This document is scheduled to be published in the
Federal Register on 02/22/2012 and available online at
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DEPARTMENT OF JUSTICE

Antitrust Division

UNITED STATES v. INTERNATIONAL PAPER COMPANY et al.

Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)–(h), that a proposed Final Judgment, Asset Preservation Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in United States v. International Paper Company et al., Civil Action No. 1:12-cv-00227. On February 10, 2012, the United States filed a Complaint alleging that the proposed acquisition by International Paper Company of Temple-Inland Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. §18. The proposed Final Judgment, filed at the same time as the Complaint, requires the divestiture of Temple-Inland's containerboard mills in Waverly, Tenn., and Ontario, Calif., and either International Paper's containerboard mill in Oxnard, Calif., or International Paper's containerboard mill in Henderson, Ky., but not both of those mills.

A Competitive Impact Statement filed by the United States describes the Complaint, the proposed Final Judgment, the industry, and the remedies available to private litigants who may have been injured by the alleged violation.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW, Suite 1010, Washington, DC 20530 (telephone: 202-514-2481), on the Department of Justice's website at http://www.usdoj.gov/atr, and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the *Federal Register* and filed with the Court. Comments should be directed to Joshua H. Soven, Chief, Litigation I Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW, Suite 4100, Washington, D.C. 20530, (telephone: 202-307-0827).

__________/s/__________________
Patricia A. Brink
Director of Civil Enforcement

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

U.S. Department of Justice

Antitrust Division, Litigation I Section

450 Fifth Street, NW, Suite 4100

Washington, DC 20530,

Plaintiff,

v.

INTERNATIONAL PAPER COMPANY

6400 Poplar Avenue,

Memphis, TN 38197, and

TEMPLE-INLAND INC.

1300 MoPac Expressway South, Third Floor

Austin, TX 78746,

Defendants.

Case: 1:12-cv-00227

Assigned To: Collyer, Rosemary M.

Assign Date: 2/10/2012

Description: Antitrust

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin International Paper Company ("International Paper") from acquiring Temple-Inland Inc. ("Temple-Inland"). Plaintiff alleges as follows:

I. NATURE OF THE ACTION

1. On September 6, 2011, International Paper agreed to acquire Temple-Inland in a transaction valued at $4.3 billion. International Paper and Temple-Inland are, respectively, the largest and third-largest producers of containerboard in the United States and Canada (which the paper industry and this Complaint refer to collectively as "North America"). Containerboard is the paper that is used to make corrugated boxes.

2. The proposed merger would increase International Paper's share of the containerboard capacity in North America from approximately 26 to 37 percent. After the merger, the combined firm would likely reduce containerboard output, raising containerboard prices throughout North America. International Paper would also likely accommodate its large rivals' efforts to raise containerboard prices by reducing their own output, making such price increases more likely. These higher containerboard prices would, in turn, raise the prices of corrugated boxes.

3. Because International Paper's proposed merger with Temple-Inland is likely to substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, the Court should permanently enjoin this merger.

II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

4. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, seeking injunctive and other equitable relief from the defendants' violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

5. International Paper and Temple-Inland sell containerboard, corrugated boxes, and other industrial products throughout the United States. They engage in interstate commerce and in activities substantially affecting interstate commerce.

6. The Court has subject-matter jurisdiction over this action under Section 15 of the Clayton Act, 15 U.S.C. § 25; and 28 U.S.C. §§ 1331, 1337(a), and 1345.

7. Defendants have consented to personal jurisdiction in this District. The Court also has personal jurisdiction over the defendants under Section 12 of the Clayton Act, 15 U.S.C. § 22.

8. Defendants have consented to venue in this District. Venue is also proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391.

III. DEFENDANTS AND THE TRANSACTION

9. International Paper is a corporation organized and existing under the laws of the State of New York, with its headquarters in Memphis, Tennessee. International Paper owns and operates 12 containerboard mills and 133 plants that convert containerboard into corrugated boxes ("box plants") in the United States. In 2010, International Paper's annual revenues were approximately $25.2 billion, with its North American Industrial Packaging Group, which produces containerboard and corrugated products, accounting for $8.4 billion.

10. Temple-Inland is a corporation organized and existing under the laws of the State of Delaware, with its headquarters in Austin, Texas. Temple-Inland owns and operates seven containerboard mills and 53 box plants in the United States. In 2010, Temple-Inland's annual revenues were approximately $3.8 billion, with its corrugated-packaging business accounting for $3.2 billion.

IV. THE RELEVANT MARKET

A. Relevant Product Market: Containerboard

11. The relevant product market for analyzing the likely effects of the proposed merger is containerboard. There are two types of containerboard: (1) linerboard, the paper that forms the inner and outer facings of a corrugated sheet; and (2) medium, the paper that is inserted between the inner and outer linerboards in a wavy, fluted pattern. Linerboard is made from virgin wood fiber, recycled fiber (usually "old corrugated containers," or "OCC"), or a combination of both virgin and recycled fibers. Medium is typically made from recycled fiber, but can also be made from virgin fibers or a combination of recycled and virgin fibers.

