UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,*	)	**Civil Action No.:**
v.	)	Case: 1:10-cv-00659 Assigned To : Kessler, Gladys Assign. Date : 4/27/2010 Description: Antitrust
BAKER HUGHES INCORPORATED *and*	)	
BJ SERVICES COMPANY,	)	
Defendants.	)	

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Defendants Baker Hughes Incorporated ("Baker Hughes") and BJ Services Company ("BJ Services" or "BJ") entered into a merger agreement pursuant to which Baker Hughes would acquire 100% of BJ's stock for Baker Hughes stock then valued at approximately $5.5 billion. The United States today filed a civil antitrust Complaint seeking to enjoin the proposed

stimulation services in the United States Gulf of Mexico ("Gulf") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. This loss of competition would likely result in higher prices and reduced service quality in the Gulf vessel stimulation services market.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the proposed merger. Under the proposed Final Judgment, the terms of which are explained more fully below, Defendants are required to create a new competitor for vessel stimulation services by divesting their interests in two specially-equipped stimulation vessels, Baker Hughes' HR Hughes and BJ's Blue Ray, and other assets used to support their offshore stimulation services operations, including Baker Hughes' dock facilities at Port Fourchon, Louisiana, Baker Hughes' Gulf stimulation fluids assets, and BJ's sand control tools assets. Also included in the divestiture package is an expansive right to hire key personnel from both companies.

The United States and 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 Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Industry

Baker Hughes is a major supplier of products and services for drilling, formation evaluation, completion, and production to the worldwide oil and natural gas industry. In 2009,

Baker Hughes reported total revenues of approximately $9.7 billion. BJ Services is also a leading worldwide provider of products and services to the oil and gas industry. BJ Services reported revenues of $4.1 billion for the 2009 fiscal year.

Oil and gas companies lease offshore exploration rights from the state or federal government. After drilling a well to evaluate the formation, the company decides if it will be profitable to produce oil from that well. If so, the well will be "completed," or prepared for production. The completion process is designed to enable and control the flow of oil and gas from the formation through the wellbore and to the surface.

Due to the soft rock formations in the Gulf, virtually all wells require stimulation services as part of the completion process. These services generally encompass sand control, which is designed to prevent formation sand from clogging the well and enhance oil and gas production. Most stimulation services on the shelf (less than 1000 feet water depth) and virtually all stimulation services in deepwater are performed by specially-equipped stimulation vessels.[1] Stimulation vessels are typically well over 200 feet in length and are equipped with high pressure pumps, blenders, storage tanks and other equipment necessary to provide these services. To operate in the Gulf, a stimulation vessel must comply with a federal law known as the "Jones Act," which requires vessels to be U.S. flagged, U.S. built, and U.S. crewed.

Baker Hughes and BJ Services are two of only four firms in the Gulf that supply

[1] While some offshore stimulation services are performed by pumps that are mounted on skids rather than vessels, skid-mounted pumps are not feasible for most stimulation services in the Gulf. Even when a job could technically be performed by skid-mounted equipment, oil and gas companies often use a vessel due to safety and logistical concerns.

stimulation services with vessels to offshore oil and gas wells. The other two firms are Schlumberger and Halliburton. These four companies are the only significant vessel stimulation service providers in the world, and operate the only Jones Act compliant stimulation vessels. Each of these companies provides stimulation services in the Gulf with two stimulation vessels. Baker Hughes supplies stimulation services in the Gulf with the HR Hughes and the RC Baker, and BJ utilizes the Blue Dolphin and the Blue Ray.

Drilling and completing a well is extremely costly, particularly in deepwater, and the demand for stimulation vessel services is inelastic and time-sensitive. The daily costs for the drilling rig and other assets often exceed $100,000 for wells on the shelf, and may be $1 million or more for wells in deepwater. These assets remain at the drilling site while vessel stimulation services are performed and throughout the completion process. If a stimulation vessel is not available at the precise time its services are needed, the oil and gas company will incur the very high costs associated with the rig and other supporting assets while it waits for a vessel to arrive at the well site. To avoid this, many oil and gas customers in the Gulf require a vessel stimulation service provider to maintain two vessels in its fleet for greater assurance that a vessel will be available when needed.

