United States against Freeway Land Company pursuant to Sections 301(a) and 309 of the Clean Water Act, 33 U.S.C. 1311(a) and 1319, to obtain injunctive relief from and to impose civil penalties against the Defendant for violating the Clean Water Act by discharging dredged or fill material into waters of the United States without a Clean Water Act Section 404 permit. The proposed Consent Decree resolves these allegations by requiring Defendant to pay a civil penalty. Additionally, the Corps is considering issuing an after-the-fact Clean Water Act Section 404 permit that would allow the dredged or fill material to remain in place, but would require wetland creation as mitigation. If the Corps denies the permit application, the proposed Decree requires Defendant to remove the dredged or fill material and restore the impacted area.

The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to Michael B. Schon, United States Department of Justice, P.O. Box 23986, Washington, DC 20026–3986, and refer to *United States* v. *Freeway Land Co.,* DJ No. 90–5–1–1–18205.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District of Oregon, 740 Mark 0. Hatfield United States Courthouse, 1000 SW., Third Avenue, Portland, OR 97204–2802. In addition, the proposed Consent Decree may be viewed at *http://www.usdoi.gov/enrd/Consent_Decrees.html*.

**Russell M. Young,**

*Assistant Chief, Environmental Defense Section, Environment & Natural Resources Division, U.S. Department of Justice.*

[FR Doc. E8–7270 Filed 4–8–08; 8:45 am]

**BILLING CODE 4410–15–M**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### United States v. Altivity Packaging LLC and Graphic Packaging International, Inc.; 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 Complaint, 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. *Altivity Packaging LLC and Graphic Packaging International, Inc.*, Civ. Action No. 08–00400. On March 5, 2008, the United States filed a Complaint alleging that the proposed merger between Altivity Packaging LLC (''Altivity'') and Graphic Packaging International, Inc. would violate section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint alleges that the acquisition would substantially reduce competition for the production, distribution, and sale of coated recycled boxboard (''CRB'') in the United States. Specifically, the Complaint alleges that the merger would enhance the merged firm's ability and incentive to reduce their combined CRB output and anticompetitively raise CRB prices in the United States. The proposed Final Judgment, filed at the same time as the Complaint, requires the parties to divest two Altivity CRB mills in Wasbash, Indiana and Philadelphia, Pennsylvania. If divestiture of the Philadelphia mill is not accomplished, the proposed settlement requires the sale of Altivity's Santa Clara, California CRB mill in the alternative. A Competitive Impact Statement filed by the United States describes the Complaint, the proposed Final Judgment, and the remedies available to private litigants who may have been injured by the alleged violation.

Copies of the Complaint, proposed Final Judgment, Asset Preservation Stipulation and Order, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 325 7th Street, NW., Room 215, Washington, DC 20530 (telephone: 202–514–2481), on the Internet 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 sixty (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 Soven, Chief, Litigation I Section, Antitrust Division, Department of Justice, 1401 H Street, NW., Suite 4000, Washington, DC 20530 (202–307–0001).

**J. Robert Kramer II,**

*Director of Operations, Antitrust Division.*

### The United States District Court for the District of Columbia

United States of America, Plaintiff, v. Altivity Packaging LLC, 1500 Nicholas Blvd., Elk Grove Village, IL 60007, and Graphic Packaging International, Inc., 814 Livingston Court, Marietta, GA 30067, Defendants.

*Case:* I:08–cv–00400.
*Assigned to:* Sullivan, Emmet G.
*Assign. Date:* 3/5/2008.
*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 the proposed merger of Graphic Packaging International, Inc. (''Graphic'') and Altivity Packaging, LLC (''Altivity''). The United States alleges as follows:

### I. Nature of the Action

1. On July 10, 2007, Altivity and Graphic announced plans to combine their businesses in a transaction valued at $1.75 billion. Altivity and Graphic are respectively the first and fourth largest producers of coated recycled boxboard (''CRB'') in the United States and Canada (hereinafter, ''North America''). CRB is a type of paperboard used to make folding cartons used in consumer and commercial packaging, such as cereal boxes. Both companies are also major integrated producers of folding cartons made from CRB (hereinafter, ''CRB folding cartons''). The total annual volume of CRB supplied to the packaging industry in North America is valued at approximately $1.6 billion.

2. The proposed merger of Graphic and Altivity would create a single firm in control of approximately 42 percent of the total supply of CRB in North America and would likely result in increased prices of CRB. The resulting increases in CRB prices would have the further effect of increasing the prices of CRB folding cartons.

3. Unless the transaction is enjoined, the proposed merger of Graphic and Altivity would likely substantially lessen competition in the supply of CRB in North America, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

### II. Jurisdiction and Venue

4. The United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18. This Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25 and 28 U.S.C. 1331, 1337(a), and 1345.

5. Graphic and Altivity produce and sell CRB and CRB folding cartons in the flow of interstate commerce, and their production and sale of CRB and CRB

folding cartons substantially affect interstate commerce. Defendants have consented to venue and personal jurisdiction in this judicial district.

