

Complaint

106 F.T.C.

IN THE MATTER OF

WEYERHAEUSER COMPANY, ET AL.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9150. Complaint, Feb. 9, 1981—Dismissal Order, Sept. 26, 1985

The Federal Trade Commission has dismissed a complaint that charged Weyerhaeuser Co.'s acquisition of a corrugating-medium mill from Menasha Corp. could substantially lessen competition in the manufacture of corrugating medium in the western U.S. The Commission based its dismissal on its findings that a number of market characteristics show that the acquisition did not lessen competition.

Appearances

For the Commission: *Dennis F. Johnson, Richard A. Wolff, Richard L. Sippel and Timothy A. Ngau.*

For the respondents: *Tefft W. Smith, James D. Sonda and George A. Joseph, Kirkland & Ellis, Chicago, Ill. and Thomas D. Yannucci, Michael E. Baumann and James D. Senger, Kirkland & Ellis, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have undertaken an acquisition of Menasha Corporation ("Menasha") that, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a)(1), and that said undertaking therefore constitutes a violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a)(1), and that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) *Corrugating medium* is unbleached paperboard used for the fluted middle layer of corrugated sheets and includes both medium pro-

duced by a semichemical process and medium produced by other processes, regardless of whether the medium contains virgin wood-pulp.

(b) The *West Coast market* is the eleven-state region West of the Rocky Mountains (the *West Coast region*). The states in the West Coast region are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. [2]

II. WEYERHAEUSER COMPANY

2. Respondent Weyerhaeuser Company ("Weyerhaeuser") is a Washington corporation with its principal offices in Tacoma, Washington. It is a major integrated forest products firm engaged in the growing and harvesting of timber and in the manufacture, distribution and sale of forest products. In 1979, it had sales of \$4.423 billion, end-of-year assets of \$4.959 billion, contribution to earnings of \$956 million and net earnings of \$512 million. It has three principal forest product business segments: (1) building materials, including lumber, softwood and hardwood plywood and veneer, particleboard, hardboard, logs, chips and timber; (2) pulp, newsprint, paper and paper products; and (3) container and packaging products, including shipping containers and cartons. Weyerhaeuser is the largest producer of corrugated containers in the United States. Respondent Weybuy, Inc. ("Weybuy"), a Wisconsin corporation, is a wholly-owned subsidiary of Weyerhaeuser with its principal offices in Tacoma, Washington.

3. At all times relevant hereto, Weyerhaeuser and Weybuy have engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Weyerhaeuser transacts business in this judicial district.

III. MENASHA CORPORATION

4. Menasha Corporation is a privately-owned Wisconsin corporation with its principal offices at Highway 41, Neenah, Wisconsin. A major segment of its business is the manufacture of corrugating medium and corrugated containers. It manufactures corrugating medium for its own corrugated container plants and is a net supplier of corrugating medium to other container manufacturers. Menasha's other paper businesses include the production of solid fiber containers, paper cores and specialty packaging materials. It produces wood flour, manufactures papermaking and converting equipment and buys and sells wastepaper. Another segment of its business is the production of various plastic products, including plastic material handling containers. Menasha also owns and manages timberlands in the Pacific Northwest and owns citrus grove acreage in California. In

1979, Menasha had total sales of \$239 million, net income of \$11 million and end-of-year assets of \$142.6 million.

5. At all times relevant hereto, Menasha engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. [3]

IV. THE ACQUISITION

6. Weyerhaeuser proposes to acquire, for \$66.3 million, the following assets and businesses of Menasha: (1) a corrugating medium mill in North Bend, Oregon; (2) a corrugated container plant in Anaheim, California; (3) three waste paper plants, two in Portland and one in Eugene, Oregon, and one sales office in Portland, Oregon; (4) a 710-acre unimproved mill site in North Bend, Oregon; and (5) current assets having an adjusted net book value of \$8.3 million. These assets comprise almost all of Menasha's operations in the western part of the United States.

7. Menasha's non-West Coast assets and liabilities have been transferred, through a pre-acquisition reorganization, to New Menasha, Inc., a new Wisconsin corporation established to carry on Menasha's non-West Coast businesses. New Menasha therefore operates substantial businesses in the eastern half of the United States.

8. Menasha has sought to restructure a tax-free pre-acquisition reorganization and has sought a ruling from the Internal Revenue Service that the acquisition will be tax-free. Consummation of the acquisition is conditioned upon receipt of a favorable tax ruling.

V. TRADE AND COMMERCE

9. The relevant product market is the production of corrugating medium.

10. The relevant geographic market for corrugating medium is the West Coast market.

11. The production of corrugating medium in the West Coast region is substantially concentrated. In 1979, the top four firms accounted for 53.27 percent of production, and the top eight firms accounted for 85.39 percent. Menasha and Weyerhaeuser ranked third and seventh, with 13.07 percent and 7.44 percent of production, respectively. The acquisition would make Weyerhaeuser the number one firm in the region, with 20.51 percent of West Coast corrugating medium production.

12. Barriers to entry into corrugating medium production are high. Prime mill sites are in short supply; capital costs are high and increasing; long lead time is required to construct a new mill; environmental regulations increase the difficulty of new entry; and the new entrant

may encounter shortages of raw materials. In addition, high capital costs require entry on a large scale and a new entrant would have to be prepared to operate below capacity until demand grows or until market share can be taken away from competitors. The increase in capital costs over the past several years also gives new mills a higher cost structure than efficient older mills, putting new mills at a comparative disadvantage until higher cost mills subsequently are built. [4]

VI. ACTUAL COMPETITION

13. Weyerhaeuser and Menasha both are actual competitors in the production of corrugating medium in the West Coast market. Menasha produces corrugated medium on the West Coast at its mill in North Bend, Oregon. Weyerhaeuser produces corrugating medium on the West Coast at its mill in Longview, Washington.