Oil and gas companies in the Gulf obtain pricing for vessel stimulation services in two basic ways. They solicit bids for specific wells or projects, and they enter into annual or multi-year contracts that generally establish a discount off of list prices published by the stimulation service provider. Some oil and gas companies prefer to use one approach or the other, but most employ a combination of the two. Under the project approach, the pricing for a specific well or

project may be established months or days before the stimulation service is provided. Under the contract approach, the discounts are generally established long before the stimulation service is rendered and are not tied to a particular well or project.[2] Generally, both approaches involve a bidding process in which the technical capabilities, reputation, and prices of multiple vessel stimulation service providers are evaluated, and preferred providers are chosen.

Demand for vessel stimulation services in the Gulf rises and falls with overall drilling levels and seasonal variation. During periods of sustained high demand, stimulation vessels are busier, and operators are forced to pay higher prices to ensure vessel availability, utilize less preferred suppliers, or even incur expensive rig-costs while waiting for a vessel.[3]

B. The Market for Vessel Stimulation Services in the Gulf of Mexico

The United States has alleged in the Complaint that the provision of vessel stimulation services for wells located in the Gulf is a line of commerce and a relevant market within the meaning of Section 7 of the Clayton Act.

Oil and gas companies have no economical alternatives to sand control or stimulation services and need these services for the great majority of offshore wells in the Gulf. While some offshore stimulation services may be performed by pumps that are mounted on skids rather than

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[2] Generally, these contracts do not guarantee vessel stimulation service providers a certain amount of stimulation services business, nor do they guarantee oil and gas customers the availability of a vessel for particular jobs or projects. They merely establish discounts that customers may invoke when they call on the supplier to provide services.

[3] During even generally "slow" seasons, vessels may be occupied with other jobs at the precise times a customer requires their services. Having available capacity "most of the month" is of little value to a customer whose operations require a vessel's services on a specific day.

vessels, skid-mounted pumping equipment is not feasible for most stimulation services in the Gulf, including frac packs – the most commonly used stimulation service in the Gulf – which require high horsepower and significant fluid and proppant storage. Oil and gas companies procuring these vessel stimulation services for wells located in the Gulf require a provider to have stimulation service vessels capable of providing the service in the region as well as the facilities, engineers, sales and other staff necessary to support the vessels. The relevant geographic region is the Gulf. This region is defined based on the locations of customers.

A small but significant, non-transitory increase in the price of vessel stimulation services for wells located in the Gulf would not cause customers to turn to skid-mounted pumps or to any other type of service, or to vessel simulation services provided outside the Gulf, or to otherwise reduce purchases of vessel stimulation services, in volumes sufficient to make such a price increase unprofitable.

C. The Anticompetitive Effects of the Proposed Transaction

1. The Market is Highly Concentrated

The market for vessel stimulation services in the Gulf is highly concentrated, with just four firms competing to perform these services. Based on 2008 revenues for vessel stimulation services in the Gulf, BJ accounted for nearly twenty percent of all vessel stimulation service revenues and Baker Hughes accounted for nearly fifteen percent. The other two firms providing vessel stimulation services in the Gulf account for all other revenues. Using an accepted economic measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), described in Appendix A to the Complaint, the premerger HHI is 2801, making the market

highly concentrated. By eliminating BJ as a competitor, the transaction would significantly increase concentration levels, resulting in a post-merger HHI of 3390. These high concentration levels create an economic and legal presumption that the proposed transaction is likely to significantly reduce competition in the market for vessel stimulation services.

2. *Baker Hughes' Acquisition of BJ is Likely to Result in Higher Prices for Vessel Stimulation Services in the Gulf*

a. *The Reduction in Bidders is Likely to Result in Higher Prices*

Absent entry of the proposed Final Judgment, the transaction would eliminate BJ as an independent competitor and reduce, from four to three, the number of bidders for vessel stimulation services in the Gulf. The loss of BJ as a bidder would likely lead to increases in prices.

Today, Baker Hughes and BJ are close competitors. BJ and Baker Hughes not only ranked first and second the past two years in terms of total expenditure on vessel stimulation services in the Gulf for numerous customers, the two share many of the same characteristics with one another. They charge similar prices for similar types of jobs and provide vessel stimulation services in the same water depths and at many of the same geological locations. This suggests that their products, while differentiated in some dimensions and facing competition from other providers, are relatively close substitutes for one another.

