

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

GRAFTECH INTERNATIONAL LTD.

and

SEADRIFT COKE L.P.

Defendants.

CASE NO.: 1:10-cv-02039

JUDGE: Collyer, Rosemary M.

DECK TYPE: Antitrust

DATE STAMP: March 21, 2011

**MOTION AND MEMORANDUM OF
THE UNITED STATES IN SUPPORT OF ENTRY OF FINAL JUDGMENT**

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“Tunney Act” or “APPA”), plaintiff, the United States of America (“United States”) moves for entry of the proposed Final Judgment filed in this civil antitrust proceeding. The proposed Final Judgment may be entered at this time without further hearing if the Court determines that entry is in the public interest. The Competitive Impact Statement (“CIS”), filed in this matter on November 29, 2010, explains why entry of the proposed Final Judgment would be in the public interest. The United States is also filing a Certificate of Compliance, attached hereto as Exhibit 1, which sets forth the steps taken by the parties to comply with all applicable provisions of the APPA and certifying that the statutory waiting period has expired.

I. Background

The United States filed a civil antitrust Complaint on November 29, 2010, seeking to enjoin GrafTech International Ltd.'s ("GrafTech") proposed acquisition of Seadrift Coke L.P. ("Seadrift"). The Complaint alleged that the acquisition likely would substantially lessen competition in the worldwide sale of petroleum needle coke used to manufacture graphite electrodes, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. That loss of competition likely would result in higher prices, reduced output and less favorable terms of sale in the global petroleum needle coke market.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and a Stipulation and Order ("Stipulation") signed by the plaintiff and the defendants, consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. The Stipulation, which was entered by the Court on December 13, 2010, provides that the proposed Final Judgment may be entered by the Court after the completion of the procedures required by 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. Compliance with the APPA

The APPA requires a sixty-day period for the submission of public comments on a proposed Final Judgment. *See* 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed its Competitive Impact Statement ("CIS") with the Court on November 29, 2010; published the proposed Final Judgment and CIS in the *Federal Register* on December 7, 2010, *see United States v. Graftech International Ltd. and Seadrift L.P.*, 75 Fed. Reg. 76026; and

published summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in *The Washington Post* for seven days beginning on December 3, 2010 and ending on December 9, 2010. The sixty-day period for public comments ended on February 7, 2011. The Division received one comment, the response to which was filed with the Court on March 3, 2011, and published in the *Federal Register* on March 18, 2011, see *United States v. Graftech International Ltd. and Seadrift L.P.*, 76 Fed. Reg. 14987. As recited in the Certificate of Compliance, filed simultaneously with this Motion and Memorandum, all the requirements of the APPA now have been satisfied. It is therefore appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the Final Judgment.

III. Standard of Judicial Review

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 in accordance with the statute, the court is required to consider:

- (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

- (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)-(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see 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); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶76,736, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").

As the United States Court of Appeals for the District of Columbia 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); *InBev*, 2009

U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of 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).¹ In determining whether a proposed settlement is in the public interest, the 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's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case); *United States v. Republic Serv., Inc.*, 2010-2 Trade Cas. (CCH) ¶ 77,097, 2010 U.S. Dist. LEXIS 70895, No. 08-2076 (RWR), at *10 (D.D.C. July 15, 2010) (finding that "[i]n light of the deferential review to which the government's proposed remedy is accorded, [amicus curiae's] argument that an alternative remedy may be

¹ *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'").

comparably superior, even if true, is not a sufficient basis for finding that the proposed final judgment is not in the public interest.”).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. “[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest.’” *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (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). Therefore, 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; *Republic Serv.*, 2010 U.S. Dist. LEXIS 70895, at *2-3 (entering final judgment “[b]ecause there is an adequate factual foundation upon which to conclude that the government’s proposed divestitures will remedy the antitrust violations alleged in the complaint.”).

Moreover, in its 2004 amendments to the Tunney Act,² Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating: “[n]othing in this section shall be construed to require the court to conduct an evidentiary

² The 2004 amendments substituted the word “shall” for “may” when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and 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).

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 11.³

The United States alleged in its Complaint that the acquisition of Seadrift by GrafTech would substantially lessen competition in the development, production and sale of petroleum needle coke in the United States, leading to higher prices, reduced output and less favorable terms of sale in the worldwide petroleum needle coke market. The remedy in the proposed Final Judgment resolves these alleged competitive effects by removing the opportunity and means for GrafTech, Seadrift and Conoco to engage in anticompetitive activity under cover of the Supply Agreement, and possibly future supply arrangements. The proposed Final Judgment creates

³ 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.”).

several layers of protection against such a result, including supply contract modifications, a prohibition on the inclusion of certain terms in future supply arrangements, production of supply contracts to the United States for review, strict segregation of employees who handle the terms of supply from Conoco from those that made decisions about Seadrift pricing and production, and the requirement that GrafTech report capacity, sales and production information on a quarterly basis so that the United States may detect any changes in the business that suggest possible coordination. There has been no showing that the proposed settlement constitutes an abuse of the United States's discretion or that it is not within the zone of settlements consistent with the public interest.

IV. Conclusion

For the reasons set forth in this Motion and Memorandum and in the CIS, the Court should find that the proposed Final Judgment is in the public interest and should enter the Final Judgment without further hearings. The United States respectfully requests that the Final Judgment, attached hereto as Exhibit 2, be entered as soon as possible.

Dated: March 21, 2011

Respectfully submitted,

/s/
Stephanie A. Fleming, Esq.
United States Department of Justice
Antitrust Division, Litigation II Section
450 5th Street, N.W., Suite 8700
Washington, DC 20530
Phone: (202) 514-9228
Fax: (202) 514-9228
stephanie.fleming@usdoj.gov

CERTIFICATE OF SERVICE

I, Stephanie A. Fleming, hereby certify that on March 21, 2011, I caused a copy of the foregoing Motion and Memorandum in Support of Entry of the Final Judgment and attached Certificate of Compliance to be served upon defendants GrafTech International Ltd. and Seadrift Coke L.P. by mailing the documents electronically to their duly authorized legal representatives as follows:

COUNSEL FOR DEFENDANT GRAFTECH:

Jonathan Gleklen, Esq.
Arnold & Porter LLP
555 12th Street, N.W.
Washington, D.C. 20004

COUNSEL FOR DEFENDANT SEADRIFT:

Craig Seebald, Esq.
Joel Grosberg, Esq.
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20006

/s/
Stephanie A. Fleming, Esq.
United States Department of Justice
Antitrust Division, Litigation II Section
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 20530
Phone: (202) 514-9228
Fax: (202) 514-9033
stephanie.fleming@usdoj.gov