12. Linerboard and medium are relatively undifferentiated products. The linerboard made by one North American producer is substantially the same as the linerboard made by other producers. The medium made by the various producers is also substantially the same.

13. Although linerboard and medium are typically produced on different machines and have different performance characteristics, it is appropriate to view them as a single relevant product market because (1) containerboard producers and their customers generally regard competition in terms of a single containerboard market, not separate markets for linerboard and medium, and (2) analyzing them as separate products would not significantly alter the market shares or the analysis of the proposed merger's competitive effects.

14. Producers manufacture containerboard at mills and then ship it to box plants. At box plants, a large machine called a corrugator combines the linerboard and medium into rigid corrugated sheets. Box plants then convert the sheets into corrugated packaging, including corrugated boxes and displays. The work performed at box plants is sometimes divided between separate facilities called sheet feeders (which combine linerboard and medium into corrugated

sheets) and sheet plants (which convert the sheets into corrugated boxes). Containerboard typically is the largest cost component of a corrugated box, accounting for a majority of the price.

15. For box manufacturers, there is no reasonable substitute for containerboard: boxes made from other types of paper lack the required performance characteristics, such as the necessary strength, basis weight, and thickness. Furthermore, for box customers, there is no reasonable substitute for corrugated boxes: other products used to carry and transport goods, such as returnable plastic containers, are typically too expensive or lack the required performance characteristics to serve as a commercially viable alternative.

16. Consequently, a small but significant increase in the price of containerboard in North America is unlikely to cause a sufficient number of containerboard or corrugated box customers to switch to other types of products such that the price increase would be unprofitable. Therefore, containerboard is a relevant product market and a "line of commerce" within the meaning of Section 7 of the Clayton Act.

B. Relevant Geographic Market: North America

17. The relevant geographic market for analyzing the likely effects of the proposed merger on the production and sale of containerboard is North America.

18. Containerboard produced outside of North America is not a commercially viable substitute for containerboard produced in North America due to higher transportation costs, volatile and unfavorable currency exchange rates, lower-quality fiber, and other disadvantages. Because of these disadvantages, containerboard produced outside of North America accounts for less than one percent of the containerboard sold in North America.

19. Consequently, a small but significant increase in the price of containerboard in North America is unlikely to cause a sufficient number of customers of containerboard or corrugated boxes to switch to containerboard produced outside of North America to make the price increase unprofitable. Therefore, North America is a relevant geographic market and a "section of the country" within the meaning of Section 7 of the Clayton Act for the production and sale of containerboard.

V. LIKELY ANTICOMPETITIVE EFFECTS

20. The proposed merger would likely substantially lessen competition in the production and sale of containerboard in North America. International Paper controls approximately 26 percent of North American containerboard capacity, and Temple-Inland controls approximately 11 percent. Thus, as alleged in paragraph 2, the proposed merger would give International Paper control over approximately 37 percent of North American containerboard capacity. Post-merger, the four largest producers would control approximately 74 percent of that capacity. A number of smaller producers, none with a share higher than three percent, account for the remainder of the market.

21. Using a standard concentration measure called the Herfindahl–Hirschman Index (or "HHI," defined and explained in Appendix A), the proposed merger would significantly raise market concentration and result in a moderately concentrated market, producing an HHI increase of approximately 605 and a post-merger HHI of approximately 2,025. The defendants' combined market share (approximately 37 percent), coupled with the significant increase in market concentration (605), exceed the levels that courts have found to create a presumption that a proposed merger likely would substantially lessen competition.

22. The proposed merger is likely to cause International Paper to engage in unilateral conduct that would raise the market price of containerboard. In the containerboard industry, there is a close relationship between the market price and industry output. All else equal, when industry output grows, the market price of containerboard falls, and as industry output shrinks, the market price of containerboard rises. Because of this close relationship, a containerboard producer can raise the market price of containerboard by strategically reducing output, for example, by idling containerboard machines or closing mills. When a producer significantly reduces output, it loses profits on the output that it removed, but it gains profits (from the resulting higher price) on the output that remains.

23. A producer's willingness to raise the market price by reducing output depends on its size: as a producer grows larger, it is more likely to profit from strategically reducing output because it will have more sales at the higher price to offset the lost sales on the reduced output. In contrast, a small producer is unlikely to profit from reducing output because it will not have sufficient remaining sales at the higher price, making the reduction unprofitable.

24. By combining the containerboard capacity of International Paper and Temple-Inland, the proposed merger would significantly expand the volume of containerboard over which International Paper would benefit from a price increase. With that additional volume, International Paper would likely find it profitable to strategically reduce containerboard output, for example, by idling containerboard machines or closing mills. As described generally in paragraphs 22–23, although International Paper would lose profits on the output that it removed, it would gain even greater profits on the output that remains.

25. The proposed merger would also likely cause International Paper to engage in parallel accommodating conduct. Due to its additional containerboard volume obtained as a

result of the merger, International Paper would benefit more from a price increase after the proposed merger. Thus, if a large rival attempted to raise the market price by reducing output, International Paper would likely accommodate its rival's actions by reducing or not increasing its own output. The rival would thus be likely to increase the market price by reducing output after International Paper and Temple-Inland complete the proposed merger.