Pre-merger, an attempt by Baker Hughes to raise prices would cause disaffected customers for whom BJ is the next best alternative to shift business to BJ. But post merger, Baker Hughes could raise prices without concern of losing customers that viewed BJ as their

next best choice. Given the closeness between BJ's and Baker Hughes' services, the diversion ratio between the two (the diversion ratio being the fraction of unit sales lost by one of the firms in response to a price increase that would be diverted to the other) is likely significant. Where that is the case, a merger likely provides the merged firm with the incentive to raise its prices as it recaptures sales it would have lost had it raised price absent the merger. And where, as is also the case here, the value of diverted sales between the merging firms is likely high (as evidenced by the high price-variable cost margins that both firms earn currently), a significant price increase will most likely be profitable for the merged firm.

Moreover, as firms in the market face intermittent or recurring capacity constraints, Halliburton and Schlumberger could not likely expand supply easily or rapidly to serve customers in response to a post-merger price increase from Baker Hughes. In fact, Halliburton and Schlumberger would likely bid less aggressively because they would recognize that the merger gives Baker Hughes the incentive to raise prices.

The combination of Baker Hughes and BJ is also likely to lead to higher prices because, absent entry of the proposed Final Judgment, the merged firm would control four of the eight stimulation vessels in the Gulf. The anticompetitive effect of reducing the number of vessels controlled by its rivals would be particularly pronounced for project-specific bids, which may be requested by customers just days or weeks in advance. Instead of factoring in the availability of six rival vessels for these stimulation services projects, as each of the Defendants does currently when pricing its services, the merged firm would confront only four potentially available vessels. Thus, not only would the merger reduce the number of rival bidders, it would substantially

increase the likelihood that the merged firm would be the sole supplier with available capacity on any given day. This would allow it to exercise greater pricing power.

b. The Merger May Also Result in a Reduction in Capacity Leading to Higher Prices

The transaction may also result in a reduction in the number of stimulation vessels in the Gulf, which would also lead to higher prices.[4] Today, because each company needs two vessels to remain competitive, neither Baker Hughes nor BJ Services has the incentive to move any of its stimulation vessels out of the Gulf. Absent entry of the proposed Final Judgment, the merged firm will have four vessels in the Gulf, giving it the opportunity, which Baker Hughes recognized, to remove one or more vessels without sacrificing the redundancy required by customers. With fewer vessels in the Gulf, utilization of the remaining vessels will increase, as will the likelihood that a vessel will be unavailable at any particular time. Given the highly time-sensitive nature of the stimulation services business in the Gulf, the importance of these services to oil and gas production, and the fact that these services represent a very small percentage of the overall costs associated with drilling and completing a well, oil and gas customers in the Gulf will likely pay higher prices to ensure a vessel is available when needed. Moreover, in periods of high demand, reduced vessel availability would likely mean that some oil and gas customers would be forced to accept delays in scheduling vessel stimulation services,

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[4] From the perspective of the merged firm, removing one or two vessels from the Gulf may have two potential advantages over a reduction in capacity that does not involve removing vessels. First, removing one or two vessels might credibly demonstrate to rival vessel stimulation providers that the merged firm will not compete aggressively in the Gulf in the near future. Second, the reduction in stimulation service capacity to which the merged firm would commit by such a movement (and the associated likely price increase) would be relatively large.

resulting in significant rig expenses and opportunity costs.

3. The Anticompetitive Effects are Not Likely to Be Prevented by Entry or Repositioning

Successful entry into the provision of vessel stimulation services in the Gulf is difficult, costly, and time consuming, requiring vessels and an array of supporting onshore assets relating to engineering, research and development, testing, performance, and marketing. A strong technical team, including experienced engineers and scientists, is essential. Additionally, customers want a supplier with a proven track record for reliable and successful performance and may require prospective bidders to undergo a lengthy and expensive qualification process. Many customers also require stimulation service providers to have two vessels as a measure of redundancy.

