



BILLING CODE: 6750-01S

FEDERAL TRADE COMMISSION

[File No. 191 0087]

FXI Holdings and Innocor; Analysis of Agreement Containing Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Agreement Containing Consent Order to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY**

INFORMATION section below. Please write: “FXI Holdings and Innocor; File No. 191 0087” on your comment, and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW,

5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Llewellyn Davis (202-326-3394),
Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue NW,
Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Agreement Containing Consent Order to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Website (for February 21, 2020), at this web address: <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]**. Write “FXI Holdings and Innocor; File No. 191 0087” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online through the <https://www.regulations.gov> website.

If you prefer to file your comment on paper, write “FXI Holdings and Innocor; File No. 191 0087” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at <https://www.regulations.gov>, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential” – as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) – including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Website – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from the FTC Website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Analysis of Agreement Containing Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission (“Commission”) has accepted from One Rock Capital Partners II, LP (“One Rock Capital”), FXI Holdings, Inc. (“FXI”), Bain Capital

Fund XI, LP (“Bain”), and Innocor Inc. (“Innocor”), subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) designed to remedy the anticompetitive effects that would likely result from FXI’s proposed acquisition of Innocor. The proposed Decision and Order (“Order”) contained in the Consent Agreement requires FXI and Innocor to divest three polyurethane foam pouring plants to Future Foam, Inc. (“Future Foam”).

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and decide whether it should withdraw, modify, or make the Consent Agreement final.

On March 4, 2019, FXI and Innocor signed an Agreement and Plan of Merger by which FXI’s parent company, One Rock Capital, would acquire 100% of the voting securities of Innocor for approximately \$850 million (the “Acquisition”). The proposed Acquisition would combine two leading producers of polyurethane foam in the United States. The Commission’s Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, by substantially lessening competition in several regional markets across the United States for low-density conventional polyurethane foam (“Low-Density Foam”). The proposed Consent Agreement would remedy the alleged violations by preserving the competition that otherwise would be lost in this market as a result of the proposed Acquisition.

II. The Parties

Headquartered in Media, Pennsylvania, FXI is a polyurethane foam producer, providing a full range of polyurethane foam products including conventional, visco, and high resiliency foam. Polyurethane foam is used in a variety of end-uses, including home furnishing, packaging, and automotive applications. FXI operates foam-pouring facilities across the United States, including in the Pacific Northwest, the Midwest States, and Mississippi.

Innocor, headquartered in Red Bank, New Jersey, also produces a full range of polyurethane foam products including conventional, visco, and high resiliency foam for home furnishing, packaging, and other end uses. Like FXI, Innocor operates foam-pouring facilities across the United States, including in the Pacific Northwest, the Midwest States, and Mississippi.

III. The Relevant Product and Market Structure

The relevant product market in which to assess the competitive effects of the proposed acquisition is Low-Density Foam for home furnishing uses. Polyurethane foam consists of various grades and densities with different properties and end uses. Both FXI and Innocor sell Low-Density Foam, commonly referred to as “light and white,” to furniture manufacturers directly or through third party fabricators. When used in home furnishing products, such as mattresses, mattress toppers, pet beds, pillows, chairs, and couches, Low-Density Foam serves as padding or cushioning. There are no reasonably interchangeable substitutes for Low-Density Foam in home furnishing applications.

Regional geographic markets are appropriate to assess the competitive effects of the proposed Acquisition because of the importance of proximity to producers. Low-

Density Foam is bulky, and involves shipping a large volume of air, so the cost of shipping is high relative to the value of the product. These high shipping costs limit the ability of distant producers to compete against local suppliers and result in regional competition. Foam producers like FXI and Innocor operate regional pouring facilities that service customers in the surrounding areas. In this matter, there are three relevant geographic markets for Low-Density Foam: the Pacific Northwest, the Midwest States, and Mississippi. The Pacific Northwest includes Oregon, Washington. The Midwest States include Indiana, Michigan, and Ohio.

The combination of FXI and Innocor would create the largest supplier of Low-Density Foam in the United States. The combined firm would have a market share above 50% in each of the Pacific Northwest, Midwest States, and Mississippi markets. FXI and Innocor face varying levels of competition in these regional markets. FXI and Innocor are the only firms that pour foam in the Pacific Northwest. In the Midwest States, FXI, Innocor, and Carpenter each have foam-pouring facilities, while in Mississippi FXI, Innocor, Carpenter and Elite each operate foam-pouring facilities. Future Foam does not currently pour foam in any of these markets.