VI. ABSENCE OF COUNTERVAILING FACTORS

26. Supply responses from competitors or potential competitors will not prevent the likely anticompetitive effects of the proposed merger. Virtually all existing North American containerboard producers are capacity-constrained and have other operational limitations that would prevent them from significantly expanding output using their existing machines in response to a post-merger increase in the price of containerboard. North American producers are also unlikely to respond to a domestic price increase by diverting a significant amount of their containerboard exports to the North American market.

27. Entry and expansion in the containerboard market through the construction of new containerboard mills or machines also are unlikely to occur in a timely manner or on a scale sufficient to undo the competitive harm that the proposed merger would produce. New entry typically requires investing hundreds of millions of dollars in equipment and facilities, obtaining extensive environmental permits, and establishing a reliable distribution system. Competitors are unlikely to build new containerboard mills or install new containerboard machines in response to a small but significant price increase, or do so quickly enough to defeat one.

28. Defendants cannot demonstrate cognizable, merger-specific efficiencies that are sufficient to reverse the proposed merger's anticompetitive effects.

VII. VIOLATION ALLEGED

29. The United States hereby incorporates paragraphs 1 through 28.

30. International Paper's proposed merger with Temple-Inland would likely substantially lessen competition in the market for containerboard, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

31. Unless enjoined, the proposed merger would likely have the following effects, among others:

a. competition between International Paper and Temple-Inland for the sale of containerboard would be eliminated;

b. competition generally in the sale of containerboard in North America would likely be substantially lessened; and

c. prices for containerboard in North America would likely increase to levels above those that would prevail absent the proposed merger.

VIII. REQUESTED RELIEF

32. Plaintiff requests that this Court:

a. adjudge and decree that the proposed merger violates Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. preliminarily and permanently enjoin the defendants from carrying out the proposed merger or from entering into or carrying out any other agreement, understanding, or plan, the effect of which would be to bring the containerboard business of International Paper and Temple-Inland under common ownership or control;

c. award plaintiff its costs in this action; and

d. award plaintiff such other relief as may be just and proper.

Dated: February 10, 2012

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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APPENDIX A

Herfindahl–Hirschman Index

The term "HHI" means the Herfindahl–Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,500 and 2,500 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. *See* U.S. Department of Justice & FTC, *Horizontal Merger Guidelines* § 5.3 (2010). Transactions that increase the HHI by more than 200 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission. *See id.*

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL PAPER COMPANY

and TEMPLE-INLAND INC.,

Defendants

Case: 1:12-cv-00227

Assigned To: Collyer, Rosemary M.

Assign Date: 2/10/2012

Description: Antitrust

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 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 filed a civil antitrust lawsuit on February 10, 2012, seeking to enjoin Defendant International Paper Company ("International Paper") from acquiring Defendant Temple-Inland Inc. ("Temple-Inland"), and alleging that the merger would likely substantially lessen competition in the market for containerboard in North America in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The loss of competition would likely result in higher containerboard prices and lower containerboard output in the United States.

At the same time the Complaint was filed, the United States filed an Asset Preservation Stipulation and Order and a proposed Final Judgment, which are designed to preserve competition for the production and sale of containerboard in North America. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest one International Paper mill and two Temple-Inland mills that manufacture containerboard. Pursuant to the Asset Preservation Stipulation and Order, International Paper and Temple-Inland must ensure that the assets being divested continue to be operated as ongoing, economically viable, and competitive assets until the divestitures required by the proposed Final Judgment have been accomplished.

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

II. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendants and the Proposed Transaction

On September 6, 2011, International Paper agreed to acquire Temple-Inland for $4.3 billion. International Paper and Temple-Inland are, respectively, the largest and third-largest producers of containerboard in the United States and Canada (which the containerboard industry and the Complaint refer to collectively as "North America"). Containerboard is the type of paper that is used to make corrugated boxes.

International Paper, a New York corporation headquartered in Memphis, Tennessee, owns and operates 12 containerboard mills and 133 plants that convert containerboard into corrugated boxes ("box plants") in the United States. International Paper controls approximately 26 percent of North American containerboard capacity. In 2010, International Paper's revenues were approximately $25.2 billion, with its North American Industrial Packaging Group, which produces containerboard and corrugated products, accounting for $8.4 billion.

Temple-Inland, a Delaware corporation headquartered in Austin, Texas, owns and operates seven containerboard mills and 53 box plants in the United States. Temple-Inland controls approximately 11 percent of North American containerboard capacity. In 2010, Temple-Inland's annual revenues were approximately $3.8 billion, with its corrugated-packaging business accounting for $3.2 billion. The proposed merger would have created a single firm in control of approximately 37 percent of North American containerboard capacity.

B. Competitive Effects of the Proposed Merger

1. Containerboard is the Relevant Product Market.

The Complaint alleges that containerboard is a relevant product market within the meaning of Section 7 of the Clayton Act. There are two types of containerboard: (1) linerboard, the paper that forms the inner and outer facings of a corrugated sheet; and (2) medium, the paper that is inserted between the inner and outer linerboards in a wavy, fluted pattern. Linerboard is made from virgin wood fiber, recycled fiber (usually "old corrugated containers," or "OCC"), or a combination of both virgin and recycled fibers. Medium is typically made from recycled fiber, but can also be made from virgin fibers or a combination of recycled and virgin fibers.