A provider of vessel stimulation services may have a difficult time growing its business if it does not also offer a line of sand control tools, increasing the difficulty of entry and competitive expansion. Producing sand control tools requires special skills and intellectual property. Sand control tools are installed in the well prior to performance of the stimulation services. Many customers prefer obtaining sand control tools from the same company that provides the vessel stimulation services. This reduces the number of companies with which a customer must deal, often results in a discount in the price of the services and products, and also eliminates the possibility of "finger-pointing" between the providers in the event that there is a problem or delay with the sand control tools or stimulation services. All four providers of vessel stimulation services in the Gulf sell sand control tools. Entry by an additional vessel stimulation

service provider would not be timely, likely, and sufficient to prevent the substantial lessening of competition caused by the elimination of BJ Services as an independent competitor.

It is also unlikely that a small but significant non-transitory increase in prices on vessel stimulation services in the Gulf would cause competitors to reposition vessels from other geographic regions. The four companies currently servicing customers in the Gulf are the only significant providers operating anywhere in the world and the only providers with vessels that comply with the Jones Act. There are just three Jones Act compliant stimulation service vessels outside of the Gulf, and only one of them has the sophisticated dynamic positioning capability required by customers for deepwater stimulation projects in the Gulf. Moreover, all three vessels are under contract to provide stimulation services internationally, and are therefore unable to service customers in the Gulf in the near term. It is therefore unlikely that repositioning of vessels into the Gulf would offset the likely harm from the transaction.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by Section IV of the proposed Final Judgment will eliminate the anticompetitive effects of the merger in the market for vessel stimulation services in the Gulf by establishing a new, independent and economically viable competitor. The package of divestiture assets includes all of the types of assets that Baker Hughes and BJ Services currently use to compete in this market, including: two stimulation vessels; operations, production and sales facilities; and tangible and intangible assets relating to the provision of stimulation services and the production and sale of sand control tools and stimulation fluids in the Gulf. In addition, because experienced personnel are critical to success in the vessel stimulation services business

– and will be even more important to a new entrant seeking to secure the trust and business of risk-adverse customers – the divestiture package provides the acquirer with an expansive right to hire relevant personnel without interference from the merged firm.

The overriding goal of the proposed Final Judgment is to provide the acquirer of the divestiture assets with everything needed to replace the competition that would otherwise be lost as a result of the transaction. Where possible, the United States favors the divestiture of an existing business entity that has already demonstrated its ability to compete in the relevant market. In this case, however, neither Defendant's Gulf vessel stimulation services business operates as a stand-alone business. Moreover, the accompanying stimulation fluids and sand control tools operations are likewise intertwined with other businesses.[5] To ensure that the acquirer will have all assets necessary to be an effective, long-term competitor, while minimizing disruption to Defendants' broader operations, the proposed Final Judgment requires divestiture of assets from each of the merging parties' operations. The proposed Final Judgment also provides maximum flexibility to the acquirer by providing it with the option to buy some of the assets, depending on whether it needs such assets given its existing operations.

The "Divestiture Assets" are fully described in schedules to the proposed Final Judgment and fall into three major categories: Stimulation Services, Sand Control Tools, and Stimulation Fluids. The assets in these categories are described generally below.

A. Stimulation Services

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[5] For example, BJ's research and development for stimulation fluids for vessel stimulation services in the Gulf is intertwined with its extensive onshore fluids business.

The Divestiture Assets related to Defendants' provision of vessel stimulation services in the Gulf include: (1) two stimulation vessels – Baker Hughes' HR Hughes and BJ's Blue Ray – and all equipment installed on the vessels; (2) Baker Hughes' dock and mooring facilities at Port Fourchon, Louisiana; (3) the option to acquire Baker Hughes' skids and non-vessel pumping equipment used to perform Gulf stimulation services;[6] (4) tangible and intangible assets used in connection with BJ's stimulation services for wells located in the Gulf; (5) the option to acquire BJ's vessel operations facility in Crowley, Louisiana; and (6) the option to acquire BJ's sales offices in New Orleans, Louisiana and Houston, Texas.

