



DEPARTMENT OF JUSTICE  
Antitrust Division

United States V. Flakeboard America Limited, Celulosa Arauco Y Constitución, S.A.,  
Inversiones Angelini Y Compañía, Limitada, and Sierrapine;

Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b) – (h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the U.S. District Court for the Northern District of California in United States of America v. Flakeboard America Limited, Celulosa Arauco y Constitución, S.A., Inversiones Angelini y Compañía, Limitada and SierraPine, Civil Action No. 3:14-cv-04949. On November 7, 2014, the United States filed a Complaint alleging that Flakeboard, Arauco, and SierraPine coordinated to close SierraPine’s Springfield, Oregon particleboard mill and move the mill’s customers to Flakeboard before receiving federal antitrust approval under Section 7A of the Clayton Act, 15 U.S.C. 18a, also commonly known as the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (“Section 7A” or “HSR Act”). The Complaint alleges that this coordination constituted a *per se* unlawful agreement between competitors to reduce output and allocate customers in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and a premature transfer of beneficial ownership to Flakeboard in violation of the HSR Act.

The United States and the defendants have reached a proposed settlement that eliminates the need for a trial in this case. The proposed Final Judgment, filed the same time as the Complaint, remedies the Sherman Act violation by enjoining the defendants from reaching similar anticompetitive agreements with competitors and requiring Flakeboard to disgorge \$1.15 million, the approximate amount of profits that Flakeboard illegally obtained from the closure of the Springfield mill. To resolve the HSR Act violation, the proposed Final Judgment requires the companies to pay a combined \$3.8 million in civil penalties.

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

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the U.S. Department of Justice, Antitrust Division's internet website, filed with the Court and, under certain circumstances, published in the Federal Register. Comments should be directed to Peter Mucchetti, Chief, Litigation I Section, Antitrust Division, Department of Justice, 450 Fifth Street, NW, Suite 4100, Washington, DC 20530 (telephone: 202-307-0001).

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

FLAKEBOARD AMERICA LIMITED,

CELULOSA ARAUCO Y CONSTITUCIÓN,  
S.A.,

INVERSIONES ANGELINI Y COMPAÑÍA  
LIMITADA,

and

SIERRAPINE,

*Defendants.*

Case No. 3:14-cv-4949

## COMPLAINT

The United States of America brings this civil antitrust action to challenge unlawful conduct by Flakeboard America Limited; its parent companies, Celulosa Arauco y Constitución, S.A., and Inversiones Angelini y Compañía Limitada; and SierraPine that occurred while the U.S. Department of Justice was reviewing Flakeboard's proposed acquisition of certain assets from SierraPine.

### I. NATURE OF THE ACTION

1. On January 13, 2014, Flakeboard and SierraPine executed an asset purchase agreement in which Flakeboard agreed to acquire SierraPine's particleboard mills in Springfield, Oregon, and Martell, California, and a medium-density fiberboard (MDF) mill in Medford, Oregon. The total value of the proposed transaction was approximately \$107 million, plus a variable amount for inventory.

2. SierraPine's Springfield and Martell particleboard mills competed directly with Flakeboard's particleboard mill in Albany, Oregon. Particleboard is an unfinished wood product that is widely used in countertops, shelving, low-end furniture, and other finished products. Both companies also compete in the sale of MDF, a higher-end wood product that is widely used in furniture, kitchen cabinets, and decorative mouldings.

3. The transaction exceeded thresholds established by Section 7A of the Clayton Act, 15 U.S.C. § 18a, also commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("Section 7A" or "HSR Act"). Consequently, the HSR Act required that the defendants make premerger notification filings with the Federal Trade Commission and Department of Justice and observe a waiting period before Flakeboard obtained beneficial ownership of SierraPine's business. The waiting period seeks to ensure that the parties to a proposed transaction are preserved as independent entities while the reviewing agency—here, the Department of Justice—investigates the transaction and determines whether to challenge it.

4. Instead of preserving SierraPine as an independent business, however, Flakeboard, Arauco, and SierraPine coordinated during the HSR waiting period to close

SierraPine's Springfield mill and move the mill's customers to Flakeboard. The mill was permanently shut down on March 13, 2014, months before the HSR waiting period expired. On September 30, 2014, Flakeboard and SierraPine abandoned their proposed transaction in response to concerns expressed by the Department of Justice about the transaction's likely anticompetitive effects in the sale of MDF.

5. The defendants' coordination to close Springfield and move the mill's customers to Flakeboard constituted a per se unlawful agreement between competitors to reduce output and allocate customers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and prematurely transferred operational control of SierraPine's business to Flakeboard during the HSR waiting period in violation of Section 7A of the Clayton Act, 15 U.S.C. § 18a.

## **II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE**

6. The United States brings this action under Section 4 of the Sherman Act, 15 U.S.C. § 4, seeking relief for the violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and under Section 7A of the Clayton Act, 15 U.S.C. § 18a, to recover civil penalties for the violation of the HSR Act. This Court has jurisdiction over this action and the defendants under Section 7A(g) of the Clayton Act, 15 U.S.C. § 18a(g), 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355.

7. The defendants are engaged in, and their activities substantially affect, interstate commerce.

8. The defendants have stipulated to venue and personal jurisdiction in this District.

## **III. THE DEFENDANTS**

9. Flakeboard America Limited is a Delaware corporation with its U.S. headquarters in Fort Mill, South Carolina. Flakeboard and its related entities own numerous mills in North America that produce particleboard and MDF, including a particleboard mill in Albany, Oregon.

10. Flakeboard's parent company is Celulosa Arauco y Constitución, S.A., a Chilean company headquartered in Santiago, Chile, that also produces particleboard and other products. Arauco oversees Flakeboard's operations in North America.

11. Inversiones Angelini y Compañía Limitada is a Chilean corporation headquartered in Santiago, Chile. Inversiones Angelini is a holding company and Flakeboard's ultimate parent entity, as defined by the Premerger Notification Rules, 16 C.F.R. § 800 *et seq.* Inversiones Angelini is also the ultimate parent entity of Arauco.

12. SierraPine is a California limited partnership with its headquarters in Roseville, California. SierraPine owns an operating particleboard mill in Martell, California; the closed particleboard mill in Springfield, Oregon; a closed particleboard mill in Adel, Georgia; and an operating MDF mill in Medford, Oregon.

