companies, it is well-respected by the medical community and has a significant capital base to support its proposed acquisition of the Retavase assets. In the event that Roche does not sell these assets to Centocor or another Commission-approved purchaser within ninety days of the Order's becoming final, a ''crown jewel'' provision in the Order permits a Commission-appointed trustee to divest the world-wide rights to Retavase.

The proposed Order also effectively remedies the proposed transaction's anticompetitive effects in the workplace DAT reagent market by requiring Roche to divest BM's DAT reagents and grant a non-exclusive license to all other Cloned Enzyme Donor Immuno-Assay (''CEDIA'') reagents in the United States, including, but not limited to, reagents used for therapeutic drug monitoring, thyroid analysis, testing for anemia, and hormone testing. In the event Roche fails to divest and license these assets within two months of the Order's becoming final, the proposed Order contains a ''crown jewel'' provision that allows a Commission-appointed trustee to divest all of BM's CEDIA reagents.

The proposed Order also requires Roche to provide substantial assistance to each of the acquirers so that they can each compete effectively in the relevant markets. First, Roche must contract manufacture a supply of the divested products for the time period it takes for each acquirer to establish its own manufacturing processes and obtain its own FDA approvals to manufacture and sell Retavase and DAT reagents in the United States. Second, Roche must provide technical assistance and advice to assist both acquirers in their efforts to begin manufacturing the divested products. Finally, the Order provides the Retavase acquirer and the reagent acquirer the ability to hire former BM employees associated with the marketing or sales of Retavase or CEDIA reagents, respectively.

In order to facilitate the smooth transfer of assets and ensure that the acquirers will get the assistance necessary to independently manufacture the products, the proposed Order also provides for the appointment of an interim trustee. The interm trustee will serve until the acquirers have received all necessary FDA approvals to manufacture and sell the divested products.

Because it is becoming essential for a DAT reagents supplier to also provide its customers with DAT analyzers, the proposed Order requires Roche to terminate BM's exclusive distribution arrangement with Hitachi Ltd., and to inform Hitachi, within ten days of divesting the DAT reagents, that, as to the reagent acquirer, it waives all exclusivity provisions of BM's agreement with Hitachi.

In addition, because of pending litigation between Genentech and BM, the proposed Order requires Roche to provide: (1) Full access to, and cooperation from, former BM employees and agents who have knowledge about the disputed patents; (2) access to any documents that may be relevant to the dispute; and (3) reimbursement for half of all the legal expenses relating to the dispute. In addition, Roche is prohibited from disclosing or otherwise making available to Genentech any information relating to the patent dispute without the prior written consent of the Retavase acquirer.

The Order also requires Roche to provide to the Commission a report of compliance with the divestiture and licensing provisions of the Order within sixty (60) days following the date the Order becomes final, and every ninety (90) days thereafter until Roche has completed the divestitures and licensing. The Order also requires Roche to notify the Commission at least thirty (30) days prior to any change in the structure of Roche that may affect compliance with the Order.

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.

Donald S. Clark,

Secretary.

[FR Doc. 98–5534 Filed 3–3–98; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

[File No. 951–0006]

Stone Container Corp.; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before May 4, 1998.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Michael Antalics, FTC/S–2627, Washington, DC 20580. (202) 326–2821.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's rules of practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with the accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for February 25, 1998), on the World Wide Web, at ''http://www.ftc.gov/os/actions/htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H–130, Sixth Street and Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–3627. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's rules of practice (16 CFR 4.9(b)(6)(ii)).

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

[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.

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 joint 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

[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).

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.

Donald S. Clark,

Secretary .

Concurring Statement of Commissioners Robert Pitofsky, Sheila F. Anthony and Mozelle W. Thompson

In the Matter of: Stone Container Corporation, File No. 951 0006.

The Commission recognizes that in invitation to collude cases, a fundamental question is whether the alleged ''invitation'' was merely legitimate business conduct. Our colleague, Commissioner Orson Swindle, dissents in this matter on grounds that Stone Container Corporation's behavior in curtailing its own production, and simultaneously purchasing excess inventory from its competitors, was conduct that did not clearly lack an ''independent legitimate business reason.'' As the Analysis To Aid Public Comment emphasizes, however, it would have been more economical for Stone Container to keep its plants open than to purchase inventory from competitors, and competitors would have recognized that fact. This conduct and other statements by Stone Container made clear that its goal was to manipulate industry supply conditions to invite a coordinated price increase. It is for these reasons that we accept the consent agreement for public comment.