**III. The Defendants**

6. Altivity, a Delaware limited liability company headquartered in Elk Grove Village, Illinois, is the largest CRB producer in North America. Altivity is also a major North American producer (or ''converter'') of folding cartons made from CRB and other types of paperboard. Altivity owns and operates five paperboard mills that produce CRB and 24 folding carton converting plants in North America. Altivity's CRB mills have a combined annual production capacity of approximately 722,000 tons, or about 27 percent of total North American CRB supply. In 2006, Altivity had total sales of approximately $2 billion, including approximately $660 million in North American sales of CRB and CRB folding cartons.

7. Graphic, the fourth-largest CRB producer in North America, is incorporated in Delaware and has its principal place of business in Marietta, Georgia. In North America, Graphic owns and operates one CRB paperboard mill, the single largest CRB mill in North America, as well as 19 folding carton converting plants that produce folding cartons from CRB and other types of paperboard. Graphic's CRB mill has a total annual production capacity of approximately 390,000 tons, or about 15 percent of total North American CRB supply. In 2006, Graphic's total sales were approximately $2.4 billion, including approximately $357 million in North American sales of CRB and CRB folding cartons.

8. Graphic also is the largest North American producer of coated unbleached kraft (''CUK''), another type of paperboard. Graphic operates two CUK mills with a total annual production capacity of approximately 1.3 million tons, or about 55 percent of total North American CUK supply. In 2006, Graphic had approximately $1 billion in North American sales of CUK and CUK folding cartons.

**IV. Relevant Market**

*A. Relevant Product Market*

9. CRB is a type of paperboard (often called a ''substrate'' in the packaging industry) made from recycled paper. CRB is manufactured by forming and building up multiple layers (or ''plys'') of recycled fiber, and then applying a clay coating to the top layer. The clay-coated top layer provides CRB with a smooth surface for good graphics printability. The bottom layer is left in the natural color of the recycled fiber, typically a greyish or brownish hue, depending on the type of fiber used (grey, if recycled newsprint is used; brown, if recycled corrugated boxes are used). CRB is an intermediary product that undergoes conversion into folding cartons.

10. CRB is the preferred paperboard substrate for a wide range of relatively low-cost folding carton applications, including dry food cartons such as cereal boxes. CRB typically is the single largest cost component of such folding cartons, accounting for as much as 65 percent of the cost of the folding carton.

11. Uncoated recycled boxboard (''URB'') is a lower-grade and lower-cost paperboard compared to CR13. Major uses of URB are in the construction industry (as backing for gypsum wallboard) and in making paperboard cores and tubes (such as industrial cores for winding rolls of paper and other flexible materials, commercial mailing tubes, and tubes for paper towels and toilet paper rolls). URB is not a close substitute for CRB in folding carton applications because it lacks the smooth coated surface needed for good graphics printability.

12. CUK is a clay-coated paperboard made from virgin wood pulp rather than recycled paper, and has a brown-colored back. CUK has greater strength and wet-resistance than CRB and is more expensive than CRB on a price per ton basis. The large majority of CUK produced in North America is used to make beverage carriers (beer and soft-drink cartons) and refrigerated and frozen food packaging, where it is valued for its high strength and wet-resistance properties. Graphic is the larger of the only two North American CUK producers. Altivity does not produce CUK.

13. Solid bleached sulfate (''SBS'') is another type of paperboard made from virgin wood pulp. Produced from bleached white pulp, SBS is the most expensive and highest grade of paperboard used in the folding carton industry. SBS has a bright white finish on both sides, in contrast to CUK's brown back and CRB's grey or brown back. SBS affords the best printing surface of the paperboard grades, and is thus preferred despite its higher cost when superior printability is required. Consequently, SBS is often used to make cartons for higher-priced consumer goods, such as pharmaceuticals, cosmetics, and health and beauty products. When appropriately coated, SBS is also used in certain types of packaging that comes into direct contact with food, again due to manufacturer and consumer preferences for its white appearance. Neither Graphic nor Altivity produces SBS.

14. Because of the price and performance distinctions between CRB and the other folding carton substrates, few customers of CRB and CRB folding cartons consider URB, CUK, or SBS to be economical substitutes for CRB. Further, even where another substrate can provide acceptable performance at a similar price, few customers will switch from their existing substrate to an alternative substrate because doing so is time consuming, costly, and risky. The customer must first qualify the alternative substrate, and switching often requires modification of folding carton converting equipment and end-users' packaging lines. Customers of CRB and CRB folding cartons likely would not switch to URB, CUK, SBS, or any other potential substitutes in response to a small but significant and non-transitory increase in CRB prices to an extent that would make such a price increase unprofitable. Accordingly, CRB constitutes a relevant product market within the meaning of the Clayton Act.

15. Based on relative price and performance for some customers, CUK is the next closest substitute for CRB, and any switching by CRB customers to another substrate in response to a small but significant and non-transitory increase in CRB prices would primarily be to CUK. As alleged in paragraph 14, switching by some customers to CUK would not be sufficient to make a CRB price increase unprofitable, for reasons including that the two producers of CUK are currently operating at near-capacity. If such switching to CUK would constrain a CRB price increase, however, CRB and CUK would constitute a relevant product market within the meaning of the Clayton Act, and the relevant market would be no larger than CRB and CUK.