#### **IV. THE HSR ACT AND THE ASSET PURCHASE AGREEMENT**

13. The HSR Act imposes notification and waiting-period requirements on certain transactions that result in an acquiring person holding assets or voting securities valued above certain thresholds. Section 801(c)(1) of the Premerger Notification Rules, 16 C.F.R. § 800 *et seq.*, defines "hold" to mean to have "beneficial ownership." One way that an acquiring person may prematurely obtain beneficial ownership of assets or voting securities it plans to acquire is by obtaining operational control of the acquired person's business before the end of the HSR waiting period. This conduct, sometimes referred to as "gun jumping," violates Section 7A.

14. Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), states that any person, or any officer, director, or partner thereof, who fails to comply with any provision of the HSR Act is liable to the United States for a civil penalty for each day during which the person is in violation. For the period relevant to the Complaint, the maximum civil penalty was \$16,000 per defendant, per day, according to the Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 61 Fed. Reg. 54548 (Oct. 21, 1996).

15. Flakeboard's proposed acquisition of SierraPine's mills was subject to the HSR Act. On January 22, 2014, Flakeboard's ultimate parent entity, Inversiones Angelini, and SierraPine submitted premerger notification filings to the antitrust agencies as required by

Section 7A. The HSR waiting period expired on August 27, 2014, 30 days after Flakeboard and SierraPine certified compliance with the Antitrust Division's requests for additional information.

16. Before negotiating the proposed acquisition, SierraPine had no plans to shut down the Springfield mill. But during negotiations, Flakeboard made clear that it did not intend to operate Springfield after the transaction closed. Flakeboard insisted that SierraPine close the mill because Flakeboard did not want to manage the shutdown, and its parent company, Arauco, was concerned that its reputation might be harmed if it announced the closure.

17. Accordingly, SierraPine agreed in the asset purchase agreement (APA) to "take such actions as are reasonably necessary to shut down and close all business operations at its Springfield, Oregon facility five (5) days prior to the Closing." The APA further provided that "in no event shall [SierraPine] be required to shut down or close its business operations at its Springfield, Oregon facility" until "[a]ny required waiting periods and approvals...under applicable Antitrust Law shall have expired or been terminated." Consistent with these provisions, when Flakeboard and SierraPine executed the APA, they anticipated that SierraPine would announce and implement the Springfield closure immediately after the HSR waiting period expired, but before the transaction was consummated.

## **V. THE DEFENDANTS' UNLAWFUL CONDUCT**

18. Despite the defendants' intentions under the APA, they subsequently entered into a series of agreements and took other actions during the HSR waiting period to close SierraPine's Springfield mill and move the mill's customers to Flakeboard—conduct that together constituted an unlawful agreement between competitors and prematurely transferred operational control of SierraPine's business to Flakeboard.

19. On January 14, 2014, the day after executing the APA, the defendants announced Flakeboard's proposed acquisition of SierraPine's mills. SierraPine did not announce the Springfield closure at that time because it intended to continue operating Springfield if the acquisition was not consummated and knew that employees and customers would start leaving the mill as soon as news of the planned closure became public.

20. Within two days of the transaction's announcement, however, a labor issue arose that SierraPine believed would likely require it to publicly disclose the Springfield closure earlier than planned, while the transaction was still being reviewed by the Department of Justice. SierraPine immediately informed Flakeboard that the labor issue would require them to "share the pending news on Springfield...before we have early determination on [the] HSR." The following week, SierraPine and Flakeboard discussed the Springfield closure announcement, its timing, and its ramifications. During these discussions, the companies considered the possibility that Flakeboard might waive the provision requiring SierraPine to close the mill, which they expected would avert the need to announce the Springfield closure during the HSR waiting period.

21. After consulting with Arauco, however, Flakeboard informed SierraPine that it would not waive the Springfield closure provision. As a result, the companies understood that SierraPine would announce the Springfield closure during the HSR waiting period and that the mill would close within weeks of that announcement, without regard to whether the HSR waiting period had expired and regardless of whether the underlying transaction was ultimately consummated. Consistent with this understanding, at the end of January, Flakeboard and SierraPine agreed on the content and timing of a press release announcing that Springfield would "cease operations in an orderly manner over the next few weeks" and that the mill would be "permanent[ly] clos[ed]." SierraPine issued the press release on February 4, 2014, and ceased production at Springfield on March 13, 2014, months before the HSR waiting period expired.

22. Flakeboard and SierraPine also agreed to transition Springfield's customers to Flakeboard's competing mill in Albany, Oregon. In the period leading up to the Springfield closure announcement, SierraPine gave Flakeboard competitively sensitive information about Springfield's customers—including the name, contact information, and types and volume of products purchased by each Springfield customer—and Flakeboard distributed this information to its sales employees. SierraPine also agreed to Flakeboard's request to delay the issuance of the press release from February 3 to February 4 so that Flakeboard could better position its sales personnel to contact Springfield's customers.



23. In addition, at Flakeboard's request, SierraPine instructed its own sales employees to inform Springfield customers following the Springfield closure announcement that Flakeboard wanted to serve their business and would match SierraPine's prices. Also at Flakeboard's request, SierraPine relayed assurances of future employment with Flakeboard to key SierraPine sales employees so that they would direct SierraPine's Springfield customers to Flakeboard. A top Flakeboard sales manager underscored the purpose of these employment assurances: "Once that [Springfield closure] announcement is made the 74 [million square feet of particleboard] from Springfield becomes fair game. I...want to make sure that the SierraPine sales group will be trying to direct the business to their new employer and to [Flakeboard's Albany mill]."

24. After the Springfield closure announcement, SierraPine did not compete for most of Springfield's customers from its remaining particleboard mill in Martell, California, but instead directed these customers to Flakeboard, telling them that Flakeboard could meet their needs and would honor SierraPine's prices. As SierraPine informed one Springfield customer, "We will try and transition all business to [Flakeboard's] Albany [mill]."

