 16(e); W. Elec. I, 900 F.2d at 295; United States v. AT&T, 552 F. Supp. 131, 147 n.67 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 406 U.S. 1001 (1983); United States v. Radio Corp. of Am., 46 F. Supp. 654, 656 (D. Del. 1942). It has long been recognized that the United States has broad discretion in settling antitrust litigation on terms that will best serve the public interest in competition. E.g., Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961). In determining whether the initial entry of a consent decree is in the public interest, absent a showing of abuse of discretion by the United States, the Court is not to substitute its own opinion, but to assess whether the United States' explanation is well reasoned. United States v. Microsoft Corp., 56 F.3d 1448, 1461-62 (D.C. Cir. 1995); United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981) (citing United States v. NBC, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978)); United States v. Med. Mut. of Ohio, 1999-1 Trade Cas. (CCH) ¶ 72,465 at 84,271 (N.D. Ohio 1999); United States v. Mid-Am. Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508 at 71,980 (W.D. Mo. 1977). The Court should conduct a limited review to "insur[e] that the government has not breached its duty to the public in consenting to the decree" through malfeasance or by acting irrationally. Bechtel, 648 F.2d at 666; see also Microsoft, 56 F.3d at 1461 (examining whether "the remedies [obtained in the decree] were not so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

Thus, where the United States has offered a reasonable explanation of why the

termination of a consent decree vindicates the public interest in preserving free and unfettered competition and there is no showing of abuse of discretion or corruption affecting the United States' recommendation, the Court should accept the United States' conclusion concerning the appropriateness of termination.

IV. CONCLUSION

After careful consideration of the comments from the public, the United States concludes that termination of the Decree is in the public interest. The United States will move the Court, jointly with defendant Ludowici, for an order terminating the Final Decree.

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

_____/s/_____

Christine A. Hill
N.D. Ill. Bar No. 6257442
U.S. Department of Justice
Antitrust Division
Litigation II Section
1401 H Street, N.W.
Washington, D.C. 20530
christine.hill@usdoj.gov
(202) 305-2738

Dated: March 27, 2006