ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted an agreement to a proposed consent order from Stone Container Corporation ("Stone Container"), the largest manufacturer of linerboard in the United States. Stone Container maintains its principal place of business at 150 N. Michigan Avenue, Chicago, Illinois 60601.(1)

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The complaint alleges that during 1993 Stone Container engaged in acts and practices that, collectively and in the prevailing business environment, constituted an invitation from Stone Container to competing linerboard manufacturers to join a coordinated price increase.

This invitation to collude is an unfair method of competition, and violates Section 5 of the Federal Trade Commission Act.

In January 1993, Stone Container announced a $30 per ton price increase for all grades of linerboard, to take effect the following March. As of March 1993, several major linerboard manufacturers had failed to announce an equivalent price move, and Stone Container was forced to withdraw its price increase.

Stone Container concluded that its proposed price increase had failed to garner the requisite competitor support, in significant part because Stone Container and other firms in the industry held excess inventory. A firm that holds unwanted inventory will be tempted to shade prices in order to increase sales volume (or in any event, rivals may be concerned about this prospect). Excess inventory therefore acts as a constraint on prices and impedes coordinated interaction.(2)

Stone Container developed and implemented a strategy to invite its competitors to increase the price of linerboard. This invitation, if accepted by Stone Container's competitors, was likely to result in higher linerboard prices, reduced output, and injury to consumers. The centerpiece of this strategy was Stone Container's decision to suspend production (take "downtime") at five of its nine North American linerboard mills, and simultaneously to arrange to purchase excess inventory from several of its competitors. These unusual and costly actions to reduce and reallocate industry inventory were undertaken in full view of competing linerboard manufacturers, and with the intent of securing their support for a price increase.

During late June and early July 1993, Stone Container conducted a telephone survey of major U.S. linerboard manufacturers, asking competitors how much linerboard was available for purchase and at what price. Based upon its survey, Stone Container decided to reduce its linerboard production by approximately 187,000 tons.(3) This was the single largest voluntary reduction in output in the history of the U.S. linerboard industry. During the term of the mill downtime, Stone Container planned to purchase approximately 100,000 tons of linerboard from competitors, and to reduce its own linerboard inventories by approximately 87,000 tons.

Stone Container subsequently communicated to competitors its intention to take mill downtime and to draw down industry inventory levels, and its belief that these actions would support a price increase. The methods of communication included public statements -- press releases and published interviews. Stone Container also communicated its scheme through direct, private conversations with high level executives of its competitors that were outside of the ordinary course of business. Senior officers of Stone Container contacted their counterparts at competing linerboard manufacturers to inform them of the extraordinary planned downtime and Stone Container's plan to make substantial linerboard purchases from its competitors. In the course of these communications, Stone Container arranged and agreed to purchase a significant volume

of linerboard from each of several competitors.

Stone Container's intent was to coordinate an industry-wide price increase; there was no independent legitimate business justification for the company's actions. The unprecedented mill downtime was not a response to the company's own inventory build-up. Further, it would have been less costly for the company to self-manufacture linerboard (at its idled mills) than to purchase inventory from its competitors. Mill downtime and linerboard acquisitions were mechanisms that enabled Stone Container to be seen by competitors as incurring significant costs in order to manipulate industry supply conditions. These, together with other public and private communications, were a signal to rival firms to join in a coordinated price increase.

The Chairman and Chief Executive Officer of Stone Container has stated that the cost to the company of taking massive mill downtime was approximately $26 million, but that this investment was beneficial for the company and the linerboard industry. He has characterized the company's strategy as an "unqualified success" that helped to "jump start" an industry-wide price increase in October of 1993.

Invitations to collude have been judged unlawful under Section 2 of the Sherman Act (attempted monopolization),(4) and under the federal wire and mail fraud statutes.(5) In addition, in recent years the Commission has entered into several consent agreements in cases alleging that an invitation to collude violates Section 5 of the FTC Act. Precision Moulding Co., C-3682 (1996); YKK (U.S.A.) Inc., C-3345 (1993); A.E. Clevite, Inc., C-3429 (1993); Quality Trailer Products Corp., C-3403 (1992).

These cases illustrate that an invitation to collude may be communicated in explicit fashion. E.g., American Airlines, 743 F.2d at 1116 ("I have a suggestion for you. Raise your goddamn fares twenty percent. I'll raise mine the next morning."). Alternatively, the invitation may be implicit in the respondent's words and deeds.(6) E.g., Precision Moulding Co. (alleging that during an uninvited visit to the headquarters of a competitor, respondent informed competitor that its prices were "ridiculously low" and that the competitor did not have to "give the product away").(7) Whether explicitly or implicitly, the respondent communicates its request that the competitor increase its prices, together with the assurance that respondent will follow -- and not seek to undercut -- upward price leadership.

In the present case, it is alleged that Stone Container's course of conduct implicitly invited competing linerboard manufacturers to join a coordinated price increase. As noted above, senior officers of Stone Container allegedly communicated to competitors Stone Container's intention to reduce its linerboard production, to draw down its inventory, and simultaneously to purchase competitors' unneeded inventories. The complaint identifies additional factors that support the characterization of these actions as an invitation to collude: the mill downtime and the linerboard acquisitions were outside of the ordinary course of business; the high-level communications initiated by Stone Container were likewise extraordinary; and the entire scheme was undertaken with the purpose of securing an industry-wide price increase and without an independent legitimate business justification.

Stone Container has signed a consent agreement containing the proposed consent order. Stone Container would be enjoined from requesting, suggesting, urging, or advocating that any manufacturer or seller of linerboard raise, fix, or stabilize prices or price levels. The proposed consent order also prohibits Stone Container from entering into, adhering to, or maintaining any combination, conspiracy, agreement, understanding, plan or program with any manufacturer or seller of linerboard to fix, raise, establish, maintain, or stabilize prices or price levels.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

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(1) Stone Container operates linerboard mills in seven states. Stone Container also operates more than sixty box plants, which convert linerboard (together with corrugating medium) into corrugated containers. Linerboard is used as the inner and outer facing or liner of a corrugated box, and corrugating medium is the fluted inner material.

(2) See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); FTC v. Elders Grain, Inc., 868 F.2d 901, 906 (7th Cir. 1989); F. Scherer and D. Ross, Industrial Market Structure and Economic Performance at 268-73 (3d ed. 1990).

(3) During the third quarter of 1993, Stone Container took downtime at four linerboard mills in the United States and one in Canada for periods ranging from two weeks to two months.

(4) United States v. American Airlines, 743 F.2d 1114 (5th Cir. 1984), cert. dismissed, 474 U.S. 1001 (1985).

(5) United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990).

(6) See P. Areeda and H. Hovenkamp, Antitrust Law ¶ 1419.1d1 (1997 Supp.) ("To demand utter clarity . . . would unrealistically ignore the diverse and often veiled language of would-be conspirators.").

(7) See also United States v. General Electric Co., 1977-2 Trade Cas. (CCH) ¶ 61,659 (E.D. Pa. 1977) (General Electric adopted a price protection policy under which, if it offered a discount to a customer, it obligated itself to give the same discount retroactively to all other customers that bought the product within the previous six months. The district court recognized that, in effect, the company was offering its competitor assurances that General Electric would not engage in price discounting because of the substantial self-imposed penalty involved).