25. With SierraPine's assistance, Flakeboard successfully secured a substantial amount of Springfield's business, including a significant number of new customers that Flakeboard had not previously served and additional business from customers that Springfield and Flakeboard's Albany mill both previously served. The increased sales volumes from SierraPine's Springfield customers significantly increased Flakeboard's profits.

26. Although Flakeboard and SierraPine subsequently abandoned their transaction on September 30, 2014, SierraPine's Springfield mill remains closed. Virtually all of its employees have voluntarily left or been terminated. Reopening the Springfield mill would be costly and time-consuming, and SierraPine has no plans to do so.

## **VI. VIOLATIONS ALLEGED**

### **FIRST CAUSE OF ACTION (Violation of Section 1 of the Sherman Act)**

27. Plaintiff realleges and incorporates the allegations in paragraphs 1 through 26 of this Complaint.

28. Flakeboard and SierraPine are horizontal competitors in the sale of particleboard.

29. Flakeboard, Arauco, and SierraPine's coordination to close SierraPine's particleboard mill in Springfield, Oregon, and to move the mill's customers to Flakeboard constituted a contract, combination, or conspiracy in restraint of trade that was unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1. Their unlawful agreement was not reasonably necessary to achieve the procompetitive benefits of any legitimate business collaboration.

30. Flakeboard, Arauco, and SierraPine's actions to close the Springfield mill and move its customers to Flakeboard were undertaken without any assurance that their transaction would be consummated and constituted an agreement between competitors to reduce output and allocate customers that is per se unlawful under Section 1 of the Sherman Act.

**SECOND CAUSE OF ACTION**  
**(Violation of Section 7A of the Clayton Act)**

31. Plaintiff realleges and incorporates the allegations in paragraphs 1 through 26 of this Complaint.

32. Flakeboard's acquisition of SierraPine's mills was subject to Section 7A's premerger notification and waiting-period requirements.

33. Flakeboard, after contracting to acquire SierraPine's assets under the APA, exercised operational control, and therefore obtained beneficial ownership, over SierraPine's business in violation of the HSR Act by:

- (a) Coordinating with SierraPine to close the Springfield mill without regard to the HSR waiting period;
- (b) Coordinating with SierraPine to move Springfield's customers to Flakeboard during the HSR waiting period, by, among other things:
  - (i) obtaining competitively sensitive information from SierraPine, including a customer list with the name, contact information, and types and volume of products purchased by each Springfield customer, and distributing this confidential information to Flakeboard sales employees;

- (ii) delaying the Springfield closure announcement so that Flakeboard could better position its sales team to contact Springfield's customers;
- (iii) directing SierraPine sales employees to inform Springfield customers that Flakeboard sought their business and would match SierraPine's prices; and
- (iv) coordinating with SierraPine to offer assurances of future employment with Flakeboard to key SierraPine sales employees so that they would direct Springfield's customers to Flakeboard.

34. Through these actions, Flakeboard exercised operational control, and therefore obtained beneficial ownership, of SierraPine's business before the HSR waiting period expired.

35. The defendants were continuously in violation of Section 7A from on or about January 17, 2014, until the HSR waiting period expired on August 27, 2014. Thus, Inversiones Angelini, as Flakeboard's ultimate parent entity (together with Arauco and Flakeboard) and SierraPine are each liable to the United States for a maximum civil penalty of \$16,000 per day.

## **VII. REQUEST FOR RELIEF**

36. The United States requests that this Court:

- (a) adjudge and decree that Flakeboard, Arauco, and SierraPine engaged in an agreement, combination, or conspiracy that was unlawful under Section 1 of the Sherman Act;
- (b) award the United States such other relief, including equitable monetary relief, as the nature of this case may require and as is just and proper to prevent the recurrence of the alleged violation of Section 1 of the Sherman Act and to dissipate the anticompetitive effects of the violation;
- (c) adjudge and decree that the defendants violated the HSR Act and were in violation of the HSR Act during the period beginning on or about January 17, 2014, and ending on August 27, 2014;

- (d) order that Inversiones Angelini (together with Arauco and Flakeboard) and SierraPine each pay to the United States an appropriate civil penalty as provided under Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18(a)(g)(1), and 16 C.F.R. § 1.98(a); and
- (e) award the United States the costs of this action.

Dated: November 7, 2014

Respectfully Submitted,

For Plaintiff United States Of America.

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Attorneys for the United States

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**CERTIFICATE OF SERVICE**

I certify that on November 7, 2014, I electronically filed this Complaint with the Clerk of Court using the CM/ECF system. A copy has also been sent via e-mail to:

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

FLAKEBOARD AMERICA LIMITED,

CELULOSA ARAUCO Y CONSTITUCIÓN,  
S.A.,

INVERSIONES ANGELINI Y COMPAÑÍA  
LIMITADA,

and

SIERRAPINE,

*Defendants.*

Case No. 3:14-cv-4949

**COMPETITIVE IMPACT STATEMENT**

The United States of America files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this antitrust proceeding, as required by Section

2(b) of the Antitrust Procedures and Penalties Act (“APPA” or “Tunney Act”), 15 U.S.C. § 16(b)–(h).

### **I. NATURE AND PURPOSE OF THE PROCEEDING**

On November 7, 2014, the United States filed a two-count Complaint against Flakeboard America Limited; its parent companies, Celulosa Arauco y Constitución, S.A., and Inversiones Angelini y Compañía Limitada; and SierraPine for engaging in unlawful conduct while Flakeboard’s proposed transaction with SierraPine was under antitrust review.

Flakeboard and SierraPine compete in the sale of particleboard, an unfinished wood product that is widely used in countertops, shelving, and other finished products. In January 2014, Flakeboard agreed to acquire three competing mills from SierraPine—two particleboard mills in Springfield, Oregon, and Martell, California, and a medium-density fiberboard (MDF) mill in Medford, Oregon. This transaction exceeded the thresholds established by Section 7A of the Clayton Act, 15 U.S.C. § 18a, also commonly known as the Hart–Scott–Rodino Antitrust Improvements Act of 1976, as amended (“Section 7A” or “HSR Act”), and therefore required the defendants to notify the federal antitrust agencies of their proposed acquisition and observe a waiting period before Flakeboard could take control of SierraPine’s business. This waiting period seeks to ensure that the parties to a proposed transaction are preserved as independent entities while the reviewing agency—here, the Department of Justice—investigates the transaction and determines whether to challenge it.