As explained above, all four competitors in the Gulf vessel stimulation services market compete with two vessels because many customers require redundancy. Thus, the divestiture package includes two vessels. These vessels have established track records, and are capable of performing stimulation services for virtually all wells in the Gulf. Both vessels are outfitted with sophisticated dynamic positioning systems (*i.e.*, DP-2 capability), which allow the vessel to hold its position using the vessel's own thrusters as opposed to an anchor or chains. This capability is a critical requirement for deepwater stimulation jobs in the Gulf, and many oil and gas customers require stimulation service providers to maintain two deepwater-capable vessels in the Gulf in order to be considered for such projects. Having two deepwater-capable vessels will position the

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[6] While the Complaint alleges that stimulation services performed with pumping equipment on skids is not in the same product market with vessel stimulation services, skid-based equipment is included in the divestiture package to ensure that the acquirer will be able to offer the full range of offshore stimulation services, as all competitors do now. The divestiture package is designed to not only preserve the competition that would be lost from the merger, but also to ensure the viability of the acquirer.

acquirer to compete for these projects.

The divestiture package also requires divestiture of tangible and intangible assets associated with the vessels and with BJ's provision of stimulation services for wells located in the Gulf. These assets will provide the acquirer with the physical tools (e.g., equipment, inventory and business records), and the bank of knowledge and rights (e.g., job history databases, design know-how and contractual rights) needed to create an independent stimulation services business equivalent to one of Defendants' current operations.

B. Sand Control Tools

The Divestiture Assets related to Defendants' production and sale of sand control tools include: (1) intangible assets used in connection with BJ's sand control tools for wells located in the Gulf; (2) the option to acquire tangible assets used in connection with BJ's sand control tools for wells located in the Gulf; (3) the option to acquire BJ's Southpark facility located in Lafayette, Louisiana, where BJ conducts assembly, sales, and support for its sand control tools; and (4) the option to acquire all or part of BJ's Completion Tool Technology Center in Houston Texas, where BJ's sand control tools are researched, tested, and manufactured.[7]

Baker Hughes and BJ produce and sell a full line of sand control tools, which are used in conjunction with the provision of stimulation services. Many oil and gas companies prefer to purchase these tools from the same company that provides the vessel stimulation service. To

[7] BJ's Completion Tool Technology Center is located on 22 acres of land in Houston, Texas. There are five buildings on the property, as well as associated parking lots that are reached by three entrances. Pursuant to Schedule B of the proposed Final Judgment, the acquirer will have the option of acquiring the entire facility, or a portion of the property consisting of one or two buildings.

ensure that the acquirer can compete effectively in the vessel stimulation services market (and to avoid the competitive disadvantage that likely would result if the acquirer could not provide these complementary products), the divestiture requires Defendants to divest intangible assets associated with BJ's sand control tool business, including patents, designs and other know-how.[8] The acquirer will also have the option to acquire the tangible assets associated with certain of BJ's facilities, as well as BJ's tangible assets associated with the production and sale of sand control tools, including production and testing equipment and inventory.

C. Stimulation Fluids

The Divestiture Assets related to Defendants' production and sale of stimulation fluids in the Gulf include: (1) tangible and intangible assets primarily used in connection with or necessary for Baker Hughes' stimulation fluids for wells located in the Gulf; and (2) the option to acquire BJ's trucks and tanks used to transport stimulation fluids in the Gulf.

In performing vessel stimulation services in the Gulf, the Defendants use a variety of acids, proppants, gels and other fluids and additives which are pumped downhole under pressure to stimulate the production of oil and gas. Although many of these fluids and additives are manufactured by third-parties, each vessel stimulation service provider in the Gulf has its own unique set of "recipes" and know-how relating to the blending and use of these fluids. These

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[8] The proposed Final Judgment requires total divestiture of intangible assets used in connection with the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of BJ's sand control tools for wells located in the Gulf. Defendants, however, will retain BJ's patents and other intangible assets associated with BJ's Multi-Zone Single Trip tool – which was developed by BJ in conjunction with a customer, and for which Baker Hughes has no comparable tool. Defendants will provide a worldwide royalty-free non-exclusive license to the acquirer for these patents and other intangible assets.

recipes and know-how represent an important qualitative aspect of the stimulation services provided by the Defendants. To ensure that the acquirer will be equipped with the necessary recipes and know-how, the divestiture package includes intangible assets used in connection with relating to Baker Hughes' stimulation fluids business.[9] Defendants will also divest tangible assets used in connection with Baker Hughes' stimulation fluids for wells located in the Gulf, as well as BJ's trucks and tanks used to transport stimulation fluids in the Gulf.

IV. IMPLEMENTATION OF THE FINAL JUDGMENT

The Divestiture Assets must be divested in such a way as to satisfy the United States in its sole discretion that these assets can and will be operated by the acquirer as a viable, ongoing business that can compete effectively in the design, development, production, marketing, servicing, distribution or sale of vessel stimulation services, sand control tools and stimulation fluids in the Gulf. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

The proposed Final Judgment requires Defendants to accomplish the divestiture within sixty (60) days after the filing of the Complaint, or five (5) days after notice of the entry of the

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[9] The proposed Final Judgment requires (1) a total divestiture (with one exception discussed below) of intangible assets that are primarily used in connection with or necessary to the design, development, testing, production, quality control, marketing, servicing, sale, installation, or distribution of Baker Hughes' stimulation fluids for wells located in the Gulf; and (2) a royalty-free, worldwide license to all other intangible assets used in connection with Baker Hughes' stimulation fluids for wells located in the Gulf. The exception relates to Baker Hughes' specialized heavyweight frac fluid - Diamond Fraq. Defendants will retain Baker Hughes' patents and associated intangible assets primarily used in connection with Diamond Fraq, and will provide the acquirer with a license to those patents and assets, as well as to BJ's BrineStar/ BrineStar II heavyweight frac fluids, which use a different technology than Diamond Fraq.

Final Judgment of the Court, whichever is later. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances.

In the event that Defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Baker Hughes will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price and terms obtained and the speed with which the divestiture is accomplished. After the trustee's appointment becomes effective, the trustee will provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the merger by enabling the acquirer to compete with the merged firm, and with Halliburton and Schlumberger, in the provision of vessel stimulation services in the Gulf, including the provision of fluids and sand control tools.

The proposed Final Judgment imposes certain obligations on the acquirer given the mobility of certain of the assets and the likelihood that a transaction involving their sale would

be below Hart-Scott-Rodino reporting thresholds. Section XI requires the acquirer to keep the vessels in the Gulf for two years, unless it obtains consent otherwise from the Antitrust Division. This provision ensures that the acquirer gains experience in the Gulf to compete effectively there. Section XI also imposes a five-year requirement for the acquirer to provide the Antitrust Division notice prior to the sale or transfer of any of the divestiture assets to Halliburton or Schlumberger, should such a transaction not otherwise meet HSR thresholds. Given the limited number of competitors in the market today, the Antitrust Division would likely object to either Halliburton or Schlumberger as the proposed acquirer of the divestiture assets as such a divestiture would not likely remedy the competitive harm alleged in the Complaint. (See proposed Final Judgment, Sections IV J. & VII.) The notice provision will allow the Antitrust Division to determine whether a future sale of the divestiture assets by the acquirer to Halliburton or Schlumberger would frustrate the proposed Final Judgment's goal of preserving competition in the Gulf.

V. 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 the provisions of 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 Defendants.

VI. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not 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 sixty (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 sixty (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 United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Donna N. Kooperstein, Chief
Transportation, Energy & Agriculture Section
Antitrust Division
450 5th Street, N.W.
Suite 8000
Washington D.C. 20530

VII. 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 Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions preventing Baker Hughes, Inc from acquiring BJ Services. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will preserve competition for the design, development, and sale of vessel stimulation services in the United States Gulf of Mexico. Thus, 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.

VIII. 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 sixty-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
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> (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 generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[10]

As the United States Court of Appeals for the District of Columbia 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) (citing *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). Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed

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[10] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court 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).

> 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 insuring 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).[11] 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 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

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[11] *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'").

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) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also 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. 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. *Id*. at 1459-60. As this 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 utilizing 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). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he 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 Senator 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.[12]

IX. 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.

Dated: April 27, 2010

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[12] *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.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (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, 93d Cong., 1st Sess., 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.").

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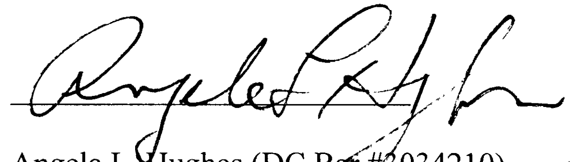
Respectfully submitted,



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