*B. Relevant Geographic Market*

16. North America is a relevant geographic market for the supply of CRB, and for the supply of CRB and CUK, within the meaning of the Clayton Act. Due to relatively high transportation costs, unfavorable currency exchange rates, and other cost and marketing disadvantages to importing foreign CRB, CUK, or potential substitutes for CRB or CUK into North America, a small but significant increase in the prices of CRB produced in North America would not likely cause foreign suppliers to increase North American sales in sufficient volumes to make such a price increase unprofitable.

**V. Anticompetitive Effects**

17. Since 2005, the North American CRB market has experienced significant producer consolidations, including CRB mill closures that have caused the removal of hundreds of thousands of tons of CRB production capacity. As a result, the market has become highly concentrated, with Altivity and Graphic becoming the first and fourth largest of only four major producers. The recent producer consolidations and capacity reductions in North America have resulted in high capacity utilization rates by the remaining producers, and have significantly constrained the market supply of CRB.

18. If the proposed merger of Graphic and Altivity is permitted to occur, the North American CRB market would become substantially more concentrated. The combination of Graphic and Altivity would control approximately 42 percent of total North American CRB supply. The market would have only three major competitors controlling a collective market share of approximately 86 percent. Using a standard concentration measure called the Herfindahl-Herschman Index (or ''HHI,'' defined and explained in Appendix A), the proposed merger would substantially raise market concentration in a highly concentrated market, producing an HHI increase of approximately 788 and a post-merger HHI of approximately 2745.

19. Even if the relevant product market were broader than CRB and included CUK, the proposed merger of Graphic and Altivity would also substantially increase concentration in the North American market. The merger would produce a single firm controlling approximately 49 percent of total North American supply of CRB and CUK, combining Graphic's 35 percent and Altivity's 14 percent. The four remaining major competitors would have a collective market share of approximately 94 percent. The merger would substantially raise market concentration in a highly concentrated market, producing an HHI increase of approximately 991 and a post-merger HHI of approximately 3155.

20. The proposed merger would produce a further substantial consolidation of the North American CRB market and eliminate significant head-to-head competition between Graphic and Altivity, substantially lessening competition and likely causing higher CRB prices than there would be without the merger. These CR13 price increases are also likely to cause increases in the prices of CRB folding cartons.

21. Producers of CUK are not likely to defeat an increase in the price of CRB after the merger of Graphic and Altivity. Graphic produces more than half of the CUK sold in North America, and would not have an incentive to undermine a post-merger increase in the price of CRB. The only other North American CUK producer is operating at nearly full capacity and would not increase its sales of CUK or other potential substitutes for CRB by an amount sufficient to undermine a post-merger increase in CRB prices.

**VI. Absence of Countervailing Factors**

22. Supply responses from competitors or potential competitors will not prevent the likely anticompetitive effects of the proposed merger. Existing North American CRB producers face capacity and other operational limitations that would constrain them from significantly expanding output in response to a post-merger Graphic-Altivity increase in the price of CRB. Further, to the extent that they have any additional capacity to produce more CRB, these producers would likely support a Graphic-Altivity price increase by raising their own prices.

23. Foreign producers import into North America small quantities of CRB and potential substitutes for CRB. The ability of foreign paperboard producers to expand imports into North America is limited by their commitments to home and other markets that are more profitable than North America, as well as significant transportation, currency exchange, and other disadvantages and competitive constraints to importing into North America. Thus, the potential for expansion of foreign supply, by itself or in combination with other supply responses, would not likely be sufficient to constrain a small but significant and non-transitory North American CRB price increase.

24. New entry into the production and sale of CRB or CUK is costly and time consuming. Among other things, entry would require investments of over $100 million and two years or more to construct and install production equipment and facilities. New entry is not likely to occur on a timely or sufficient basis in response to a small but significant and non-transitory post-merger CRB price increase in North America.

25. The anticompetitive effects of the proposed Graphic-Altivity merger are not likely to be eliminated or mitigated by any efficiencies that may be achieved by the merger.

**VII. Violation Alleged**

26. The United States hereby incorporates paragraphs 1 through 25.

27. The proposed merger of Graphic and Altivity would likely substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and would likely have the following effects, among others:

(a) Actual and potential competition between Graphic and Altivity for CRB sales would be eliminated; and

(b) Competition generally in the North American market for CRB (or in a North American market for CRB and CUK) would be substantially lessened.

*Prayer for Relief*

The United States requests:

1. That the proposed acquisition be adjudged to violate section 7 of the Clayton Act, 15 U.S.C. 18;

2. That the Defendants be permanently enjoined and restrained from carrying out the proposed merger or from entering into or carrying out any other agreement, understanding, or plan by which Graphic would acquire, be acquired by, or merge with, any of the other Defendants;

3. That the United States be awarded costs of this action; and

4. That the United States have such other relief as the Court may deem just and proper.

Respectfully submitted,

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(DC Bar No. 426840)
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Dated: March 5, 2008.