While there may be some difference of view on the facts in this matter, we agree with Commissioner Swindle that there can be no implied invitation to collude when the actions that amount to the invitation are justified by business considerations.

Dissenting Statement of Commissioner Orson Swindle

In the Matter of: Stone Container Corporation, File No. 951 0006.

I have voted against the Commission's acceptance of a consent agreement in this case because I do not believe that the facts unearthed and presented in the investigation support the allegation that Stone Container (''Stone'') invited its competitors ''to join a coordinated price increase.''

The Commission's proposed complaint alleges that Stone took several actions in the second half of 1993 that amounted to an invitation to collude on linerboard prices. According to the complaint, Stone's invitation-to-collude strategy consisted at the outset of a plan ''to take downtime as its plants, to reduce its production by approximately 187,000 tons, and contemporaneously to purchase 100,000 tons of linerboard from competitors and to reduce Stone Container's inventory by 87,000 tons.'' To carry out this plan, Stone allegedly'' conducted a telephone survey of major U.S. linerboard manufacturers, asking competitors how much linerboard was available for purchase and at what price.''

Pursuant to its scheme, Stone's ''[s]enior officers''—whose role in this regard is alleged to have been ''outside the ordinary course of business''—''contacted their counterparts at competing linerboard manufacturers to inform them of the extraordinary planned downtime and linerboard purchases.'' Stone ''arranged and agreed to purchase a significant volume of linerboard from each of several competitors'' and is alleged to have ''communicated to competitors''—both in private conversations and through public statements—''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 complaint asserts that Stone's communications with its competitors on these subjects were made with ''[t]he specific intent . . . to coordinate an industry wide price increase'' and that Stone's actions ''were undertaken with anticompetitive intent and without an independent legitimate business reason'' (emphasis added).

I have quoted at length from the proposed complaint because it (together with the Analysis To Aid Public Comment) is the document in which the Commission sets forth its theory of violation and, to the extent permissible, the evidence underlying that theory. As I see it, the acts and communications of Stone alleged in the complaint, as well as other evidence in this case, do not sufficiently support the Commission's theory of violation.

As 1993 approached, Stone and other firms in the linerboard industry had been and were experiencing financial difficulties, including excess production capacity, alleged excess inventory, and depressed price levels. It should hardly be surprising that Stone chose mill downtime and inventory reductions as a normal competitive response to general industry conditions. ''Extraordinary'' as Stone's downtime and inventory purchases may have been, it is difficult to second-guess the rationality of those actions from a business perspective. The assertion in the complaint that Stone's actions ''were undertaken with anticompetitive intent and without an independent legitimate business reason'' is a considerable stretch.[1] If senior officials of Stone had been more circumspect in their statements—particularly their public statements—about Stone's reasons for its own downtime and purchase decisions, I doubt that the Commission would have considered this matter a worthy target of our scarce resources.

The Commission's Analysis To Aid Public Comment discusses explicit and implicit invitations to collude and places the present situation in the latter category. I agree with that categorization as far as it goes, since no one from Stone is alleged to have contacted a competitor and baldly suggested a price increase or an output reduction (and thus this case is not a replay of American Airlines). Instead, it is the totality of Stone's conduct—when judged against the backdrop of Stone's remarks concerning low prices, excess capacity, and possibly inventory overhang—that has led the Commission to conclude that Stone implicitly invited its competitors to collusively raise prices.[2] I am unable to place on

[1] In their Concurring Statement, my colleagues rely on the Analysis To Aid Public Comment in this case for the proposition that ''it would have been more economical for Stone Container to keep its plants open than to purchae inventory from competitors . . .'' With all due respect, it is precisely the truth of that assertion that I find insufficiently supported by the evidence.

[2] The Analysis To Aid Public Comment cites *Precision Moulding Co., Inc.*, Docket No. C–3682, as an example of an implicit invitation to collude. According to the Analysis, Precision Moulding

Stone's actions (and its explanations of them) the sinister characterization that would permit me to condemn its otherwise justifiable actions. I am concerned that the Commission's decision in this case may deter corporate officials from making useful public statements (*e.g.*, in speeches to investors or presentations to securities analysts) that candidly address industry conditions, individual firms' financial situations, and other important subjects.

I respectfully dissent.

