IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	Civil Action No. 80-2495
Plaintiff,	)	Judge Johnson
	)	
v.	)	
	)	
THE FLINTKOTE COMPANY, et al.,	)	Filed: February 27, 1981
	)	
Defendants.	)	

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States 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

On September 30, 1980, the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25, challenging the acquisition of the Home-Crete Division of G. & W. H. Corson, Incorporated ("Corson") by The Flintkote Company ("Flintkote") as a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The complaint alleged that the acquisition eliminated actual and potential competition between Flintkote and Corson in the production and sale of dry-mixed concrete products; that competition generally in the production and sale of those products may be substantially lessened; and that concentration in the production and sale of those products may be substantially increased. The complaint alleged that the acquisition would have these effects in two geographic markets: the Washington/Baltimore market, consisting of the cities of Washington, D. C., Baltimore, their surrounding metropolitan areas and various intermediate points; and the Philadelphia/New York market, consisting of the cities of

Philadelphia, New York City, their surrounding metropolitan areas and various intermediate points. The complaint sought divestiture of the two plants acquired by Flintkote from Corson located in Milford, Virginia (near Fredericksburg) and Gibbsboro, New Jersey (near Camden), or in the alternative, sought recision of the transaction. In addition, the complaint sought a ban on further acquisitions by Flintkote of dry-mixed concrete products manufacturers in the northeastern United States.

The United States and Flintkote have stipulated that the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act. Entry of the proposed Final Judgment will terminate this action, except that the court will retain jurisdiction to construe, modify or enforce the proposed Final Judgment. The stipulation between Flintkote and plaintiff will no longer be in effect upon entry of the proposed Final Judgment. A separate stipulation between the United States and defendants Corson and IU International Corp. will result in the dismissal of this action against those defendants if the court enters the proposed Final Judgment.

II.

DESCRIPTION OF PRACTICES INVOLVED IN THE ALLEGED VIOLATION

On April 11, 1980, Flintkote acquired Corson's Home-Crete Division for total consideration in excess of $1.9 million. Before that date, Flintkote and Corson competed in the manufacture and sale of dry-mixed concrete products. These products are packaged and dried combinations of cement and sand, or cement, sand and stone. They are used for a number of purposes, including cementing bricks, repairing concrete structures, and building small concrete structures.

Before April 11, 1980, Flintkote was the largest and Corson was the second largest manufacturer of dry-mixed concrete products in the northeastern United States. Flintkote owned two plants that competed with Corson's plants, and they were located in Kenvil, New Jersey (west of New York City) and White Marsh,

Maryland (near Baltimore). Flintkote's total 1979 sales of dry-mixed concrete products were approximately $15.5 million, and Corson's 1979 sales of these products were approximately $2.1 million. Flintkote's 1979 market share in the Washington/Baltimore market was approximately 67 percent, and Corson's share was approximately 26 percent. In the Philadelphia/New York market, Flintkote's 1979 share was approximately 63 percent and Corson's share was approximately 9 percent.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, entry of the proposed Final Judgment is conditioned upon a determination by the court that it is in the public interest.

A. Divestiture

The proposed Final Judgment requires Flintkote to divest itself, by its own efforts, of its entire interest in the Gibbsboro plant within six months from the date of entry of the Final Judgment. If Flintkote cannot accomplish this divestiture within six months, it may petition the court for up to another six months; plaintiff, however, may oppose the petition and seek the appointment of a trustee to sell the plant. Divestiture must be made to a person approved by the plaintiff, or failing such approval, by the court. Any divestiture must be accomplished in a way that does not impair the ability of the purchaser of the Gibbsboro plant to operate as a going concern in the manufacture and sale of dry-mixed concrete products.

If Flintkote does not divest the Gibbsboro plant within one year, or if the court grants plaintiff's petition for appointment of a trustee, a trustee will be appointed to sell the plant. Should this event occur, the trustee shall have full power to dispose of the plant in accordance with the provisions of the Final Judgment subject to the court's approval. Flintkote will pay the expenses of the trustee and will assist it in bringing about a sale.

In order to advertise the availability of the plant, Flintkote must, among other things, place advertisements in publications that are likely to reach potential purchasers, as well as notify certain manufacturers of dry-mixed concrete products who may have an interest in purchasing the plant. Flintkote must also report periodically to plaintiff regarding the status of its efforts to sell the Gibbsboro plant. When a purchaser is found, the details of the proposed sale must be reported to the plaintiff. In addition, plaintiff will have time to investigate the proposed transaction and to seek additional information from Flintkote. Should plaintiff object to a sale, it cannot be consummated until plaintiff withdraws its objection or the court approves the sale.