Linerboard and medium are relatively undifferentiated products. The linerboard made by one North American producer is substantially the same as the linerboard made by other producers. The medium made by the various producers is also substantially the same.

Although linerboard and medium are typically produced on different machines and have different performance characteristics, it is appropriate to view them as a single relevant product market because (1) containerboard producers and their customers generally regard competition in terms of a single containerboard market, not separate markets for linerboard and medium, and (2) analyzing them as separate products would not significantly alter the market shares or the analysis of the proposed merger's competitive effects.

Producers manufacture containerboard at mills and then ship it to box plants. At box plants, a large machine called a corrugator combines the linerboard and medium into rigid corrugated sheets. Box plants then convert the sheets into corrugated packaging, including corrugated boxes and displays. The work performed at box plants is sometimes divided between separate facilities called sheet feeders (which combine linerboard and medium into corrugated sheets) and sheet plants (which convert the sheets into corrugated boxes). Containerboard typically is the largest cost component of a corrugated box, accounting for a majority of the price.

For box manufacturers, there is no reasonable substitute for containerboard: boxes made from other types of paper lack the required performance characteristics, such as the necessary strength, basis weight, and thickness. Furthermore, for box customers, there is no reasonable substitute for corrugated boxes: other products used to carry and transport goods, such as returnable plastic containers, are typically too expensive or lack the required performance characteristics to serve as a commercially viable alternative.

Therefore, a small but significant increase in the price of containerboard in North America is unlikely to cause a sufficient number of containerboard or corrugated box customers to switch to other types of products such that the price increase would be unprofitable. Accordingly, containerboard is a relevant product market and a "line of commerce" within the meaning of Section 7 of the Clayton Act.

2. North America is a Relevant Geographic Market.

The Complaint alleges that North America is a relevant geographic market for the production and sale of containerboard within the meaning of Section 7 of the Clayton Act. Containerboard produced outside of North America is not a commercially viable substitute for containerboard produced in North America due to higher transportation costs, unfavorable currency exchange rates, lower-quality fiber, and other disadvantages to producers of containerboard outside of North America seeking to import containerboard into North America. Therefore, a small but significant increase in the price of containerboard produced in North America is unlikely to cause a sufficient number of customers of containerboard or corrugated boxes to switch to containerboard produced outside of North America to make such a price increase unprofitable. Accordingly, North America is a relevant geographic market for the production and sale of containerboard and a "section of the country" within the meaning of Section 7 of the Clayton Act.

3. Likely Anticompetitive Effects of the Proposed Merger

The Complaint alleges that the proposed merger would likely substantially lessen competition in the production and sale of containerboard in North America. International Paper controls approximately 26 percent of North American containerboard capacity, and Temple-Inland controls approximately 11 percent. Therefore, the proposed merger would give International Paper control over approximately 37 percent of North American containerboard capacity. Post-merger, the four largest producers would control approximately 74 percent of that capacity. A number of smaller producers, none with a share higher than three percent, account for the remainder of the market.

Using a standard measure of concentration called the Herfindahl–Herschman Index ("HHI"), the proposed merger would significantly raise market concentration and result in a moderately concentrated market, producing an HHI increase of approximately 605 and a post-merger HHI of approximately 2,025. The defendants' combined market share (approximately 37 percent), coupled with the significant increase in market concentration (605), exceed the levels that courts have found to create a presumption that a proposed merger likely would substantially lessen competition.

The proposed merger is likely to cause International Paper to engage in unilateral conduct that would raise the market price of containerboard. The competitive effects analysis described in Section 6.3 of the 2010 Horizontal Merger Guidelines ("Merger Guidelines") is applicable to analyzing the unilateral competitive effects of this transaction. U.S. Dept. of Justice & FTC, *Horizontal Merger Guidelines* §6.3 (2010) ("Merger Guidelines"). Section 6.3 of the Merger Guidelines provides that "[i]n markets involving relatively undifferentiated products, the

Agencies may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price. A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities."

In the containerboard industry, there is a close relationship between the market price and industry output. All else equal, when industry output grows, the market price of containerboard falls, and as industry output shrinks, the market price of containerboard rises. Because of this close relationship, a containerboard producer can raise the market price of containerboard by strategically reducing output, for example, by idling containerboard machines or closing mills. When a producer significantly reduces output, it loses profits on the output that it removed, but it gains profits (from the resulting higher price) on the output that remains.

A producer's willingness to raise the market price by reducing output depends on its size: as a producer grows larger, it is more likely to profit from strategically reducing output because it will have more sales at the higher price to offset the lost sales on the reduced output. In contrast, a small producer is unlikely to profit from reducing output because it will not have sufficient remaining sales at the higher price, making the reduction unprofitable.

As alleged in the Complaint, by combining the containerboard capacity of International Paper and Temple-Inland, the proposed merger would significantly expand the volume of containerboard over which International Paper would benefit from a price increase. With that additional volume, International Paper would likely find it profitable to strategically reduce containerboard output, for example, by idling containerboard machines or closing mills. Although International Paper would lose profits on the output that it removed, it would gain even greater profits on the output that remains.