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## Appendix A

Herfindahl-Hirschman Index

''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It 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%, the HHI is 2600 (302 + 302 +202 + 202 = 2600). The HHI takes into account the relative size distribution of the firms in a market and approaches zero when a market consists of a large number of small firms. 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 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be highly concentrated. See Horizontal Merger Guidelines 1.51 (revised Apr. 8, 1997). Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the guidelines issued by the U.S. Department of Justice and Federal Trade Commission. See id.

**The United States District Court for the District of Columbia**

United States of America, Plaintiff, v. Altivity Packaging, LLC and Graphic Packaging International, Inc., Defendants.

*Case:* I:08–cv–00400.

*Assigned To:* Sullivan, Emmet G.

*Assign. Date:* 3/5/2008.

*Description:* Antitrust.

**Final Judgment**

*Whereas*, Plaintiff, United States of America, filed its Complaint on March 5, 2008, and Plaintiff and Defendants, Altivity Packaging, LLC (''Altivity'') and Graphic Packaging International, Inc. (''Graphic''), 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 or 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 entity or entities to whom one or more Divestiture Mills are divested pursuant to this Final Judgment.

B. ''Altivity'' means Defendant Altivity Packaging, LLC, a Delaware limited liability company with its headquarters in Elk Grove Village, Illinois, its direct and indirect parents, private equity owners or partners, successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

C. ''Graphic'' means Defendant Graphic Packaging International, Inc., a Delaware corporation with its headquarters in Marietta, Georgia, its direct and indirect parents, successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

D. ''CRB'' means coated recycled boxboard.

E. ''Divestiture Mills'' means Altivity's CRB mill located at 455 Factory Street, Wabash, Indiana 46992 (the ''Wabash Mill''), including all Mill Assets relating to the Wabash Mill and Altivity's CRB mill located at 5000 Flat Rock Road, Philadelphia, Pennsylvania 19127 (the ''Philadelphia Mill''), including all Mill Assets relating to the Philadelphia Mill.

F. ''Mill Assets'' means:

(1) All tangible assets used in, devoted to, or necessary to the operations of a Divestiture Mill, including but not limited to all such assets relating to research and development activities, manufacturing equipment, tooling and fixed assets, real property (leased or owned), personal property, inventory, CRB reserves, information technology systems, office furniture, materials, supplies, docking facilities, on-or off-site warehouses or storage facilities; all licenses, permits and authorizations issued by any governmental organization; all contracts, agreements, leases (including renewal rights), commitments, certifications, and understandings, including supply agreements; customer lists, accounts, and credit records; all interests in, and contracts relating to, power generation; all repair and performance records and all other records; and

(2) all intangible assets used in, devoted to, or necessary to the operations of a Divestiture Mill, including but not limited to all contractual rights, patents, licenses and sublicenses, intellectual property, 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 or assessments, design tools and simulation capability, all manuals and technical information provided to the employees, customers, suppliers, agents or licensees, and all research data concerning historic and current research and development efforts, including, but not limited to designs of experiments, and results of successful and unsuccessful designs and experiments.

G. ''Alternative Asset'' means that Altivity's CRB mill located at 2600 De La Cruz Blvd, Santa Clara, California 95050 (the ''Santa Clara Mill''), including all Mill Assets relating to the Santa Clara Mill, is deemed a Divestiture Mill if the conditions set forth in Section V(A)(2) of this Final Judgment are satisfied.

**III. Applicability**

A. This Final Judgment applies to Defendants, as defined above, and all other persons in active concert or participation with Defendants who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with sections IV and V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets that include the Divestiture Mills, they shall require, as a condition of the sale or other disposition, that the purchaser or purchasers agree to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from an Acquirer under 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 (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Wabash Mill and the Philadelphia Mill in a manner consistent with this Final Judgment to an Acquirer or Acquirers approved by the United States in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Wabash and Philadelphia Mills as expeditiously as possible.

B. Defendants promptly shall make known, by usual and customary means, the availability of the Wabash and Philadelphia Mills to be divested pursuant to section IV(A) of this Final Judgment. Defendants shall inform any person making inquiry that the divestitures are pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Unless the United States otherwise consents in writing, Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the divestitures that customarily are provided in a due

diligence process except such information or documents subject to the attorney client or work product privilege. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Unless the United States otherwise consents in writing, Defendants shall provide an Acquirer and the United States information relating to Defendants' personnel involved in management, production, operations, or sales activities of a Divestiture Mill to enable an Acquirer to make offers of employment. Defendants will not prevent or interfere with any efforts by an Acquirer to employ any of Defendants' officers, directors, or employees having any executive, management, production, operations, sales, or other responsibilities relating to a Divestiture Mill, and if requested, will release any such person from any non-compete agreement with Defendants.

D. Unless the United States otherwise consents in writing, Defendants shall permit prospective Acquirers of a Divestiture Mill to have reasonable access to personnel and to make inspections of all relevant physical facilities; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, and other documents and information customarily provided as part of a due diligence process, provided that Defendants only need to comply with this provision as to the Alternative Asset in the event that the Alternative Asset is to be divested pursuant to section V(A) of this Final Judgment.