Flintkote has also agreed to use its best efforts to negotiate a contract to purchase up to 400,000 units annually of dry-mixed concrete products at a reasonable market price from the purchaser of the Gibbsboro plant. The purchaser is not required to enter into such a contract as a condition of sale of the plant, and is free to accept or reject this offer.

The Final Judgment also contains provisions which are designed to ensure that divestiture will be effective. Flintkote must, for example, continue to use the trademarks acquired by it from Corson, and must also maintain the personnel, assets and working capital of the Gibbsboro plant at a level commensurate with its normal and seasonal business activity.

In addition, the Final Judgment provides that after the divestiture is consummated, no officer, director, agent, or employee of Flintkote shall be at the same time an officer, director, or employee of the purchaser of the Gibbsboro plant. This provision is designed to ensure that the divested plant operates independently of Flintkote's control.

B. Dedicated Product

In each year from 1982 through and including 1990, Flintkote is required to make available 200,000 units of dry-mixed concrete products, bagged sand and bagged blacktop for delivery from either of the two Flintkote plants that serve the Washington/Baltimore market, namely, the White Marsh, Maryland plant and the Milford, Virginia plant. In 1981, Flintkote must make available 175,000 units of these products. The proposed Final Judgment refers to this output which Flintkote shall make available as "dedicated product," and the class of persons who are entitled to purchase the dedicated product are defined as "independent buyers." Those persons are actual or potential competitors of Flintkote, and they must either own a dry-mixed concrete products manufacturing facility in Virginia, Maryland, Delaware, West Virginia, Pennsylvania, New York, New Jersey, Connecticut, Rhode Island, Massachusetts or in the District of Columbia, or must have expressed a good faith intention to begin manufacturing such products in one of those areas. An independent buyer cannot be a company which is owned by Flintkote, either directly or indirectly. The purpose of this provision is to strengthen Flintkote's present competitors, or to induce persons who are not competitors of Flintkote in the Washington/Baltimore or Philadelphia/New York markets to become competitors.

Flintkote must make available 27,000 units per month from the White Marsh plant and 23,000 units per month from the Milford plant. The dry-mixed concrete business is a seasonal one, and most of the sales of these products occur during the spring and summer months. Thus, this provision ensures that all of the dedicated product will be made available to Flintkote's actual or potential competitors during those months if the independent buyers so desire.

In addition, a portion of the units of dedicated product will consist of vinyl concrete. Products such as vinyl concrete, which many manufacturers of dry-mixed concrete products do not produce, are important in strengthening a manufacturer's product line.

The proposed Final Judgment also contains a number of provisions to ensure that Flintkote cannot manipulate the price of dedicated product to discourage purchases. For example, Flintkote is prevented from sharing in the profit realized by an independent buyer from the resale of dedicated product. Other provisions require that the price of certain bag sizes of dedicated product be no greater than the most favorable price at which Flintkote has agreed to sell the product to a similarly situated customer within the three months preceding the delivery of dedicated product.

Flintkote must take certain steps to notify potential independent buyers that dedicated product is available for purchase. The proposed Final Judgment sets up an offering period of three months immediately preceding each calendar year in which dedicated product is to be made available (or, for 1981, the months of April and May). If Flintkote has not already executed supply contracts with one or more independent buyers for the entire amount of the dedicated product for the calendar year, Flintkote must place advertisements and offer to sell dedicated product to independent buyers. An independent buyer who wishes to purchase dedicated product must either accept Flintkote's offer or submit its own offer to Flintkote by the end of the month following the offering period.

In addition, the proposed Final Judgment contains provisions relating to the bag sizes of dedicated product, bag labels, and other matters. These provisions are designed to ensure that orders by independent buyers are filled in a way that is consistent with Flintkote's normal business operations, and that the dedicated product conforms to requirements such as labeling laws.

C. Miscellaneous Provisions

The Final Judgment enjoins any further acquistions by Flintkote, without plaintiff's consent, of dry-mixed concrete products manufacturing facilities located in any of the following areas: Virginia, Maryland, the District of Columbia, Pennsylvania, New Jersey, Delaware, New York, Connecticut, Rhode Island or Massachusetts. In addition, should Flintkote dispose of substantially all of its dry-mixed concrete products business, the acquiring party must agree to be bound by the provisions of this Final Judgment. Should Flintkote dispose of its White Marsh and Milford plants to the same person, that person must agree to be bound by the provisions of the Final Judgment relating to dedicated product.