The proposed merger would also likely cause International Paper to engage in parallel accommodating conduct. As described in Section 7 of the Merger Guidelines, "[p]arallel accommodating conduct [involves] situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms."

Due to its additional containerboard volume obtained as a result of the merger, International Paper would benefit more from a price increase after the proposed merger. Thus, if a large rival attempted to raise the market price by reducing output, International Paper would likely accommodate its rival's actions by reducing or not increasing its own output. The rival would thus be likely to increase the market price by reducing output after International Paper and Temple-Inland complete the proposed merger.

4. Neither Supply Responses Nor Entry Would Constrain the Likely Anticompetitive Effects of the Proposed Merger.

The Complaint alleges that supply responses from competitors or potential competitors will not prevent the likely anticompetitive effects of the proposed merger. Virtually all existing North American containerboard producers are capacity-constrained and have other operational limitations that would prevent them from significantly expanding output using their existing machines in response to a post-merger increase in the price of containerboard. Further, North American producers are also unlikely to respond to a domestic price increase by diverting a significant amount of their containerboard exports to the North American market.

Entry and expansion in the containerboard market through the construction of new containerboard mills or machines also are unlikely to occur in a timely manner or on a scale sufficient to undo the competitive harm that the proposed merger would produce. New entry typically requires investing hundreds of millions of dollars in equipment and facilities, obtaining extensive environmental permits, and establishing a reliable distribution system. Competitors are unlikely to build new containerboard mills or install new containerboard machines in response to a small but significant price increase, or do so quickly enough to defeat one. Moreover, Defendants cannot demonstrate cognizable, merger-specific efficiencies that are sufficient to reverse the proposed merger's anticompetitive effects.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment requires Defendants to divest two of Temple-Inland's containerboard mills and all associated mill assets and one of International Paper's containerboard mills and all associated mill assets. Defendants must divest (1) both the Temple-Inland mill in Waverly, Tennessee (the "New Johnsonville Mill"), with an annual containerboard production capacity of approximately 372,900 tons, and the Temple-Inland mill in Ontario, California (the "Ontario Mill"), with an annual containerboard production capacity of approximately 360,200 tons; and (2) either the International Paper mill in Oxnard, California (the "Port Hueneme Mill"), with an annual containerboard production capacity of approximately 210,300 tons, or the International Paper mill in Henderson, Kentucky (the "Henderson Mill"), with an annual containerboard production capacity of approximately 222,400 tons, but not both of those mills. The New Johnsonville Mill, the Ontario Mill, the Port Hueneme Mill, and the Henderson Mill are referred to collectively as the "Divestiture Mills." It will be in Defendants' discretion to decide whether to divest either the Port Hueneme Mill or the Henderson Mill unless a divestiture trustee is appointed pursuant to Section V of the proposed Final Judgment.

Defendants' divestiture of the Divestiture Mills would result in the sale of approximately 943,400 to 955,400 tons of containerboard production capacity to a competitor or competitors of Defendants. Under the proposed Final Judgment, the Divestiture Mills may be sold to one or more buyers, with the approval of the United States in its sole discretion. In addition, Defendants are required to satisfy the United States in its sole discretion that the divested assets will be operated as viable ongoing businesses that will compete effectively in the North American containerboard market.

In evaluating the likely competitive effects of the proposed merger, the United States considered market shares; costs of production; current and historical industry capacity, utilization rates, margins, and market pricing; historical and projected market demand for containerboard; and the likelihood of supply responses to increased containerboard prices. The United States concluded that allowing the merger as proposed would give the merged firm control of a sufficiently large amount of industry capacity that the firm would likely (a) strategically reduce its containerboard output, raising containerboard prices throughout North America, and (b) likely accommodate its large rivals' efforts to raise containerboard prices by reducing their own output, making such price increases more likely. The divestitures required by the proposed Final Judgment will decrease this incentive by reducing the merged firm's capacity and output and transferring that capacity to a competitor or competitors. As a result, the divestitures will reduce the incentive of the merged firm to raise price by reducing output and capacity.

At the option of the Acquirer(s), the proposed Final Judgment requires Defendants to enter into an agreement pursuant to which Defendants shall purchase containerboard produced by the Divestiture Mills that are sold to the Acquirer(s). Under the agreement, the Acquirer(s) shall have the right to require Defendants to purchase up to 100 percent of the volume of containerboard supplied by the particular Divestiture Mill in 2011 to Defendants' box plants or other facilities in the first year of the contract, up to 75 percent of this volume during the second year, and up to 50 percent during the third year. Any such agreement shall have a term of no longer than three years. Similarly, at the option of the Acquirer(s), and upon the approval of the United States, the proposed Final Judgment requires Defendants to provide certain transition services for up to 12 months as part of the divestiture. Both provisions ensure that the Acquirer(s) will be able to profitably operate the Divestiture Mills, and that they will remain a competitive constraint on Defendants.