E. Defendants shall warrant to an Acquirer of a Divestiture Mill that the Divestiture Mill and all related Mill Assets will be operational on the date of sale.

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

G. At the option of an Acquirer 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 twelve (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 a Divestiture Mill or related Mill Assets.

H. Defendants shall warrant to an Acquirer that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of a Divestiture Mill or related Mill Assets, and shall enter into a contractual commitment with the Acquirer that following the sale of a Divestiture Mill, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of a Divestiture Mill or any related Mill Assets.

I. Unless the United States otherwise consents in writing, any divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V. of this Final Judgment, shall include a Divestiture Mill and all related Mill Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Mill can and will be used by an Acquirer as a viable, ongoing business engaged in producing, distributing, and selling CRB, that the Divestiture Mill will remain viable, and that the divestiture of such assets will remedy the competitive harm alleged in the Complaint. 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, have the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the production, distribution, and sale of CRB;

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

(3) may be required by the United States, in its sole discretion, to be accomplished by sale of all divestiture assets to a single Acquirer.

J. As part of a divestiture, and at the option of an Acquirer, Defendants may negotiate a transitional supply agreement or agreements to supply CRB to Defendants' folding carton plants previously supplied by a Divestiture Mill purchased by the Acquirer. Any such agreement shall be subject to the approval of the United States in its sole discretion, shall be on commercially reasonable terms, and shall have a term no longer than three (3) years. The volume requirements during the first year of any such agreement may be up to 100 percent of the 2007 volumes supplied by the particular Divestiture Mill to Altivity's folding carton plants, no more than 75 percent during the second year, and no more than 50 percent during the third year.

**V. Appointment of Trustee**

A. If Defendants have not accomplished the divestitures ordered by Section IV(A) of this Final Judgment within the time period specified in Section IV(A), Defendants shall notify the United States and provide the pertinent facts in writing. Thereafter, upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to accomplish divestitures in the following manner.

(1) If Defendants have not divested one or both of the Divestiture Mills within the time period specified in Section IV(A), the United States shall seek appointment of a trustee to ensure divestiture of the Wabash Mill and the Philadelphia Mill or the Alternative Asset.

(2) If, at the time of the trustee's appointment, the Philadelphia Mill has not been divested, the trustee shall seek to divest the Philadelphia Mill within 120 calendar days thereafter. If the Philadelphia Mill has not been divested during this 120-day period, the trustee shall divest the Philadelphia Mill or the Alternative Asset within 90 calendar days thereafter.

(3) The United States, in its sole discretion, may allow the trustee one or more extensions of the time periods specified in this Section, not to exceed sixty (60) days in total, and shall notify the Court in such circumstances.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Mills. The trustee shall have the power and authority to accomplish the divestitures to an Acquirer or Acquirers acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the 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 trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestitures.

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

D. The 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 divestitures effected by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of divestiture assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants shall develop financial and other information relevant to such business as the 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 trustee's accomplishment of the divestitures.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestitures ordered

under this Final Judgment. To the extent such reports contain information that the 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 the Divestiture Mills, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to effect the divestitures.

G. If the trustee has not accomplished the divestitures within seven (7) months after its appointment, and any extension pursuant to Section V(A)(3) of this Final Judgment, the trustee shall promptly file with the Court a report setting forth: (1) The trustee's efforts to accomplish the required divestitures; (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished; and (3) the trustee's recommendations. To the extent such report contains information that the trustee deems confidential, such report shall not be filed in the public docket of the Court. The 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 trustee's appointment by a period requested by the United States.

**VI. Notice of Proposed Divestitures**

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants or the trustee, whichever is then responsible for effecting the divestitures required herein, shall notify the United States of any proposed divestitures required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestitures 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 Mills, together with full details of the same.

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

C. Within thirty (30) calendar days after receipt of the notice, or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer, any third party, or the trustee, whichever is later, the United States shall provide written notice to Defendants and the trustee, if there is one, stating whether or not it approves or objects to the proposed divestitures. If the United States provides written notice that it does not object, the divestitures 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 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. Notwithstanding the foregoing provisions of this Section VI, the United States, in its sole discretion, may withhold its approval or objection to the proposed divestiture of a single Divestiture Mill until such time as the United States concludes that it can approve an Acquirer or Acquirers for both Divestiture Mills consistent with the terms of the Final Judgment.

**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. Affidavits**

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestitures have been completed under Section IV or V, Defendants shall deliver to the United States an affidavit as to the fact and manner of its 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 thirty (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 a Divestiture Mill, 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 Mills, and to provide required information to any prospective Acquirer, including the limitations, if any, on such information. Assuming 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 fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (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 they 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 fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Mills until one year after such divestitures have been completed.

**X. Compliance Inspection**

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly 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 United States's option, to require Defendants to provide electronic or hard 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 a duly 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.

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 ten (10) calendar days

notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

**XI. Notification of Future Transactions**

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C.18a (the ''HSR Act''), Defendants, without providing advance notification to the Antitrust Division of the United States Department of Justice (''DOJ''), shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in any CRB mill or producer in North America during the term of this Final Judgment if the value of such acquisition exceeds $2,000,000.