Instead of preserving SierraPine as an independent business, however, the Complaint alleges that Flakeboard, Arauco, and SierraPine coordinated during the HSR waiting period to close SierraPine’s Springfield mill and move the mill’s customers to Flakeboard. The mill was permanently shut down on March 13, 2014, months before the HSR waiting period expired. On September 30, 2014, Flakeboard and SierraPine abandoned their proposed transaction in response to concerns expressed by the Department of Justice about the transaction’s likely anticompetitive effects in the sale of MDF. The Complaint alleges that the defendants’ conduct



constituted a per se unlawful agreement between competitors to reduce output and allocate customers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and a premature transfer of beneficial ownership to Flakeboard in violation of Section 7A of the Clayton Act, 15 U.S.C. § 18a.

The United States and the defendants have reached a proposed settlement that eliminates the need for a trial in this case. The proposed Final Judgment remedies the Sherman Act violation by enjoining Flakeboard, Arauco, and SierraPine from reaching similar anticompetitive agreements with competitors and requiring Flakeboard to disgorge \$1.15 million of ill-gotten gains, the approximate amount of profits that Flakeboard illegally obtained by coordinating with SierraPine to close the Springfield mill and move the mill's customers to Flakeboard. To resolve the HSR Act violation, the proposed Final Judgment requires Inversiones Angelini (together with Flakeboard and Arauco) and SierraPine to each pay a civil penalty of \$1.9 million, for a total of \$3.8 million.

The United States and the 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 any violations.

## **II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS**

### **A. The Defendants and the Proposed Acquisition**

Flakeboard America Limited is a Delaware corporation with its U.S. headquarters in Fort Mill, South Carolina. Flakeboard and its related entities own numerous mills in North America that produce particleboard and MDF, including a particleboard mill in Albany, Oregon, that competes against SierraPine.

Flakeboard's parent company is Celulosa Arauco y Constitución, S.A., a Chilean company headquartered in Santiago, Chile, that also produces particleboard and other products. Arauco oversees Flakeboard's operations in North America.

Inversiones Angelini y Compañía Limitada is a Chilean corporation headquartered in Santiago, Chile. Inversiones Angelini is a holding company and Flakeboard's ultimate parent entity, as defined by the Premerger Notification Rules, 16 C.F.R. § 800 *et seq.* Inversiones Angelini is also the ultimate parent entity of Arauco.

SierraPine is a California limited partnership with its headquarters in Roseville, California. SierraPine owns an operating particleboard mill in Martell, California; the closed particleboard mill in Springfield, Oregon; a closed particleboard mill in Adel, Georgia; and an operating MDF mill in Medford, Oregon.

On January 13, 2014, Flakeboard and SierraPine entered into an asset purchase agreement (APA) in which Flakeboard agreed to acquire SierraPine's Medford, Martell, and Springfield mills for approximately \$107 million, plus a variable amount for inventory. Before negotiating the APA, SierraPine had no plans to shut down the Springfield mill. During negotiations, however, Flakeboard made clear that it did not intend to operate Springfield after the transaction closed and insisted that SierraPine close the mill before the transaction was consummated. Thus, as part of the APA, SierraPine agreed to "take such actions as are reasonably necessary to shut down and close all business operations at its Springfield, Oregon facility" before the transaction closed. When the defendants executed the APA, they anticipated that SierraPine would announce and implement the Springfield mill closure immediately after the HSR waiting period expired, but before the transaction was consummated.

## **B. The Defendants' Unlawful Conduct**

Despite the defendants' intentions under the APA, they subsequently entered into a series of agreements and took other actions during the HSR waiting period to close SierraPine's Springfield mill and move the mill's customers to Flakeboard.

The Complaint alleges that on January 14, 2014, the day after executing the APA, the defendants announced the proposed transaction. At that time, SierraPine did not announce the Springfield closure because it intended to continue operating Springfield if the acquisition were not consummated and knew that employees and customers would start leaving the mill as soon as news of the planned closure became public.

Within two days of the transaction's announcement, however, a labor issue arose that SierraPine believed would likely require it to publicly announce the Springfield closure earlier than planned, while the transaction was still being reviewed by the Department of Justice. SierraPine immediately informed Flakeboard, notifying Flakeboard's president and an executive at Arauco on January 17, 2014, that "we need to have a discussion about [the] Springfield announcement" because the labor issue would force the companies to "share the pending news on Springfield" in early February "before we have early determination on [the] HSR." The following week, SierraPine and Flakeboard discussed the Springfield closure announcement, its timing, and its ramifications. During these discussions, the companies considered the possibility that Flakeboard might waive the provision requiring SierraPine to close the mill, which they expected would avert the need to announce the Springfield closure during the HSR waiting period.

After consulting with Arauco, however, Flakeboard informed SierraPine that it would not waive the Springfield closure provision. The Complaint alleges that as a result, the companies understood that SierraPine would announce the Springfield closure during the HSR waiting period and that the mill would close within weeks of that announcement, without regard to whether the HSR waiting period had expired and regardless of whether the underlying transaction was ultimately consummated. Consistent with this understanding, at the end of January, Flakeboard and SierraPine agreed on the content and timing of a press release announcing that Springfield would be permanently closed. SierraPine issued the press release on February 4, 2014, and ceased production at Springfield on March 13, 2014, months before the HSR waiting period expired.

The Complaint further alleges that Flakeboard and SierraPine agreed to transition Springfield's customers to Flakeboard's competing mill in Albany, Oregon, in several ways. First, in the period leading up to the Springfield closure announcement, SierraPine gave Flakeboard competitively sensitive information about Springfield's customers—including the name, contact information, and types and volume of products purchased by each Springfield customer—and Flakeboard distributed this information to its sales employees.

Second, SierraPine agreed to Flakeboard's request to delay the issuance of the press release from February 3 to February 4 so that Flakeboard could better position its sales personnel to contact Springfield's customers.

Third, at Flakeboard's request, SierraPine instructed its own sales employees to inform Springfield customers following the Springfield closure announcement that Flakeboard wanted to serve their business and would match SierraPine's prices.

