

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Domtar Inc., Domtar Industries, Inc., Domtar Gypsum America, Inc., The Flintkote Co., Inc., and Genstar Gypsum Products Co., U.S. District Court, N.D. California, 1987-1 Trade Cases ¶67,639, (May 13, 1987)

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United States v. Domtar Inc., Domtar Industries, Inc., Domtar Gypsum America, Inc., The Flintkote Co., Inc., and Genstar Gypsum Products Co.

1987-1 Trade Cases ¶67,639. U.S. District Court, N.D. California, Civil Action No. C-87-0689 RFP, Filed May 13, 1987, (Competitive impact statement and other matters filed with settlement: 52 *Federal Register* 7226), Case No. 3393, Antitrust Division, Department of Justice.

Clayton Act

Acquisitions: Gypsum Board: Divestiture of Manufacturing Facilities: Consent Decree.— A Canadian company was required by a consent decree to divest gypsum board manufacturing facilities in the Pacific Southwest United States to settle charges that its acquisition of a competitor violated [Sec. 7 of the Clayton Act](#).

For plaintiff: Charles F. Rule, Actg. Asst. Atty. Gen., Roger B. Andewelt, Judy Whalley, Anthony V. Nanni, Robert E. Bloch, John Schmoll, Peter H. Goldberg and Joseph Allen, Attys., Antitrust Div., U.S. Dept. of Justice, Washington, D.C. **For defendants:** Covington & Burling, of McCutchen, Doyle, Brown & Enersen, Washington, D.C., for Domtar Inc., Domtar Industries, Inc., and Domtar Gypsum America, Inc.; Shearman & Sterling and Sullivan & Cromwell, New York, N.Y., for the Flintkote Co., Inc., and Genstar Gypsum Products Co.

Final Judgment

Peckham, Ch. J.: Whereas, plaintiff, United States of America, having filed its Complaint herein on February 25, 1987 and plaintiff and defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue;

And Whereas, the defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

And Whereas, prompt and certain divestiture is the essence of this agreement and the defendants have represented to the plaintiff that the divestiture required below can and will be made and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I. [*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of each of the parties hereto. The Complaint states a claim upon which relief may be granted against defendants under [Section 7 of the Clayton Act](#), as amended ([15 U.S.C. §18](#)).

II. [*Definitions*]

As used in this Final Judgment:

A. "Defendants" means Domtar Inc.; Domtar Industries, Inc.; Domtar Gypsum America, Inc.; The Flintkote Company, Inc.; and Genstar Gypsum Products Company, each division, subsidiary or affiliate of any of them, and each officer, director, employee, attorney, agent or other person acting for or on behalf of any of them.

B. "Domtar" means Domtar Inc.; Domtar Industries, Inc.; Domtar Gypsum America, Inc.; and Genstar Gypsum Products Company, each division, subsidiary or affiliate of any of them, and each officer, director, employee, attorney, agent or other person acting for or on behalf of any of them.

C. "Gypsum board" means material that consists primarily of a solid, flat core of processed gypsum between two sheets of paper surfacing, and which is used principally for constructing interior walls and ceilings of commercial and residential buildings.

D. "Pacific Southwest Operations" means the gypsum board plant and gypsum quarry, real property, capital equipment, and any other interests, assets or improvements owned by Genstar Gypsum Products Company, located in or near Las Vegas, Nevada; that company's sales and marketing organization in California, Arizona and Nevada; and that company's warehouse and sales office in Vernon, California. The assets of the Pacific Southwest Operations, as they currently exist, are generally described in Schedule A of the Stipulated Hold Separate Order which is attached hereto as Attachment I and incorporated by reference in Section IX of this Final Judgment.

E. "Person" means any natural person, corporation, association, firm, partnership or other business or legal entity.

III. [*Applicability*]

A. The provisions of this Final Judgment shall apply to the defendants, their successors and assigns and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Nothing herein contained shall suggest that any portion of this Final Judgment is or has been created for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

IV. [*Divestiture*]

A. Domtar is hereby ordered and directed to divest all of its direct and indirect ownership in and control over the Pacific Southwest Operations within six (6) months of the date of filing of this Final Judgment, but in no event later than September 1, 1987.