B. Such notification shall be provided to the DOJ in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions must be provided only with respect to CRB. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the DOJ make a written request for additional information, defendants shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this section shall be resolved in favor of filing notice.

**XII. No Reacquisition**

Defendants may not reacquire any part of the Divestiture Mills or related Mill 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 ten (10) years from the date of its entry.

**XV. Public Interest Determination**

Entry of this Final Judgment is in the public interest. 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's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response 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

**The United States District Court for the District of Columbia**

United States of America, Plaintiff, v. Altivity Packaging, LLC and Graphic Packaging International, Inc., Defendants.

*Case:* I:08–cv–00400.

*Assigned to:* Sullivan, Emmet G.

*Assign. Date:* 3/5/2008.

*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**

On March 5, 2008, the United States filed a civil antitrust complaint seeking to enjoin the proposed merger of Altivity Packaging, LLC (''Altivity'') and Graphic Packaging International, Inc (''Graphic''). The Complaint alleges that the likely effect of the merger would be to lessen competition substantially in the production and sale of coated recycled boxboard (''CRB'') in North America in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. This loss of competition likely would result in higher CRB prices in the United States. At the same time the Complaint was filed, the United States also filed an Asset Preservation Stipulation and Order (''Stipulation'') and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the merger.

Under the proposed Final Judgment, which is explained more fully in Section III, Defendants are required to divest two Altivity mills that manufacture CRB. Until the Altivity CRB mills are sold and operated under new ownership, Defendants must ensure that the mills and related assets are operated as ongoing, economically viable, and competitive assets.

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 July 10, 2007, Altivity and Graphic announced plans to combine their businesses in a transaction valued at $1.75 billion. Altivity and Graphic are, respectively, the first and fourth largest producers of coated recycled boxboard (''CRB'') in the United States and Canada (hereinafter, ''North America''). CRB is a type of paperboard used to make folding cartons used in consumer and commercial packaging, such as cereal boxes. Both companies are also major producers (or ''converters'') of folding cartons made from CRB. The total annual volume of CRB supplied to the packaging industry in North America is valued at approximately $1.6 billion. The proposed merger would have created a single firm in control of approximately 42 percent of the total supply of CRB in North America.

Altivity, a Delaware limited liability company headquartered in Elk Grove Village, Illinois, is the largest CRB producer in North America. Altivity is also a major North American converter of folding cartons made from CRB and other types of paperboard. Altivity owns and operates five paperboard mills that produce CRB and 24 folding carton converting plants in North America. Altivity's CRB mills have a combined annual production capacity of approximately 722,000 tons, or about 27 percent of total North American CRB supply. In 2006, Altivity had total sales of approximately $2 billion, including approximately $660 million in North American sales of CRB and folding cartons made from CRB.

Graphic, the fourth-largest CRB producer in North America, is incorporated in Delaware and has its principal place of business in Marietta, Georgia. Graphic owns and operates one CRB paperboard mill and 19 folding carton converting plants that produce folding cartons from CRB and other types of paperboard. Graphic's CRB mill has a total annual production capacity of approximately 390,000 tons, or about 15 percent of total North American CRB supply. In 2006, Graphic's total sales were approximately $2.4 billion, including approximately $357 million in North American sales of CRB and folding cartons made from CRB.

Graphic also is the largest North American producer of coated unbleached kraft (''CUK''), another type of paperboard. Graphic operates two CUK mills with a total annual production capacity of approximately 1.3 million tons, or about 55 percent of total North American CUK supply. In 2006, Graphic had approximately $1 billion in North American sales of folding cartons made from CUK.

*B. Competitive Effects of the Proposed Merger*

1. CRB Is the Relevant Product Market

The Complaint alleges that the production and sale of CRB is a relevant product market within the meaning of Section 7 of the

Clayton Act. CRB is a type of paperboard made from recycled paper. CRB is manufactured by forming and building up multiple layers (or ''plys'') of recycled fiber, and then applying a clay coating to the top layer. The clay-coated top layer provides CRB with a smooth surface for good graphics printability. The bottom layer is left in the natural color of the recycled fiber, typically a greyish or brownish hue, depending on the type of fiber used (grey, if recycled newsprint is used; brown, if recycled corrugated boxes are used).

CRB is an intermediary product (often called a ''substrate'' in the packaging industry) that undergoes conversion into folding cartons. CRB is the preferred paperboard substrate for a wide range of relatively low-cost folding carton applications, including dry food cartons such as cereal boxes. CRB typically is the single largest cost component of such folding cartons, accounting for as much as 65 percent of the cost of the folding carton.