Fourth, also at Flakeboard's request, SierraPine relayed assurances of future employment with Flakeboard to key SierraPine sales employees so that they would direct SierraPine's Springfield customers to Flakeboard.

As a result of these actions, the Complaint alleges that Flakeboard successfully secured a substantial amount of Springfield's business, including a significant number of new customers that Flakeboard had not previously served. The increased sales volumes from SierraPine's Springfield customers significantly increased Flakeboard's profits.

Today, although Flakeboard and SierraPine abandoned their proposed transaction, the Springfield mill remains closed and virtually all of its employees have voluntarily left or been terminated. Furthermore, as the Complaint alleges, reopening the Springfield mill would be costly and time-consuming, and SierraPine has no plans to do so.

## **C. The Defendants' Antitrust Violations**

### ***1. Section 1 of the Sherman Act***

Section 1 of the Sherman Act prohibits any “contract, combination...or conspiracy...in restraint of trade.” This prohibition remains in force during the premerger period: the pendency of a proposed transaction does not excuse transacting parties of their obligations to compete independently. Thus, until a transaction is consummated, a party that coordinates with its rival on price, output, or other competitively significant matters may violate Section 1.

Here, Flakeboard, Arauco, and SierraPine’s coordination to close the Springfield mill and move the mill’s customers to Flakeboard constituted an agreement between competitors that is per se unlawful. *See National Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85, 100 (1984) (holding that the per se rule ordinarily applies to agreements to reduce output); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (affirming the per se rule for horizontal market allocations). The defendants’ agreement eliminated the Springfield mill’s output and allocated the mill’s customers. This type of agreement, because of its “pernicious effect on competition and lack of any redeeming virtue,” is presumed to be unreasonable without an elaborate inquiry into its precise harm or potential business justification. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

Furthermore, no special circumstances justified the unlawful agreement or exempted it from per se treatment. This agreement was not reasonably necessary to achieve any procompetitive benefits of the transaction, and therefore does not qualify as an ancillary restraint. The agreement also was undertaken without any assurance that the transaction would be consummated.

### ***2. The HSR Act (Section 7A of the Clayton Act)***

The Complaint also alleges that Flakeboard exercised operational control over SierraPine’s business during the HSR waiting period in violation of the HSR Act. Because the payment of

civil penalties under the HSR Act is not subject to the Tunney Act,<sup>1</sup> the civil-penalties component of the proposed Final Judgment is not open to public comment. Nevertheless, this Competitive Impact Statement explains the Antitrust Division's views regarding the defendants' violations of the HSR Act.

Before the HSR Act was enacted, the DOJ and the FTC were often forced to investigate anticompetitive mergers that had already been consummated without public notice. In those situations, the agencies' only recourse was to sue to unwind the parties' merger, and the merged firm often delayed the litigation so that years elapsed before adjudication and attempted relief. During this extended time, the loss of competition continued to harm consumers, and if the court ultimately found that the merger was illegal, effective relief was often impossible to achieve.

The HSR Act addressed these problems and strengthened antitrust enforcement by providing the antitrust agencies the ability to investigate certain large acquisitions before they are consummated. In particular, the HSR Act prohibits certain acquiring parties from undertaking their acquisition before a prescribed waiting period expires or is terminated. Throughout the waiting period, the parties must remain separate and preserve their status as independent economic actors. Indeed, the legislative history of the HSR Act underscores Congress's desire that competition existing before the merger should be maintained to the extent possible pending review by the antitrust agencies and the court.

Instead of preserving SierraPine as an independent entity, however, the Complaint alleges that Flakeboard exercised operational control over SierraPine's business during the HSR waiting period in several ways. First, Flakeboard coordinated with SierraPine to close the Springfield mill without regard to the HSR waiting period. Flakeboard then coordinated with SierraPine to

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<sup>1</sup> See, e.g., *United States v. Berkshire Hathaway Inc.*, 2014-2 Trade Cas. (CCH) ¶ 78,870 (D.D.C.) (entering a consent judgment for civil penalties under the HSR Act without employing Tunney Act procedures); *United States v. Barry Diller*, 2013-1 Trade Cas. (CCH) ¶ 78,446 (D.D.C.) (same); *United States v. MacAndrews & Forbes Holdings, Inc.*, 2013-1 Trade Cas. (CCH) ¶ 78,443 (D.D.C.) (same).

move Springfield's customers to Flakeboard during the HSR waiting period. For example, as the Complaint alleges:

- Flakeboard obtained competitively sensitive information from SierraPine, including a customer list with the name, contact information, and types and volume of products purchased by each Springfield customer, and distributed that information to Flakeboard sales employees.
- Flakeboard had SierraPine delay the Springfield closure announcement so that Flakeboard could better position its sales team to contact Springfield's customers.
- Flakeboard directed SierraPine sales employees to inform Springfield customers that Flakeboard sought their business and would match SierraPine's prices.
- Flakeboard coordinated with SierraPine to offer assurances of future employment with Flakeboard to key SierraPine sales employees so that they would direct Springfield's customers to Flakeboard.

These actions undermined the purpose of the HSR Act, which is designed to allow the antitrust agencies to conduct an investigation before the parties have combined their operations or transferred significant assets.

### **III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT**

The proposed Final Judgment remedies the Sherman Act violation by requiring disgorgement and injunctive relief and addresses the HSR Act violation by requiring monetary civil penalties. Section XII of the proposed Final Judgment states that these provisions will expire ten years after entry of the Final Judgment.

## A. Disgorgement

### 1. *Disgorgement is an appropriate remedy.*

The proposed Final Judgment requires Flakeboard to disgorge the profits that it earned as a result of its unlawful agreement with SierraPine. Disgorgement is an equitable remedy that seeks to “deprive a wrongdoer of unjust enrichment.” *SEC v. Platforms Wireless Intern. Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010) (citation omitted). Disgorgement also protects the public by deterring illegal conduct. *See, e.g., SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). The amount of disgorgement “should include all gains flowing from the illegal activities,” and “need be only a reasonable approximation of profits causally connected to the violation.” *Platforms Wireless*, 617 F.3d at 1096 (internal quotation marks and citations omitted).