B. Unless plaintiff otherwise consents, divestiture of the Pacific Southwest Operations shall be accomplished in such a way as to satisfy plaintiff that, as of the time of divestiture, the Pacific Southwest Operations can and will be operated by the purchaser or purchasers as a viable, on-going business engaged in the manufacture and sale of gypsum board. Divestiture shall be made to a purchaser or purchasers for whom it shall be demonstrated to the plaintiff that (i) the purchase is for the purpose of competing effectively in the manufacture and sale of gypsum board, and (ii) the purchaser or purchasers have the managerial, operational and financial capability to compete effectively in the manufacture and sale of gypsum board. Nothing in this Final Judgment shall preclude plaintiff from approving a divestiture by means of a "spin-off," "leveraged buy-out," or public offering.

C. In accomplishing the divestiture ordered by this Final Judgment, Domtar promptly shall make known in the United States, by usual and customary means, the availability of the Pacific Southwest Operations for sale as an on-going business. Domtar shall notify any person making an inquiry regarding the possible purchase of the Pacific Southwest Operations that the sale is being made pursuant to this Final Judgment and provide such person with a copy of this Final Judgment. Domtar shall also furnish to all bona fide prospective purchasers who so request, subject to customary confidentiality assurances, all pertinent information regarding the Pacific Southwest Operations. Domtar shall provide such information to the plaintiff at the same time that it furnishes such information to any other person. Domtar shall permit such prospective purchasers to make such inspection

of the facility and of all financial, operational, or other documents and information as may be relevant to the sale of the facility.

D. Domtar agrees to take all reasonable steps to accomplish quickly said divestiture.

V. [Trustee]

A. If Domtar has not accomplished the divestiture required by Section IV of this Final Judgment by September 1, 1987, the Court shall, upon application of plaintiff, appoint a trustee to effect the divestiture. Such appointment shall become effective on September 1, 1987 or as soon thereafter as the Court appoints the trustee. After the trustee's appointment becomes effective, only the trustee, and not Domtar, shall have the right to sell the Pacific Southwest Operations. The trustee shall be a business broker or a member of the investment banking community with experience and expertise in acquisitions and divestitures. The trustee shall have the power and authority to accomplish the divestiture at such price and on such terms as are then obtainable upon a reasonable effort by the trustee, to a purchaser acceptable to the plaintiff, subject to the provisions of Section VI of this Final Judgment. The trustee shall have such other powers as the Court deems appropriate. Defendants shall use all reasonable efforts to assist the trustee in accomplishing the required divestiture. Defendants shall not object to a sale by the trustee on any grounds other than malfeasance. Any such objection by the defendants must be conveyed in writing to the plaintiff and the trustee within fifteen (15) days after the trustee has notified the defendants of the proposed sale.

B. If Domtar has not divested all of its ownership interest in the Pacific Southwest Operations by July 1, 1987, Domtar shall notify plaintiff of that fact. If Domtar still has not divested all of its ownership interest in the Pacific Southwest Operations within ten (10) days thereafter, the plaintiff shall provide Domtar with written notice of the names and qualifications of not more than two (2) nominees for the position of trustee for the required divestiture. Domtar will notify plaintiff within ten (10) days thereafter whether either or both of such nominees are acceptable. If either or both of such nominees are acceptable to Domtar, plaintiff shall notify the Court of the person or persons upon whom the parties have agreed and the Court shall appoint one of the nominees as the trustee. If neither of such nominees is acceptable to Domtar, it shall furnish to the plaintiff, within ten (10) days after the plaintiff provides the names of its nominees, written notice of the names and qualifications of not more than two (2) nominees for the position of trustee for the required divestiture. Plaintiff shall furnish the Court the names and qualifications of its proposed nominees and the names and qualifications of the nominees proposed by Domtar. The Court may hear the parties as to the qualifications of the nominees and shall appoint one of the nominees as the trustee.

C. The trustee shall serve at the cost and expense of Domtar, on such terms and conditions as the Court may prescribe, and shall account for all monies derived from a sale of the Pacific Southwest Operations and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees and expenses for its services, all remaining monies shall be paid to Domtar, and the trust shall be terminated. The compensation of such trustee shall be based on a fee arrangement providing the trustee with an incentive to accomplish the required divestiture quickly at the best price and terms reasonably obtainable.