Section IV of the proposed Final Judgment requires Defendants to complete the divestiture within 120 days after the filing of the Complaint in this matter with one or more 30-day extensions not to exceed 60 calendar days in total, which extensions shall be granted at the sole discretion of the United States. If Defendants do not accomplish the divestiture within the period prescribed in the proposed Final Judgment, the proposed Final Judgment provides for the Court to appoint a trustee, upon application of the United States, to accomplish the divestitures. If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all of the costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. If any of the requisite divestitures has not been accomplished at the end of the trustee's term, the trustee and the United States will make recommendations to the Court, which may enter such orders as appropriate to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The proposed Final Judgment also provides that the United States may appoint a monitoring trustee, subject to the approval of the Court, to ensure that Defendants expeditiously comply with all of their obligations and perform all of their responsibilities under the Final Judgment and the Asset Preservation Stipulation and Order. The monitoring trustee shall serve at the cost and expense of Defendants, on customary and reasonable terms and conditions agreed to by the monitoring trustee and the United States.

Pursuant to the Asset Preservation Stipulation and Order, until the divestitures under the proposed Final Judgment have been accomplished, Defendants are required to preserve, maintain, and operate all four Divestiture Mills as ongoing businesses, and are prohibited from taking any action that would jeopardize the divestitures required by the proposed 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 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.

V. PROCEDURES FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and 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 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 60 days of the date of publication of this Competitive Impact Statement in the Federal Register or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. 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:

Joshua H. Soven, Esq.
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 4100
Washington, DC 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 against Defendants. The United States could have initiated a civil action in federal district court seeking a judicial order enjoining International Paper's acquisition of Temple-Inland. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will preserve competition in the production and sale of containerboard in North America.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, 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)(1)(A) & (B).

In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").[1]

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[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

A court considers under the APPA, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. 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. 1981)); *see also Microsoft*, 56 F.3d at 1460–62; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held 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.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the

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[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass");

government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' "prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[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.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relation to the violations that the United States has alleged in its complaint, and the APPA does not

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see generally Microsoft, 56 F.3d at 1461 (discussing 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'").

authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because 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 did not pursue. *Microsoft*, 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney explained, "[t]he 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." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

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: February 10, 2012

Respectfully submitted,

/s/ David C. Kelly

David C. Kelly*

[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("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."); H.R. Rep. No. 93-1463, at 4 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6535, 6539 ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized.").

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL PAPER COMPANY and TEMPLE-INLAND INC.,

Defendants

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff United States of America, filed its Complaint on February 10, 2012, and Plaintiff and Defendants International Paper Company ("International Paper") and Temple-Inland Inc. ("Temple-Inland") (collectively "Defendants"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights and assets by Defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED, AND DECREED:

I. Jurisdiction

This Court has jurisdiction over the subject matter of, and each of the parties to, this action. 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. "Acquirer" or "Acquirers" means the person, persons, entity, or entities to whom Defendants divest some or all of the Divestiture Assets.

B. "Containerboard" means linerboard and medium, the paper that is used to make corrugated boxes.

C. "Divestiture Assets" means the Divestiture Mills and all assets relating to the Divestiture Mills, including:

(1) all tangible assets necessary to operate, used in or for, or devoted to a Divestiture Mill, including, but not limited to, assets relating to research and development activities; all manufacturing equipment, tooling and fixed assets, real property (leased or owned), personal property, inventory, containerboard reserves, information technology systems, office furniture, materials, supplies, docking facilities, warehouses and storage facilities, and other tangible property and all assets used exclusively in connection with the Divestiture Mills; all licenses,

permits, and authorizations issued by any governmental organization relating to the Divestiture Mills; all contracts, teaming arrangements, agreements, leases (including renewal rights), commitments, certifications, and understandings, relating to the Divestiture Mills, including supply or purchase agreements; all customer lists, contracts, accounts, and credit records; all interests in, and contracts relating to, power generation; and all repair and performance records and all other records relating to the Divestiture Mills; and

(2) all intangible assets necessary to operate, used in or for, or devoted to a Divestiture Mill, including, but not limited to, all contractual rights, patents, licenses and sublicenses, intellectual property, copyrights, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, environmental studies and assessments, design tools and simulation capability, all manuals and technical information Defendants provide to their employees, customers, suppliers, agents or licensees, and all research data concerning historic and current research and development efforts relating to the Divestiture Mills, including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments.

D. “Divestiture Mills” means the Defendants’ containerboard mills in the following locations:

(1) Temple-Inland’s containerboard mill located at 2877 Scepter Road, Waverly, Tennessee 37185 (the “New Johnsonville Mill”);

(2) Temple-Inland’s containerboard mill located at 5110 East Jurupa Street, Ontario, California 91761 (the “Ontario Mill”); and

(3) either International Paper's containerboard mill located at 5936 Perkins Road, Oxnard, California 93033 (the "Port Hueneme Mill") or International Paper's containerboard mill located at 1500 Commonwealth Drive, Henderson, Kentucky 42420 (the "Henderson Mill").

E. "Divestiture Trustee" means the trustee selected by the United States and appointed by the Court pursuant to Section V of this Final Judgment.