In *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 638–41 (S.D.N.Y. 2011), the court held that the government may seek disgorgement in antitrust suits brought (like this one) under the Sherman Act. The court in *Keyspan* concluded that disgorgement under the Sherman Act was within a district court’s inherent equitable powers and fully consistent with “established principles of antitrust law.” *Id.* at 639–40. In reaching this conclusion, the court observed that “there appear[ed] to be little disagreement among commentators about the propriety of disgorgement as an antitrust remedy,” citing to the leading antitrust law treatise’s conclusion that “equity relief may include, where appropriate, the disgorgement of improperly obtained gains.” *Id.* at 640 (quoting Areeda & Hovenkamp, *Antitrust Law* ¶ 325a (3d ed. 2007)).

Furthermore, both the Ninth Circuit and this Court have affirmed the district court’s authority to award disgorgement to governmental entities enforcing federal statutory provisions. *See, e.g., First Pac. Bancorp*, 142 F.3d at 1191–92 (authorizing disgorgement for violations of the securities laws); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1159–60 (9th Cir. 2010) (authorizing disgorgement under the FTC Act); *FTC v. Silueta Distribs.*, 1995 WL 215313, at \*7–8 (N.D. Cal. Feb. 24, 1995) (same). And the Ninth Circuit has emphasized the need for “broad equity powers



to enforce the antitrust laws.” *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 229 (9th Cir. 1978).

**2. *Disgorgement is appropriate in this case.***

Here, disgorgement is necessary to ensure that Flakeboard is not unjustly enriched by the profits that it earned by coordinating with SierraPine to close the Springfield mill and move the mill’s customers to Flakeboard. As the Complaint alleges, Flakeboard secured a substantial amount of Springfield’s business for its Albany mill, including new customers that Albany had not previously served and additional sales from customers that were previously purchasing from both mills. From this business, Flakeboard earned approximately \$1.15 million in illegally obtained profits during the six-month period leading up to this settlement, which is equal to the disgorgement amount required by the proposed Final Judgment.

Disgorgement is also appropriate here because the injunctive relief that would most likely restore competition—requiring the mill to be reopened—is impractical. As alleged in the Complaint, the Springfield mill has been closed for several months and virtually all of its employees have either left the mill or been terminated. Furthermore, in this case, no other remedy would be as effective to fulfill the goal of the Sherman Act to “prevent and restrain” antitrust violations. 15 U.S.C. § 4. Disgorgement will deter Flakeboard and others from participating in anticompetitive conduct in the context of a pending transaction, regardless of whether the transaction is subject to the HSR Act.

**B. Injunctive Provisions**

**1. *Prohibited conduct***

Section VII.A of the proposed Final Judgment is designed to prevent future Sherman Act violations during a pending transaction, regardless of whether the transaction is subject to the HSR Act. Under this provision, Flakeboard, Arauco, and SierraPine may not reach agreements while a transaction is pending that affect price or output for competing products in the United States or that allocate markets or customers. The prohibited agreements also include those

involving disclosure of competitively sensitive information, except as allowed in Section VIII, or the closure of a production facility that produces a competing product without giving prior written notice to and obtaining written approval from the United States. Although an agreement to close a production facility before a transaction is consummated may be permissible under certain circumstances, this notice-and-approval provision ensures that, in light of the defendants' conduct, they will not take additional actions that reduce competition or interfere with a potential antitrust review.

## ***2. Permitted conduct***

Section VIII of the proposed Final Judgment identifies conduct that is permitted by the Final Judgment. Sections VIII.A and VIII.B ensure that the decree will not be interpreted to forbid certain "conduct of business" covenants that are common in merger agreements. For example, Section VIII.A allows agreements requiring a seller to operate its business in the ordinary course of business. And Section VIII.B allows for "material adverse change" provisions, which give the acquiring firm certain rights to prevent a to-be-acquired firm from materially changing how it conducts its business. These common provisions are intended to protect a transaction's value and prevent a to-be-acquired firm from wasting assets.

Section VIII.C recognizes a narrow exception to Section VII.A.3's prohibition on exchanging competitively sensitive information. As a general rule, competitors should not obtain prospective, customer-specific price information before consummating a transaction because it could be used to harm competition if the transaction is abandoned. Nevertheless, a prospective acquirer may need information about pending contracts to properly value a business during the due-diligence process.

Section VIII.E clarifies that the proposed Final Judgment does not prohibit the defendants from entering into buyer-seller agreements that would have been lawful independent of the proposed transaction.

### **3. Compliance and inspection**

Sections IX and X of the proposed Final Judgment establish procedures to ensure that the defendants comply with the antitrust laws and the terms of the Final Judgment. Section IX requires Flakeboard and SierraPine to maintain an antitrust compliance program, which includes naming an antitrust compliance officer responsible for supervising compliance with the Final Judgment. The compliance officer must distribute a copy of the Final Judgment to the company's officers, directors, and any other employees responsible for mergers and acquisitions, and must provide a copy of the Final Judgment to any potential partners to a merger or acquisition. In addition, Arauco must distribute a copy of the Final Judgment to each of its officers, directors, and any other employees responsible for any business in the United States.

To further ensure that the defendants are complying with the Final Judgment, Section X grants the DOJ access, upon reasonable notice, to the defendants' records and documents relating to matters contained in the Final Judgment. The defendants must also make their personnel available for interviews or depositions regarding such matters. In addition, upon request, the defendants must prepare written reports relating to matters contained in the Final Judgment.

#### **C. Civil Penalties under the HSR Act**

Under Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), any person who fails to comply with the HSR Act is liable to the United States for a civil penalty of not more than \$16,000 for each day that the person is in violation of the Act.<sup>2</sup> The Complaint alleges that the defendants were in violation of the HSR Act from on or about January 17, 2014, when Flakeboard, Arauco, and SierraPine began coordinating on the closure of the Springfield mill, until the expiration of the statutory waiting period on August 27, 2014—a period of 223 days.

Although the United States was prepared to seek the maximum civil penalty of \$3.568 million for both Inversiones Angelini (together with Arauco and Flakeboard) and SierraPine at

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<sup>2</sup> *Id.*; see also Pub. L. 104-134 § 31001(s) (Debt Collection Improvement Act of 1996); 16 C.F.R. § 1.98(a) (increasing maximum penalty to \$16,000 per day).

trial, other factors led to acceptance of \$1.9 million each as an appropriate penalty for settlement purposes. In particular, a lower penalty is appropriate because Flakeboard and SierraPine cooperated with the United States during its investigation by voluntarily producing evidence of their unlawful premerger conduct and, despite the daily accruing fine, entering into a timing agreement that resulted in an orderly production of documents relating to their proposed acquisition.