D. The trustee shall have full and complete access to the personnel, books, records and facilities of the defendants relevant to the business or assets to be divested, and the defendants shall develop such financial or other information relevant to the business or assets to be divested as the trustee may request. Defendants shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

E. After its appointment, the trustee shall file monthly reports with the plaintiff and Domtar setting forth the trustee's efforts to accomplish divestiture as contemplated under this Final Judgment. The reports shall include, but not be limited to, the name, address and telephone number of each person who was contacted, or who offered or expressed an interest or desire to acquire any ownership interest in the Pacific Southwest Operations, together with full details of such contact or interest. If the trustee has not accomplished such divestiture within six (6) months after the trustee's appointment, the trustee shall thereupon promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's

judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. The trustee shall at the same time furnish such report to the plaintiff and Domtar, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall thereafter enter such orders as it shall deem appropriate in order to carry out the purpose of the trust, which shall, if necessary, include extending the term of the trust and the term of the trustee's appointment.

VI. [Notice]

At least thirty (30) days prior to the scheduled closing date of any proposed divestiture pursuant to Section IV or V of this Final Judgment, Domtar or the trustee, whichever is then responsible for effecting the divestiture required by this Final Judgment, shall notify the plaintiff of the proposed divestiture. If a trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed transaction and for each person not previously identified who offered or expressed an interest or desire to acquire any ownership interest in the Pacific Southwest Operations, the name, address, and telephone number of that person together with full details of that person's interest or desire to acquire such ownership interest. Within fifteen (15) days after receipt of notice of the proposed divestiture, the plaintiff may request from the defendants and the proposed purchaser additional information concerning the proposed divestiture. Defendants and the proposed purchaser shall furnish the additional information requested from them within fifteen (15) days of the receipt of the request, unless plaintiff shall agree to extend the time. Until plaintiff certifies in writing that it is satisfied that defendants and the proposed purchaser have provided the additional information requested from them, the divestiture shall not be consummated. Within thirty (30) days after receipt of the notice or within fifteen (15) days after receipt of the additional information from defendants and the proposed purchaser, whichever is later, unless defendants shall agree to extend the time, plaintiff shall notify defendants and the trustee, if there is one, in writing, if it objects to the proposed divestiture. If plaintiff fails to object within the period specified, or if plaintiff notifies defendants and the trustee, if there is one, in writing, that it does not object, the divestiture may be consummated, subject only to defendants' right to object to the sale under Section V.A. Upon objection by the plaintiff, a divestiture proposed under Section IV shall not be consummated. Upon objection by the plaintiff, a divestiture proposed under Section V shall not be consummated unless approved by the Court. Upon objection by defendants under Section V.A., the proposed divestiture shall not be consummated unless approved by the Court.

VII. [Financing]

Domtar shall not finance all or any part of the purchase of the Pacific Southwest Operations pursuant to the divestiture required by Section IV or V of this Final Judgment without plaintiff's permission.

VIII. [Compliance Report]

Thirty (30) days from the date of filing of the Complaint in this civil action and every thirty (30) days thereafter until the divestiture required by Section IV or V has been completed, Domtar shall submit in writing to the plaintiff a verified written report setting forth in detail the fact and manner of compliance with Section IV or V, as the case may be, of this Final Judgment. Each such report of compliance with Section IV shall include, for each person who, during the preceding thirty (30) days, made an offer to acquire, expressed an interest or desire to acquire, entered into negotiations to acquire, or made an inquiry about acquiring any ownership interest in the Pacific Southwest Operations, the name, address, and telephone number of that person and a detailed description of each contact with that person during that period. Domtar shall maintain full records of all efforts made to divest the Pacific Southwest Operations.

IX. [Hold-Separate Order]

The terms of the Stipulated Hold Separate Order entered into by the plaintiff and the defendants, filed with the Court, and attached hereto as Attachment I [*Not reproduced.*—CCH], are incorporated herein by reference.

X. [Inspections]

For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal offices, be permitted:

(1) Access during office hours of that defendant to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of that defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of that defendant and without restraint or interference from them, to interview officers, employees and agents of that defendant, who may have counsel present, regarding any such matters.

B. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, made to any defendant's principal office, that defendant shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section X shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by a defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) days notice shall be given by plaintiff to such defendant prior to divulging such material in any legal proceedings (other than a grand jury proceeding).

XI. [Retention of Jurisdiction]

Jurisdiction is retained by this Court for the purpose of enabling plaintiff and the defendants to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, implementation, or modification of any of the provisions of this Final Judgment, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

XII. [Term]

This Final Judgment will expire on the third anniversary of the completion of the divestiture required herein.

XIII. [Public Interest]

Entry of this Final Judgment is in the public interest.