VII. EFFECTS OF THE ACQUISITION

14. The effect of the proposed acquisition may be substantially to lessen competition in the production of corrugating medium in the West Coast market, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(1) It will eliminate Menasha as a competitive entity in the production of corrugating medium in the West Coast market;

(2) It will eliminate substantial actual competition in the production of corrugating medium in the West Coast market;

(3) It will significantly increase already high levels of concentration in the West Coast market, with four-firm concentration increasing from 53.27 percent to 60.71 percent and eight-firm concentration increasing from 85.39 to 91.32 percent;

(4) It will affect the availability of corrugating medium in the West Coast market.

VIII. VIOLATIONS CHARGED

15. The effect of the acquisition of Menasha by Weyerhaeuser and Weybuy may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Initial Decision

106 F.T.C.

INITIAL DECISION BY

JOHN J. MATHIAS, ADMINISTRATIVE LAW JUDGE

OCTOBER 11, 1983

PRELIMINARY STATEMENT

The Complaint in this matter was filed on February 9, 1981, and charges that the acquisition of a corrugating medium mill located in North Bend, Oregon (the "North Bend mill") from the Menasha Corporation by respondent Weyerhaeuser Company ("Weyerhaeuser") violates Section 7 of the Clayton Act and Section 5 of the FTC Act. The Complaint further alleges that [2] corrugating medium is the relevant product market (Complaint ¶ 9), and that the 11 western states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming constitute the relevant geographic market, commonly referred to throughout this proceeding as the "West Coast." (Complaint ¶¶ 1(b), 10).

At the time the Complaint was filed, Weyerhaeuser had not yet consummated the acquisition and, therefore, the Complaint proposed enjoining the acquisition, as well as seeking other forms of relief. (Complaint at 6). Because Weyerhaeuser subsequently acquired the North Bend medium mill, complaint counsel now seek divestiture in this proceeding (CB at pp. 233 *et seq.*).

On December 12, 1980, the Commission sought to enjoin the acquisition pursuant to Section 13(b) of the FTC Act. 15 U.S.C. 53(b). An evidentiary hearing was held in the United States District Court for the District of Columbia in February 1981. Portions of that record have been stipulated into evidence in this proceeding by the parties. (Stipulation and Order of January 3, 1983).

On March 25, 1981, the District Court allowed the acquisition to go forward pursuant to the terms of a hold-separate order. Specifically, the order provided that Weyerhaeuser could own and operate the mill, pending a final determination on the merits of the acquisition in this proceeding, but that it could not (1) reduce the production of the North Bend mill without cause and prior court approval, or (2) give preference to Weyerhaeuser box shops in the distribution of the North Bend mill's production. *FTC v. Weyerhaeuser Co.*, 1981-1 Trade Cas. (CCH) ¶ 63,974 at 76,049 (D.C.D.C. 1981). (WX 1415 A-G).

The Commission appealed from the District Court's order. On September 1, 1981, the United States Court of Appeals for the District of Columbia Circuit upheld the District Court's order. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072 (D.C. Cir. 1981). During the appeal process.

which included an unsuccessful petition for rehearing *en banc* by complaint counsel, proceedings in this matter were stayed.

After affirmance by the Court of Appeals, the District Court proceeded, as initially envisioned by its order of March 25, 1981, to put in place more specific terms concerning [3] Weyerhaeuser's ownership of the mill under the hold-separate order. On January 6, 1982, the District Court entered an order that implemented its March 25 order, and that order has been in operation since that time. (WX 1415A-G).

Once the appeal process was terminated, prehearing conferences were held in this proceeding. Extensive discovery occurred between the parties. In addition, third party subpoenas to various industry members were issued on behalf of both complaint counsel and Weyerhaeuser.

The hearing on the merits in this proceeding commenced on January 17, 1983, in Washington, D.C. Complaint counsel called 10 witnesses and concluded their case on January 31, 1983, with the testimony of their expert witnesses, Mr. Charles Pidano and Dr. David Kamerschen.

Respondent Weyerhaeuser began presentation of its case on February 16, 1983, in Seattle, Washington. As part of the west coast hearings, tours of Weyerhaeuser's Longview, Washington mill complex and Longview Fibre's mill complex, also in Longview, were conducted, as was a tour of Weyerhaeuser's Portland, Oregon box plant. Weyerhaeuser called 11 witnesses on the west coast, including 5 Weyerhaeuser executives and 6 third party witnesses. The west coast hearing ended on February 23, 1983.

Weyerhaeuser resumed presentation of its case in Washington, D.C. on March 14, 1983. During this phase of the hearings, Weyerhaeuser called 6 third party fact witnesses and concluded its case with the testimony of 2 expert witnesses: Mr. Thomas Clephane and Dr. Yale Brozen.

Complaint counsel presented no rebuttal testimony or evidence. Accordingly, the hearings were concluded with the record left open for purposes of admitting certain exhibits, correction of the transcript, identifying *in camera* portions of the record, and other miscellaneous matters. The record was closed on May 16, 1983.

In all, a total of 36 witnesses testified in this proceeding, 29 through live testimony at this proceeding and 7 through the stipulated introduction of the transcript of their testimony before the District Court in the Section 13(b) trial, generating a total transcript of nearly 4,000 pages. Approximately 800 exhibits have been received into evidence. [4]

This Initial Decision is based upon the entire record, including