The proposed FXI/Innocor combination would result in highly concentrated markets for Low-Density Foam to become even more concentrated, increasing the Herfindahl-Hirschman Index (“HHI”) by more than 1500 in three regional markets – the Pacific Northwest, the Midwest States, and Mississippi. This increase in concentration far exceeds the thresholds set out in the Horizontal Merger Guidelines for raising a presumption that the Acquisition would create or enhance market power.

IV. Effects of the Acquisition

Absent a divestiture, the proposed acquisition is likely to harm customers of Low-Density Foam in the Pacific Northwest, Midwest States, and Mississippi markets. FXI and Innocor compete directly against each other for Low-Density Foam sales in each of the relevant markets, and customers have benefited from that competition. By eliminating head-to-head competition between FXI and Innocor, the proposed Acquisition likely would lead to unilateral effects in the form of higher prices and reduced innovation.

The proposed acquisition is also likely to increase the likelihood of coordination and parallel accommodating conduct among the remaining competitors in the relevant markets. There is a history of alleged anticompetitive conduct within the polyurethane foam industry, raising heightened concerns about further consolidation. The industry also shows an existing vulnerability to coordination, including significant awareness of interdependence among the suppliers, actions taken in recognition of that interdependence, and sufficient transparency among the producers to support coordination. Further consolidation is likely to increase the incentives and ability of the remaining firms to coordinate.

V. Entry

Entry into the Low-Density Foam markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed Acquisition. A new entrant with a single pouring plant would face significant barriers to entry, such as higher procurement costs for critical inputs, including the various chemicals, which make up a substantial portion of the cost of polyurethane foam. No new polyurethane foam pouring plants have opened in the Pacific

Northwest, the Midwest States or Mississippi for many years. In fact, the number of plants in these regions has steadily decreased as industry participants have consolidated and closed numerous overlapping plants.

VI. The Consent Agreement

The Consent Agreement eliminates the competitive concerns raised by the proposed Acquisition by requiring the merging parties to divest foam-pouring plants located in Kent, Washington; Elkhart, Indiana; and Tupelo, Mississippi to Future Foam, a privately held competitor based in Council Bluffs, Iowa. Future Foam is a leading producer of low-density conventional foam but currently has a limited presence in the Pacific Northwest, Mississippi, and the Midwest States. The divestiture package consists of the following assets and rights: FXI's Kent, Washington polyurethane foam plant, Innocor's Elkhart, Indiana plant, and Innocor's Tupelo, Mississippi plant, including each plant's production facilities, warehouses, storage facilities, equipment, offices, fabricating operations, transportation assets, and all other related businesses, operations and assets; formulas, technologies and other intangible rights and property relating to the facilities; and licenses to shared intellectual property. Additionally, the Order requires that, at the request of Future Foam, FXI must provide transitional assistance for up to twelve months following the divestiture date. These services include logistical and administrative support. The Order also includes other standard terms designed to ensure the viability of the divested business. The provisions of the proposed Consent Agreement positions Future Foam to become an effective competitor in the markets for Low-Density Foam in the Pacific Northwest, the Midwest States, and Mississippi in order to maintain the competition that currently exists.

Under the Order, FXI is required to divest the three plants no later than 10 days from the close of its acquisition of Innocor. If the Commission determines that Future Foam is not an acceptable acquirer, or that the manner of the divestitures is not acceptable, the Order requires FXI to either unwind the sale of rights and assets to Future Foam and then divest the assets to a Commission-approved acquirer within 120 days of the date the Order becomes final, or modify the divestiture to Future Foam in the manner the Commission determines is necessary to satisfy the requirements of the Order.

The Order also requires a monitor to oversee FXI's compliance with the obligations set forth in the Order. If FXI does not fully comply with the divestiture and other requirements of the Order, the Commission may appoint a Divestiture Trustee to divest the three facilities and perform FXI's other obligations consistent with the Order. The Order also requires that FXI and One Rock Capital shall not, without providing advance written notification to the Commission, acquire any polyurethane foam production plant in the states of Indiana, Michigan, Mississippi, Ohio, Oregon, and Washington for a period of ten years from the date the Order is issued.

The purpose of this analysis is to facilitate public comment on the Consent Agreement to aid the Commission in determining whether it should make the Consent Agreement final. This analysis is not an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

By direction of the Commission.

April J. Tabor,

Acting Secretary.