F. "International Paper" means Defendant International Paper Company, a New York corporation with its headquarters in Memphis, Tennessee, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

G. "Monitoring Trustee" means the monitor selected by the United States pursuant to Section IX of this Final Judgment.

H. "Temple-Inland" means Defendant Temple-Inland, Inc., a Delaware corporation with its headquarters in Austin, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

III. Applicability

A. This Final Judgment applies to each Defendant and all persons in active concert or participation with any Defendant who receives actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Section IV or V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, Defendants shall require the purchaser(s) to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer(s) of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. Defendants are ordered and directed, within 120 calendar days after the filing of the Complaint in this matter or five calendar days after notice of entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer or Acquirers acceptable to the United States in its sole discretion. To comply with this requirement, Defendants must divest (1) both the New Johnsonville Mill and the Ontario Mill, and (2) either the Port Hueneme Mill or the Henderson Mill, but not both mills. Unless a Divestiture Trustee is appointed pursuant to Section V of this Final Judgment, Defendants shall have the discretion to decide whether to divest either the Port Hueneme Mill or the Henderson Mill. The United States, in its sole discretion, may agree to one or more 30-day extensions of the 120-day time period, not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, Defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendants shall inform any person who inquires about a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective

Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any prospective Acquirer.

C. Defendants shall provide prospective Acquirers and the United States with information relating to the personnel involved in the management, production, operation, and sales activities relating to the Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer(s) to employ or contract with any Defendant employee whose primary responsibility is production, operations, or sales at the Divestiture Mills. Nor shall Defendants interfere with any negotiations by the Acquirer(s) to employ or contract with any of the Defendants' sales force whose responsibilities include sales of containerboard produced by the Divestiture Mills to third-party customers.

D. Defendants shall waive all non-compete agreements for any current or former employee whom the Acquirer(s) employ(s) with relation to the Divestiture Assets.

E. Defendants shall permit prospective Acquirers of the Divestiture Assets to (1) have reasonable access to personnel; (2) make inspections of the physical facilities; (3) have access to any and all environmental, zoning, and other permit documents and information; and (4) have access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. Defendants shall warrant to the Acquirer(s) that the Divestiture Assets will be operational on the date of sale, that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and that following the sale of the

Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

G. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

H. At the option of the Acquirer(s) and upon approval by the United States, in its sole discretion, Defendants shall enter into a transition services agreement based upon commercially reasonable terms and conditions. Such an agreement may not exceed 12 months from the date of divestiture. Transition services may include information technology support, information technology licensing, computer operations, data processing, logistics support, and such other services as reasonably necessary to operate the Divestiture Assets. Defendants shall designate employees, other than Defendants' senior managers, to implement any such transition services agreement and shall establish, implement and maintain procedures and take such other steps that are reasonably necessary to prevent such employees from disclosing any confidential, proprietary, or business sensitive information of the Acquirer(s) to any other employee of Defendants, and to prevent such employees from using such information except as necessary to implement the transition services agreement.

I. Unless the United States otherwise consents in writing, any divestiture of a mill pursuant to Section IV, or by the Divestiture Trustee appointed pursuant to Section V of this Final Judgment, shall include the mill and all assets relating to it, as defined in Section II.C, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the divestiture will achieve the purposes of this Final Judgment and that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing business engaged in the production and sale of containerboard. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

(1) shall be made to an Acquirer or Acquirers that, in the United States' sole judgment, has or have the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the production and sale of containerboard; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and Defendants give Defendants the ability to unreasonably raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere with the ability of an Acquirer to compete effectively.

J. As part of a divestiture, and at the option of the Acquirer(s), Defendants shall negotiate a transitional agreement or transitional agreements to purchase containerboard on commercially reasonable terms and conditions from the Divestiture Mills that are sold to the Acquirer(s). Such agreement(s) shall have a term of no longer than three (3) years. The Acquirer of a Divestiture Mill shall have the right to require Defendants to purchase up to 100 percent of the volume of containerboard supplied by the particular Divestiture Mill in 2011 to Defendants in the first year of the contract, up to 75 percent of this volume during the second year, and up to 50 percent during the third year. Defendants may agree to purchase more containerboard produced by the Divestiture Mill(s) than the amounts specified. The foregoing limitations and requirements do not affect Defendants' ability to (1) maintain or enter into current or future ordinary-course containerboard trade agreements with the Acquirer(s) or (2) enter into ordinary-course containerboard supply agreements with the Acquirer(s) after the end of the three-year term of the purchase agreement(s) described in this sub-paragraph.

V. Appointment of Trustee

A. If Defendants have not divested some or all of the Divestiture Assets ordered by Section IV(A) of this Final Judgment within the time period specified in Section IV(A), Defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of any Divestiture Mills that Defendants have not divested (the "remaining Divestiture Assets") in the following manner:

(1) If Defendants have not divested the New Johnsonville Mill and/or the Ontario Mill, the Divestiture Trustee will divest the mill(s).

(2) If Defendants have not divested the Port Hueneme Mill and have not divested the Henderson Mill, the Divestiture Trustee must divest one of these mills, but not both mills. The Divestiture Trustee shall have the discretion to decide whether to divest the Port Hueneme Mill or the Henderson Mill. The Divestiture Trustee shall make this determination based on the price and terms of the divestiture and the speed with which it can be accomplished, but timeliness is paramount.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the remaining Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to Acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the Divestiture Trustee within 10 calendar days after the Divestiture Trustee has provided the notice required under Section VI.