#### **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 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 AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT**

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA unless the United States has withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be

considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Peter J. Mucchetti  
Chief, Litigation I Section  
Antitrust Division  
United States Department of Justice  
450 Fifth Street, N.W., Suite 4100  
Washington, D.C. 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 the defendants. The United States is satisfied, however, that the proposed relief, including the disgorgement of profits and payment of civil penalties, is an appropriate remedy in this matter. The proposed relief should deter the defendants and others from engaging in similar conduct. Furthermore, given the facts of this case, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty 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 also United States v. U.S. Airways Group, Inc.*, No. 13-cv-1236 (CKK), 2014-1 Trade Cas. (CCH) ¶ 78, 748, 2014 U.S. Dist. LEXIS 57801, at \*16–17 (D.D.C. Apr. 25, 2014) (same); *see generally United States v. SBC Commc’ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (describing the public-interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at \*3 (D.D.C. Aug. 11, 2009) (noting that the court’s review of a consent judgment is limited and only inquires “into whether the government’s determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.”).<sup>3</sup>

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<sup>3</sup> The 2004 amendments substituted “shall” for “may” in directing relevant factors for courts 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).

As the D.C. 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) (quoting *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); *InBev*, 2009 U.S. Dist. LEXIS 84787, at \*3. 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 [e]nsuring 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).<sup>4</sup> 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 U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at \*16 (noting that a court should not reject the

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<sup>4</sup> *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’”).

proposed remedies because it believes others are preferable); *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); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at \*18 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461)); *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; *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at \*18 (noting that the court must simply determine whether there is a factual foundation for the government’s decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at \*20 (“the ‘public interest’ is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged”). Because the “court’s authority to review the decree depends



entirely on the government’s exercising its prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60. As the 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 using 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); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at \*20 (noting that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language captured Congress’s intent when it enacted the Tunney Act in 1974, as Senator Tunney explained: “The 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 Sen. 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.<sup>5</sup> A court can make

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<sup>5</sup> *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.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, \*22 (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, 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.”).

its public-interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at \*21.

**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.

Respectfully submitted,

/s/ Amy R. Fitzpatrick  
Amy R. Fitzpatrick  
David Altschuler  
Bindi Bhagat  
Scott I. Fitzgerald

Attorneys for the United States  
Antitrust Division  
U.S. Department of Justice  
450 Fifth Street, N.W., Suite 4100  
Washington, D.C. 20530

Dated: November 7, 2014.

**CERTIFICATE OF SERVICE**

I certify that on November 7, 2014, I electronically filed this Competitive Impact Statement with the Clerk of Court using the CM/ECF system. A copy has also been sent via e-mail to:

Counsel for Flakeboard America Limited,  
Celulosa Arauco y Constitución, S.A., and  
Inversiones Angelini y Compañía Limitada:

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# **EXHIBIT A**

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

FLAKEBOARD AMERICA LIMITED,

CELULOSA ARAUCO Y CONSTITUCIÓN,  
S.A.,

INVERSIONES ANGELINI Y COMPAÑÍA  
LIMITADA,

and

SIERRAPINE,

*Defendants.*

Case No. 3:14-cv-4949

**[PROPOSED] FINAL JUDGMENT**

WHEREAS, Plaintiff, United States of America, filed its Complaint on November 7, 2014, alleging that Defendants violated Section 7A of the Clayton Act, 15 U.S.C. § 18a, and that Flakeboard America Limited, Celulosa Arauco y Constitución, S.A., and SierraPine violated Section 1 of the Sherman Act, 15 U.S.C. § 1, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants, without admitting any wrongdoing, agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Defendants have represented to the United States that the actions and conduct restrictions 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 provisions contained below;

NOW THEREFORE, before any testimony is taken, and without trial or adjudication of any issue of fact or law, and upon the 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 claims upon which relief may be granted against Flakeboard, Arauco, and SierraPine under Section 1 of the Sherman Act, 15 U.S.C. § 1, and against all Defendants under Section 7A of the Clayton Act, 15 U.S.C. § 18a.

### **II. DEFINITIONS**

A. “Arauco” means Defendant Celulosa Arauco y Constitución, S.A., a Chilean company; its successors and assigns; and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. “Agreement” means any contract, agreement, or understanding, formal or informal, written or unwritten.

C. “Competing Product” means any product that any Defendant offers for sale in the United States that is primarily used for the same purpose as any product that any other party to a proposed Transaction with any Defendant offers for sale in the United States.

D. “Defendants” mean Flakeboard America Limited, Celulosa Arauco y Constitución, S.A., the Ultimate Parent Entity, and SierraPine.

E. “Flakeboard” means Defendant Flakeboard America Limited, a Delaware corporation with its headquarters in Fort Mill, South Carolina; its successors and assigns; and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

F. “SierraPine” means Defendant SierraPine, a California limited partnership with its headquarters in Roseville, California; its successors and assigns; and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

G. “Negotiation and Interim Period” means the period between the commencement of negotiations with respect to an offer to enter into a Transaction, and the date when negotiations are abandoned or when any resulting Transaction is consummated or abandoned.

H. “Person” means any individual, partnership, firm, corporation, association, or other legal or business entity.

I. “Production Facility” means any mill, plant, or other asset that manufactures products.

J. “Transaction” means any Agreement to acquire any voting securities, assets, or non-corporate interests, form a joint venture, settle litigation, or license intellectual property with any person offering a Competing Product.

K. “Ultimate Parent Entity” means Defendant Inversiones Angelini y Compañía Limitada, a holding company with its headquarters in Santiago, Chile, and its successors and assigns.