[FR Doc. 98–5535 Filed 3–3–98; 8:45 am]

BILLING CODE 6750–01–M

GENERAL SERVICES ADMINISTRATION

[GSA Bulletin FPMR D–246]

Public Buildings and Space

To: Heads of Federal agencies

Subject: Assessment of fees and recovery of costs for antennas of Federal agencies and public service organizations

1. *What is the Purpose of This Bulletin?*

This bulletin provides all Federal agencies with general guidelines for assessing antenna placement fees on other Federal agencies, on State and local government agencies, and on charitable, public service/public safety, and non-profit organizations. State and local government agencies, charitable, public service/public safety, and non-profit organizations are referred to as public service organizations throughout this bulletin. (The use of the phrase, ''public service organization'' is not intended to include Federal organizations or agencies, even though such organizations may also provide public services.)

While there may be other Federal agency specific statutory authorities which permit landholding agencies to perform certain tasks, studies, surveys or analysis when making their property available to other Federal agencies and the general public, this guidance is intended to identify several typical costs and common authorities.

This bulletin is not a grant of authority, but merely a source of informational guidance, further it is recommended that Executive departments and agencies consult their legal counsel prior to instituting any action relating to this bulletin.

''informed [its] competitor that its prices were 'ridiculously low' and that the competitor did not have to 'give' the product away.' '' I do not consider Stone's conduct and language to have communicated a message nearly as pointed as that conveyed by Precision Moulding.

2. When Does This Bulletin Expire?

This bulletin expires June 30, 1999, unless sooner canceled or revised.

3. What is This Bulletin's Background?

a. The use of wireless telecommunications equipment has been increasing and is expected to continue in the future. The Telecommunications Act of 1996 recognizes the increasing importance of wireless telecommunications services and provides guidance for the rapid deployment of new telecommunications technologies.

b. The General Services Administration (GSA), Office of Governmentwide Policy (OGP) has taken the leadership role concerning the Federal Government's policy on placement of wireless telecommunications equipment on Federal real property.

c. Based on the input from a working group representing several landholding Federal agencies, the GSA–OGP issued revised guidance on facilitating commercial access to Federal real property. The Associate Administrator for the OGP signed GSA Bulletin FPMR D–242, entitled ''Placement of Commercial Antennas on Federal Property,'' on June 11, 1997, and published it in the **Federal Register** on June 16, 1997 (62 FR 32611).

d. This bulletin is the result of the further efforts of the working group to provide guidance to Executive departments and agencies for assessing fees for antennas and other related equipment, which are dependent in whole or in part on the Federal spectrum rights for their transmissions. This guidance is generally focused on the placement of antennas belonging to other Federal agencies and public service organizations. Much of this guidance may also be useful when considering locating antennas and assessing fees for antenna placements on Federal property for other types of wireless telecommunications transmissions.

e. The Federal Communications Commission regulates the conditions and procedures under which communications entities offer and operate domestic wireless communications. This bulletin only is intended to serve as guidelines on the assessment of fees and recovery of costs for locating antennas of other Federal agencies and certain public service organizations on Federal agency property.

f. Other Federal agencies, independent regulatory commissions and agencies are encouraged to use these guidelines to the extent consistent with their missions and policies.

(1) GSA—In accordance with the Federal Property and Administrative Services Act of 1949, the Administrator is authorized and directed to charge for all space and services provided.

(2) Other Federal agencies are subject to their own applicable statutory authorities when providing antenna space and services to other Federal agencies and public service organizations.

g. Because of the myriad of legal authorities applicable to specific agencies, all Executive departments and agencies, and other Federal government organizations should consult their legal counsel prior to initiating any action relating to this bulletin.

4. What Action Is Required?

In the absence of other applicable authorities, Executive departments and agencies may assess fees or recover costs for services relating to antenna sites using the guidelines presented in subsections 4.a, 4.b, and 4.c of this bulletin. GSA, and Executive departments and agencies operating under a delegation of authority from GSA, will provide antenna sites and assess fees in accordance with the statutory authorities described in subsection 4.d.

a. *Under what authorities may Executive departments and agencies assess fees for antenna placements against other Executive departments and agencies?* Unless prohibited by law, regulation, or internal agency policy, Executive departments and agencies should consider using one of the legal authorities listed under subparagraphs (1), (2) or (3) below when deciding whether to assess user fees for the placement and servicing of antennas belonging to other Federal agencies.

Each of the following authorities has certain benefits or limitations, depending on the assessing agency's own programmatic needs.

For example, while an agency may be very familiar with interagency agreements under the Economy Act (discussed below), agency reimbursements under the Economy Act typically are restricted to recovering the actual costs of the assessing agency. Similarly, while authority to assess antenna siting fees pursuant to the Telecommunications Act of 1996 (discussed below) or pursuant to the Federal Property and Administrative Services Act (under a delegation of authority from GSA as discussed below) may allow agencies to assess market-based fees, unless the assessing agency has independent statutory authority to