In folding carton applications where CRB is used, other types of paperboard are not close substitutes for CRB. Uncoated recycled boxboard (''URB'') is a lower-grade and lower-cost paperboard than CRB; it lacks the smooth coated surface that provides for good graphics printability needed in most folding carton applications.[1] Coated unbleached kraft (''CUK'') is a clay-coated paperboard made from virgin wood pulp rather than recycled paper, and has a brown-colored back. CUK has greater strength and wet-resistance than CRB and is more expensive than CRB on a price per ton basis.[2] Solid bleached sulfate (''SBS'') is another type of paperboard made from virgin wood pulp. Produced from bleached white pulp, SBS is the most expensive and highest grade of paperboard used in the folding carton industry.[3]

Because of the price and performance distinctions between CRB and the other folding carton substrates, few customers of CRB and CRB folding cartons consider URB, CUK, or SBS to be economical substitutes for CRB. Further, even where another substrate can provide acceptable performance at a similar price, few customers will switch from their existing substrate to an alternative substrate because doing so is time consuming, costly, and risky. The customer must first qualify the alternative substrate, and switching often requires modification of folding carton converting equipment and end-users' packaging lines. Customers of CRB and CRB folding cartons likely would not switch to URB, CUK, SBS, or any other potential substitutes in response to a small but significant and non-transitory increase in CRB prices to an extent that would make such a price increase unprofitable.

Based on relative price and performance for some customers, CUK would be the next closest substitute for CRB, and any switching by CRB customers to another substrate in response to a small but significant and non-transitory increase in CRB prices would primarily be to CUK. Switching by some customers to CUK would not be sufficient to make a CRB price increase unprofitable, for reasons including that the two North American producers of CUK (of which Graphic is one) are currently operating at near-capacity. However, if such switching to CUK would constrain a CRB price increase, CRB and CUK would constitute a relevant product market within the meaning of the Clayton Act, and the relevant market would be no larger than CRB and CUK.

2. North America Is a Relevant Geographic Market

As alleged in the Complaint, North America is a relevant geographic market for the supply of CRB (and for the supply of CRB and CUK) within the meaning of the Clayton Act. Due to relatively high transportation costs, unfavorable currency exchange rates, and other cost and marketing disadvantages to importing foreign CRB, CUK, or potential substitutes for CRB or CUK into North America, a small but significant and non-transitory increase in the prices of CRB produced in North America would not likely cause foreign suppliers to increase North American sales in sufficient volumes to make such a price increase unprofitable.

3. Anticompetitive Effects of the Proposed Merger

As alleged in the Complaint, the North American CRB market is highly concentrated. The proposed merger of Graphic and Altivity would further increase the level of market concentration by a substantial amount. The combination of Graphic and Altivity would control approximately 42 percent of total North American CRB supply. The market would have only three major competitors controlling a collective market share of approximately 86 percent. Using a standard concentration measure called the Herfindahl-Herschman Index (or ''HHI''), the proposed merger would substantially raise market concentration in a highly concentrated market, producing an HHI increase of approximately 788 and a post-merger HHI of approximately 2745.

Further, the CRB market is currently operating at near capacity. Because of this condition and the fact that the proposed merger would substantially increase the capacity upon which the merged firm would benefit from a price increase, the merger would create incentives for a combined Graphic-Altivity to close one or more CRB mills or to otherwise reduce CRB production capacity or output. As a result, the North American CRB market would likely experience higher CRB prices than would have prevailed absent the merger.

Even if the relevant product market were broader than CRB and included CUK, the proposed merger of Graphic and Altivity would also substantially increase concentration in the North American market. In that event, the merger would produce a single firm controlling approximately 49 percent of total North American supply of CRB and CUK (combining Graphic's 35 percent and Altivity's 14 percent), and the four major post-merger competitors would have a collective market share of approximately 94 percent. The merger would substantially raise market concentration in a highly concentrated market, producing an HHI increase of approximately 991 and a post-merger HHI of approximately 3155.

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

The Complaint alleges that supply responses from competitors or potential competitors would not likely prevent the anticompetitive effects of the proposed merger of Graphic and Altivity. As stated above, existing North American CRB producers face capacity and other operational limitations that would constrain them from significantly expanding output in response to a post-merger Graphic-Altivity increase in the price of CRB. Further, to the extent that they have any additional capacity to produce more CRB, these producers would likely find it most profitable to react to a Graphic-Altivity price increase by raising their own prices.

Foreign producers import into North America small quantities of CRB, collectively accounting for approximately 90,000 tons and three percent of total CRB sales in North America. The ability of foreign paperboard producers to expand imports into North America is limited by their commitments to markets that are more profitable than North America, as well as significant transportation costs, logistical difficulties, currency exchange differences, and other disadvantages and competitive constraints to importing into North America. Thus, the potential for expansion of foreign supply, by itself or in combination with other supply responses, would not likely be sufficient to constrain a small but significant and non-transitory North American CRB price increase.

New entry into the production and sale of CRB or CUK is costly and time consuming. Among other things, entry would require investments of over $100 million and two years or more to construct and install production equipment and facilities. New entry is not likely to occur on a timely or sufficient basis in response to a small but significant and non-transitory post-merger CRB price increase in North America.

## III. Explanation of the Proposed Final Judgment

The proposed Final Judgment requires the Defendants to divest two of Altivity's CRB mills and all associated mill assets. The mills to be divested by the Defendants are the

[1] URB is used in the construction industry to make products such as backing for gypsum wallboard. URB is also used to produce paperboard cores and tubes, such as industrial cores for winding paper and other flexible materials, commercial mailing tubes, and tubes for paper towels and toilet paper rolls.