### **III. APPLICABILITY**

This Final Judgment applies to Flakeboard, Arauco, the Ultimate Parent Entity, and SierraPine as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise. This Court orders the relief in Section IV of this Final Judgment under Section 7A of the Clayton Act, 15 U.S.C. § 18a. All other relief in this Final Judgment is to remedy the violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

#### **IV. CIVIL PENALTY UNDER SECTION 7A OF THE CLAYTON ACT**

Within 30 days of the entry of this Final Judgment, Flakeboard, Arauco, and the Ultimate Parent Entity must pay \$1.9 million to the United States, and within 60 days of the entry of this Final Judgment, SierraPine must pay \$1.9 million to the United States, for a total of \$3.8 million.

#### **V. DISGORGEMENT TO REMEDY THE VIOLATION OF SECTION 1 OF THE SHERMAN ACT**

Within 30 days of the entry of this Final Judgment, Flakeboard must pay \$1.15 million in disgorgement to the United States.

#### **VI. PAYMENT OF CIVIL PENALTY AND DISGORGEMENT**

A. The payments specified in this Final Judgment must be made by wire transfer. Before making any transfers a Defendant must contact Janie Ingalls of the Antitrust Division's Antitrust Documents Group, at (202) 514-2481, for wire-transfer instructions.

B. In the event of a default in payment, interest at the rate of 18 percent per annum will accrue thereon from the date of default to the date of payment.

#### **VII. PROHIBITED CONDUCT**

A. Flakeboard, Arauco, and SierraPine may not enter into, maintain, or enforce any Agreement with an acquiring or to-be-acquired Person that, during the Negotiation and Interim Period of a Transaction:

1. fixes, raises, sets, stabilizes, or otherwise establishes price or output for any Competing Product;
2. moves, migrates, or otherwise allocates customers for any Competing Product;
3. discloses or seeks the disclosure of information about customers, prices, or output for any Competing Product, except as such disclosures may be permitted in subsection VIII.C or to the extent that such information is publicly available at the time disclosure occurs; or



4. closes a Production Facility that produces a Competing Product without prior written notice to and written approval from the United States.

### **VIII. PERMITTED CONDUCT**

Nothing in this Final Judgment prohibits Defendants from:

- A. entering into an Agreement that a party to a Transaction must continue operating in the ordinary course of business;
- B. entering into an Agreement that a party to a Transaction forego conduct that would cause a material adverse change in the value of to-be-acquired assets;
- C. before closing or abandoning a Transaction, conducting or participating in reasonable and customary due diligence, though no disclosure covered by this section is permitted unless (1) the information is reasonably related to a party's understanding of future earnings and prospects; and (2) the disclosure occurs under a non-disclosure agreement that (a) limits use of the information to conducting due diligence and (b) prohibits disclosure of the information to any employee of the Person receiving the information who is directly responsible for the marketing, pricing, or sales of the Competing Products;
- D. disclosing confidential business information related to Competing Products, subject to a protective order, in the context of litigation or settlement discussions; or
- E. entering into an Agreement where either one of the Defendants and the other party to the Transaction are or would be in a buyer/seller relationship and the Agreement would be lawful in the absence of the planned acquisition.

### **IX. ANTITRUST COMPLIANCE PROGRAM**

- A. Flakeboard and SierraPine must each maintain an antitrust compliance program that designates, within 30 days of entry of this order, an Antitrust Compliance Officer with responsibility for achieving compliance with this Final Judgment. The Antitrust Compliance Officer must, on a continuing basis, supervise the review of

current and proposed activities to ensure compliance with this Final Judgment. The Antitrust Compliance Officer must also do the following:

1. Distribute within 45 days of entry of this Final Judgment, a copy of this Final Judgment to each current officer and director, all sales managers and supervisors, and each employee, agent, or other person who, in each case, has responsibility for or authority over mergers and acquisitions; and for Flakeboard's Antitrust Compliance Officer, a copy of this Final Judgment to each current officer and director of Arauco;
2. distribute in a timely manner a copy of this Final Judgment to any officer, director, employee, or agent who succeeds to a position described in Section IX.A.1;
3. obtain within 60 days from the entry of this Final Judgment, and annually thereafter, and retain for the duration of this Final Judgment, a written certification from each person designated in Sections IX.A.1 & 2 that he or she (a) has received, read, understands, and agrees to abide by the terms of this Final Judgment; (b) understands that failure to comply with this Final Judgment may result in conviction for criminal contempt of court; and (c) is not aware of any violation of the Final Judgment; and
4. provide a copy of this Final Judgment to each potential partner to a merger or acquisition before the initial exchange of a letter of intent, definitive agreement, or other agreement of merger.

B. Within 60 days of entry Flakeboard and SierraPine must each certify to Plaintiff that it has (1) designated an Antitrust Compliance Officer, specifying his or her name, business address, and telephone number; and (2) distributed the Final Judgment in accordance with Section IX.A.1.

C. For the term of this Final Judgment, on or before its anniversary date, Flakeboard and SierraPine must each file with Plaintiff an annual statement as to the fact and manner of its compliance with the provisions of Sections VII and IX.

D. Within 45 days of entry of this Final Judgment, Arauco must distribute a copy of this Final Judgment to each current officer and director, sales manager and supervisor, and employee, agent, or other person who, in each case, has responsibility for any business in the United States.

E. If any director, officer, or Antitrust Compliance Officer of any of the Defendants learns of a violation of this Final Judgment, that Defendant must within three business days take appropriate action to terminate or modify the activity so as to assure compliance with this Final Judgment, and must notify the Plaintiff of the violation within 10 business days.

## **X. RIGHT TO INSPECTION**

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

1. access during Defendants' office hours to inspect and copy or at Plaintiff's option, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and
2. to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews are subject to the reasonable

convenience of the interviewee and without restraint or interference by Defendants.

B. Upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants must 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 may be divulged by the Plaintiff 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 a Defendant furnishes information or documents to Plaintiff, the Defendant represents and identifies 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 the Defendant marks 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 10 calendar days' notice before divulging that material in any legal proceeding (other than a grand jury proceeding) to which the Defendant is not a party.

## **XI. 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 any violations of its provisions.

**XII. EXPIRATION OF FINAL JUDGMENT**

Unless extended by this Court, this Final Judgment expires ten years from the date of its entry.

**XIII. COSTS**

Each party must bear its own costs of this action.

**XIV. PUBLIC-INTEREST DETERMINATION**

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

Dated: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE