

## IN THE MATTER OF

## STONE CONTAINER CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-3806. Complaint, May 18, 1998--Decision, May 18, 1998*

This consent order prohibits, among other things, the Illinois-based corporation from requesting, suggesting, or advocating that any manufacturer or seller of linerboard raise, fix, or stabilize prices or price levels, or engage in any other pricing action with regard to sales of linerboard to third parties. In addition, the consent order prohibits the respondent from entering into, attempting to enter into, or maintaining any combination, conspiracy, agreement or program with any manufacturer or seller of linerboard to fix, raise, establish or maintain prices, price levels, or any other pricing action.

*Appearances*

For the Commission: *Geoffrey Green, Michael Antalics and William Baer.*

For the respondent: *William Fifield, Sidley & Austin, Dallas, TX.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Stone Container Corporation, a corporation, hereinafter sometimes referred to as respondent or "Stone Container," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Stone Container Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 150 N. Michigan Avenue, Chicago, Illinois. Stone Container is the largest manufacturer of linerboard in the United States.

PAR. 2. In January 1993, Stone Container unsuccessfully attempted to increase the price for all grades of linerboard by \$30 per ton, to take effect the following March. Stone Container believed

that its attempted price increase failed in significant part because Stone Container and other firms in the industry had excess inventory.

PAR. 3. Stone Container devised a strategy to invite its competitors to increase the price of linerboard. As part of the strategy to effect a coordinated price increase, Stone Container planned to take downtime at 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.

PAR. 4. 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.

PAR. 5. Senior officers of Stone Container contacted their counterparts at competing linerboard manufacturers to inform them of the extraordinary planned downtime and linerboard purchases. In the course of these communications, Stone Container arranged and agreed to purchase a significant volume of linerboard from each of several competitors. The participation of high level executives in these communications was outside the ordinary course of business. The specific intent of Stone Container's communications with its competitors was to coordinate an industry wide price increase.

PAR. 6. During the second half of 1993, Stone Container 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 private conversations and public statements, including press releases and published interviews.

PAR. 7. The acts and practices alleged herein constitute an invitation by Stone Container to its competitors to join a coordinated price increase. The invitation, if accepted, was likely to result in higher prices, reduced output, and injury to consumers. The acts and practices of Stone Container were undertaken with anticompetitive intent and without an independent legitimate business reason.

PAR. 8. The acts and practices alleged herein are in commerce or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts and practices alleged herein could be repeated in the absence of the relief requested.

Commissioner Swindle dissenting.

## DECISION AND ORDER

The Federal Trade Commission ("the Commission") having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Stone Container Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 150 N. Michigan Avenue, Chicago, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

## I.

For purposes of this order, the following definitions shall apply:

A. "*Respondent*" means Stone Container Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Stone Container

Corporation, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. "*Linerboard*" means any grade of paperboard suitable for use in the production of corrugated containers, but excludes corrugating medium.

C. "*Commission*" means the Federal Trade Commission.

## II.

*It is ordered*, That respondent, directly or indirectly, through any corporation, subsidiary, division, employee, agent or other device, forthwith cease and desist from:

A. Requesting, suggesting, urging, or advocating that any manufacturer or seller of linerboard raise, fix, or stabilize prices or price levels, or engage in any other pricing action with regard to sales of linerboard to third parties.

B. Entering into, attempting to enter 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, or engage in any other pricing action with regard to sales of linerboard to third parties.

Provided, that the following conduct by respondent as and when conducted in the ordinary course of business shall not, of itself, constitute a violation of paragraph II of this order: (1) agreeing to purchase linerboard from, or sell linerboard to, a competitor; (2) negotiating or agreeing upon the price at which linerboard will be sold to a competitor; (3) negotiating or agreeing upon the price at which linerboard will be purchased from a competitor; and (4) discussing the financial condition of Stone Container Corporation, or the condition of or the prospects for the market for linerboard, with persons who are not competitors, such as non-integrated customers, investors, shareholders, securities analysts, and news and financial reporters.

## III.

*It is further ordered*, That respondent shall:

A. Within thirty (30) days after the date on which this order becomes final, mail by first class mail a copy of this order, to all of its directors and officers, and to all of its management employees with responsibility for the manufacture, purchase and/or sale of linerboard (hereinafter referred to as "Management Employees");

B. For a period of three (3) years after the date on which this order becomes final, mail by first class mail a copy of this order to each person who becomes a director, officer, or Management Employee, within thirty (30) days of the commencement of such person's employment or affiliation with respondent; and

C. For a period of three (3) years after the date on which this order becomes final, require each of its directors, officers, and Management Employees to sign and submit to respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject Stone Container Corporation to penalties for violation of the order.

#### IV.

*It is further ordered, That respondent shall:*

A. Within sixty (60) days from the date on which this order becomes final, and annually thereafter for five (5) years on the anniversary date of this order, and at such other times as the Commission may by written notice to the respondent require, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order;

B. For a period of five (5) years after the order becomes final, maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with any manufacturer or seller of linerboard relating to mill downtime, rates or levels of production, the purchase or sale of linerboard, or any aspect of pricing for linerboard; and

C. Notify the Commission at least thirty (30) days prior to any proposed changes in Stone Container Corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

#### V.

*It is further ordered, That this order shall terminate on May 18, 2018.*

Commissioner Swindle dissenting.

CONCURRING STATEMENT OF COMMISSIONERS ROBERT PITOFSKY,  
SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

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 emphasized, 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 now have accorded final approval to the complaint and consent order.

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.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to issue the consent order but decline to join the separate statement of Chairman Pitofsky and Commissioners Anthony and Thompson. The consent agreement, which includes the consent order and the complaint on which it is based, constitutes the decisional document of the Commission. My substantive views on this matter are contained entirely within the four corners of the decisional document. *See* Dissenting Statement of Commissioner Mary L. Azcuenaga in Dell Computer Corp., at 21-23 (Docket No. 3658, May 20, 1996).

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

I have voted against the Commission's issuance of its complaint and final order 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 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 at 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 complaint because it (together with the Analysis To Aid Public Comment that accompanied acceptance of the consent agreement) 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.<sup>1</sup> 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 discussed explicit and implicit invitations to collude and placed 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 possible inventory overhang -- that has led the Commission to conclude that Stone implicitly invited its competitors to collusively raise prices.<sup>2</sup> I am unable to place on 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.

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<sup>1</sup> 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 purchase inventory from competitors . . . ." With all due respect, it is precisely the truth of that assertion that I find insufficiently supported by the evidence.

<sup>2</sup> The Analysis To Aid Public Comment cited Precision Moulding Co., Inc., Docket No. C-3682, as an example of an implicit invitation to collude. According to the Analysis, Precision Moulding "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.

## IN THE MATTER OF

## EYE RESEARCH ASSOCIATES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3807. Complaint, May 18, 1998--Decision, May 18, 1998*

This consent order prohibits, among other things, the two Texas-based corporations and the owner from making any false claims and requires reliable scientific evidence to substantiate any safety, success or efficacy claims for Controlled Kerato-Reformation ("CKR") orthokeratology, a non-surgical eye care treatment or procedure to correct vision. In addition, the consent order requires that the respondents possess scientific evidence to support any testimonials or endorsements concerning the expected results of CKR, or else provide a disclosure stating what consumers may generally expect to achieve and that consumers should not expect to experience similar results.

*Appearances*

For the Commission: *Judith Shepherd* and *Thomas Carter*.

For the respondents: *Richard Powers* and *Steven Adducci, Butler & Binion*, Washington, D.C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Eye Research Associates, Inc., d/b/a Eye Care Associates, and ICKRS, Inc., d/b/a International Controlled Kerato Reformation Society, corporations, and Sami G. El Hage, O.D., individually and as an officer of the corporations ("respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Respondent Eye Research Associates, Inc., d/b/a Eye Care Associates ("ECA"), is a corporation formed under the laws of the state of Texas, with its principal office or place of business located at 5320 Richmond Avenue, Houston, TX.

2. Respondent ICKRS, Inc., d/b/a International Controlled Kerato Reformation Society ("ICKRS"), is a corporation formed under the laws of the state of Texas, with its principal office or place of business located at 5320 Richmond Avenue, Houston, TX.