D. The Divestiture Trustee shall serve at the cost and expense of Defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the remaining Divestiture Assets and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other persons retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of remaining Divestiture Assets, and Defendants shall develop financial and other information relevant to the remaining Divestiture Assets as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secrets or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the United States and the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring any interest in the remaining Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the remaining Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth: (1) the Divestiture Trustee's efforts to accomplish the required divestiture; (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished; and (3) the Divestiture Trustee's recommendations. To the extent the report contains information that the Divestiture Trustee deems confidential, the report shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of this Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestitures

A. Within two business days following execution of a definitive divestiture agreement, Defendants or the Divestiture Trustee, whichever is then responsible for effecting the divestitures required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within 15 calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer(s), any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s), and any other potential Acquirer(s). Defendants and the Divestiture Trustee shall furnish to the United States any additional information requested within 15 calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within 30 calendar days after receipt of the notice, or within 20 calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to Defendants and the Divestiture Trustee, if there is one, stating whether or not it approves or objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. Asset Preservation

Until the divestitures required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Asset Preservation Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestitures ordered by this Court.

IX. Appointment of Monitoring Trustee

A. Upon the filing of this Final Judgment, the United States may, in its sole discretion, appoint a Monitoring Trustee, subject to approval by the Court.

B. The Monitoring Trustee shall have the power and authority to monitor Defendants' compliance with the terms of this Final Judgment and the Asset Preservation Stipulation and Order entered by this Court and shall have such powers as this Court deems appropriate. Subject to Section IX(D) of this Final Judgment, the Monitoring Trustee may hire any consultants, accountants, attorneys, or other persons reasonably necessary in the Monitoring Trustee's judgment. These individuals shall be solely accountable to the Monitoring Trustee.

C. Defendants shall not object to actions taken by the Monitoring Trustee in fulfillment of the Monitoring Trustee's responsibilities under any Order of this Court on any ground other than the Monitoring Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the Monitoring Trustee within 10 calendar days after the action taken by the Monitoring Trustee giving rise to the Defendants' objection.

D. The Monitoring Trustee and any consultants, accountants, attorneys, and other persons retained by the Monitoring Trustee shall serve, without bond or other security, at the cost and expense of Defendants, on such terms and conditions as the United States approves. The compensation of the Monitoring Trustee and any consultants, accountants, attorneys, and other persons retained by the Monitoring Trustee shall be on reasonable and customary terms commensurate with the individuals' experience and responsibilities.

E. The Monitoring Trustee shall have no responsibility or obligation for the operation of Defendants' businesses.

F. Defendants shall assist the Monitoring Trustee in monitoring Defendants' compliance with their individual obligations under this Final Judgment and under the Asset Preservation Stipulation and Order. The Monitoring Trustee and any consultants, accountants, attorneys, and other persons retained by the Monitoring Trustee shall have full and complete access to the personnel, books, records, and facilities relating to the Divestiture Assets, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Monitoring Trustee's accomplishment of its responsibilities.

G. After its appointment, the Monitoring Trustee shall file monthly reports with the United States and the Court setting forth the Defendants' efforts to comply with their individual obligations under this Final Judgment and under the Asset Preservation Stipulation and Order. To the extent such reports contain information that the Monitoring Trustee deems confidential, such reports shall not be filed in the public docket of the Court.

H. The Monitoring Trustee shall serve until the divestiture of all of the Divestiture Assets is finalized pursuant to either Section IV or Section V of this Final Judgment and any transitional or purchase agreements described in Sections IV(H) and (J) of this Final Judgment have expired.

I. If the United States determines that the Monitoring Trustee has ceased to act or failed to act diligently, the United States may appoint a substitute Monitoring Trustee in the same manner as provided in this Section.

J. The Monitoring Trustee appointed pursuant to this Final Judgment may be the same person or entity appointed as a Divestiture Trustee pursuant to Section V of this Final Judgment.

X. Affidavits

A. Within 20 calendar days of the filing of the Complaint in this matter, and every 30 calendar days thereafter until the divestiture has been completed under Section IV or V, Defendants shall deliver to the United States an affidavit as to the fact and manner of their compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding 30 calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Provided that the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitations on the information, shall be made within 14 calendar days of receipt of such affidavit.

B. Within 20 calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within 15 calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

XI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) access during Defendants' office hours to inspect and copy or, at the option of the United States, to require Defendants to provide hard copy or electronic copies of all books,

ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested, including, but not limited to, any transitional service, supply, or purchase agreements entered into between the Acquirer(s) and the Defendants pursuant to Section IV(H) or (J) of this Final Judgment.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an 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 Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give Defendants 10 calendar days' notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XII. No Reacquisition

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire 10 years from the date of its entry.

XV. Public Interest Determination

The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to those comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: ________________

Court approval subject to procedures of the

Antitrust Procedures and Penalties Act,

15 U.S.C. § 16.

____

United States District Judge

[FR Doc. 2012-3975 Filed 02/21/2012 at 8:45 am; Publication Date: 02/22/2012]