[2] The large majority of CUK produced in North America is used to make beverage carriers (beer and soft-drink cartons) and refrigerated and frozen food packaging. CUK is valued for its high strength and resistance to wetness.

[3] SBS has a bright white finish on both sides, in contrast to CUK's brown back and CRB's grey or brown back. SBS affords the best printing surface of the paperboard grades, and is thus preferred despite its higher cost when superior printability is required. Consequently, SBS is often used to make cartons for higher-priced consumer goods, such as pharmaceuticals, cosmetics, and health and beauty products. When appropriately coated, SBS is also used in certain types of packaging that come into direct contact with food, again due to manufacturer and consumer preferences for its white appearance.

Altivity mill in Wabash, Indiana, with an annual CRB production capacity of approximately 159,000 tons, and the Altivity mill in Philadelphia, Pennsylvania, with an annual CRB production capacity of approximately 125,000 tons.

If Defendants do not divest the Wabash and Philadelphia mills within a prescribed period of time, the proposed Final Judgment provides for the Court to appoint a trustee, upon application of the United States, to accomplish the divestitures. If the trustee does not divest the Wabash and Philadelphia mills within a specified time period, the proposed Final Judgment authorizes the trustee to divest the Wabash mill and an Altivity mill in Santa Clara, California, with an annual CRB production capacity of 135,000 tons, in lieu of the Philadelphia mill.

Defendants' divestiture of the Wabash and Philadelphia mills would result in the sale of 284,000 tons of CRB production capacity, or approximately 11 percent of total North American CRB capacity, to a competitor or competitors of the merged firm. If a trustee is required to sell the Wabash and Santa Clara mills, approximately 299,000 tons of CRB production capacity, or approximately 12 percent of total North American CRB capacity, would be divested. Under the proposed Final Judgment, the two mills may be sold to a single buyer, or to two separate buyers, with the approval of the United States in its sole discretion. In addition, the 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 CRB market, and that the divestitures will successfully remedy the otherwise anticipated anticompetitive effects of the proposed merger.

In evaluating the likely competitive effects of the proposed merger, the United States considered market shares, costs of production, current and historical industry capacity and utilization, current and historical CRB market pricing, historical and projected market demand for CRB, and the relative demand elasticities of CRB and its next closest substitute, CUK. The United States concluded that allowing the merger as proposed would give the merged firm control of a sufficiently large amount of industry capacity as to create an incentive to reduce its CRB production capacity or output. The merged firm would have such an incentive because its CRB capacity would have been large enough to allow it to gain from an increase in the price of CRB by an amount that would exceed losses associated with the contraction of capacity or output necessary to generate such a price increase. The divestitures required by the proposed Final Judgment would remove this incentive by significantly reducing the merged firm's capacity and output and placing it in the hands of a competitor or competitors. As a result, the merged firm would not be able to recoup the losses associated with a contraction of capacity or output.

If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all 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 shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

Until the divestitures under the proposed Final Judgment have been accomplished, Defendants are required to comply with an Asset Preservation Stipulation and Order. Pursuant to this Stipulation and Order, the Defendants are required to preserve, maintain, and operate the divestiture mills as ongoing businesses, and prohibited from taking any action that would jeopardize the divestitures required by the proposed Final Judgment.

Finally, the proposed Final Judgment sets forth a process for and the circumstances when Defendants must notify the United States of future acquisitions by Defendants of a CRB mill or producer valued in excess of $2 million. This notification requirement would apply to transactions not otherwise subject to the reporting and waiting period requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and runs for ten years from entry of the Final Judgment. The provision is intended to ensure that any such acquisition does not undermine the benefits generated from 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 the 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 sixty (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 sixty (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, Chief, Litigation I Section, 1401 H Street, NW., Suite 4000, Antitrust Division, U.S. Department of Justice, 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 sought preliminary and permanent injunctions against the proposed merger. The United States is satisfied, however, that the divestitures required by the proposed Final Judgment will preserve competition in the market identified by the United States and that such a remedy would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, uncertainty, and the expense of a full trial on the merits of the Complaint.

## 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).[4]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's 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) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also Microsoft, 56 F.3d at 1460–62; *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).[5] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the 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 relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft*, 56 F.3d at 1459. 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. *Id.* at 1459–60. As this Court recently 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, 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). The language wrote into the statute 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.[6]

**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: March 5, 2008.

Respectfully submitted,
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[FR Doc. E8–7235 Filed 4–8–08; 8:45 am]

**BILLING CODE 4410–11–M**

[4] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for 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).

[5] 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''). 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'').

[6] 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.''); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[NOTICE: 08–026]**

### Notice of Information Collection Under OMB Review

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of information collection under OMB review.

**SUMMARY:** The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

**DATES:** All comments should be submitted within 30 calendar days from the date of this publication.

**ADDRESSES:** All comments should be addressed to Sharon Mar, Office of Information and Regulatory Affairs;