The Final Judgment also contains provisions which enable the United States to secure and determine compliance. Plaintiff may, subject to certain conditions, interview Flintkote employees and gain access to Flintkote's records. Flintkote must also report to the plaintiff periodically regarding its efforts to sell the Gibbsboro plant and to make dedicated product available to independent buyers. Finally, the Final Judgment will be in effect until December 31, 1990, unless a shorter period is specified.

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 actions. 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 the defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment may be entered by the court after compliance with the provisions of the Antitrust Procedures and Penalties Act, provided that the United States has not withdrawn its consent. The Act conditions entry upon the court's determination that the proposed Final Judgment is in the public interest.

The Act provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the government written comments regarding the proposed Final Judgment. The United States will evaluate and respond to any comments. 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, Trial Section, U. S. Department of Justice, Antitrust Division, Room 3266, 10th Street & Constitution Avenue, N. W., Washington, D. C. 20530. The proposed Final Judgment provides that the court will retain jurisdiction over this action, and that the parties may apply to the court for such orders as may be necessary or appropriate for its modification or enforcement.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered one alternative to the proposed Final Judgment: divestiture of both the Milford, Virginia and Gibbsboro, New Jersey plants sold to Flintkote by Corson. However, this alternative was rejected for three principal reasons. First, it is not clear whether the Milford plant could have been divested to a third person. Second, certain provisions of the Final Judgment may have a more favorable effect on competition than the complete divestiture which could have been obtained in a litigated judgment.

Third, complete divestiture or recision would have required plaintiff to proceed to trial on the merits, which in view of the size of this transaction, would have resulted in a significant expenditure of resources and judicial time.

The Milford plant accounted for only one-third of the total output of Corson's Home-Crete Division which Flintkote acquired. The plant has several other characteristics, which appear to be widely known throughout the industry, that might make it difficult to sell. In addition to its relatively low output, the plant was heavily dependent on one customer. The plant also appears to have been poorly designed. Because of these features, which would have discouraged potential purchasers, divestiture of the Milford plant alone or both plants as a package may have been difficult.

In addition, the proposed Final Judgment has certain features to which Flintkote has agreed in lieu of divestiture of the second plant. Some of these features may not have been obtainable in a litigated judgment. As an illustration, the time period for divestiture is extremely short. Since divestiture is generally more effective when it is accomplished quickly, this provision should significantly enhance the likelihood that competition will be restored effectively and quickly. Flintkote's agreement to negotiate in good faith to purchase a portion of the output of the divested plant further ensures the likelihood of a successful divestiture. The provisions relating to dedicated product will also assist new competitors to Flintkote, (such as the purchaser of the Gibbsboro plant) or strengthen existing competitors. In addition, the ban on acquisitions by Flintkote is broader than the marketing areas that were the subject matter of this complaint. Plaintiff estimates that most of Flintkote's production of dry-mixed concrete products is sold in the areas covered by the acquisition ban.

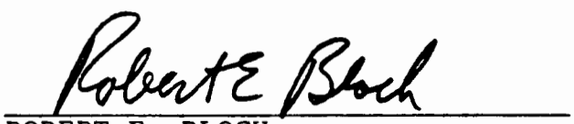
The proposed Final Judgment will dispose of the United States' claim for injunctive relief against Flintkote. The only alternative available to the Department of Justice is a trial of this case on the merits. Such a trial would require a substantial expenditure of public funds and judicial time. While the relief that plaintiff would expect to obtain after winning a trial on the merits would be different in some respects from that in the proposed Final Judgment, the pro-competitive effects of this Final Judgment are substantially similar, if not greater, than those which could be obtained after trial. Thus, the United States believes that entry of the proposed Final Judgment is in the public interest.

VII.

DETERMINATIVE DOCUMENTS

Pursuant to 15 U.S.C. § 16(b), there are no determinative documents. Consequently none are filed with this competitive impact statement.

Respectfully submitted,



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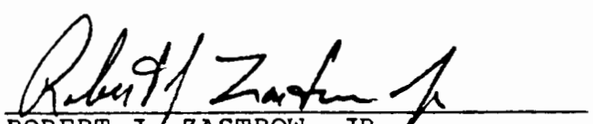

ROBERT J. ZASTROW, JR.

DIANE R. KILBOURNE

Attorneys
U.S. Department of Justice
Antitrust Division
Room 3236
10th & Pennsylvania Avenue, N.W.
Washington, D. C. 20530
(202) 633-2475