UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

HERAEUS ELECTRO-NITE CO., LLC,

Defendant.

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

On September 7, 2012, defendant Heraeus Electro-Nite Co., LLC ("Heraeus") acquired substantially all of the assets of Midwest Instrument Company, Inc. ("Minco"). After investigating the competitive impact of that acquisition, the United States filed a civil antitrust Complaint on January 2, 2014, seeking an order compelling Heraeus to divest certain assets and other relief to restore competition. The Complaint alleges that the acquisition substantially lessened competition in the U.S. market for the development, production, sale and service of single-use sensors and instruments used to measure and monitor the temperature and chemical composition of molten steel ("S&I"), in violation of Section 7 of the Clayton Act, 15 U.S.C. §

18. As a result of the acquisition, prices for these products did or would have increased, delivery times would have lengthened, and terms of service would have become less favorable.

Concurrent with the filing of this Competitive Impact Statement, the United States and Heraeus have filed an Asset Preservation Stipulation and Order and a proposed Final Judgment. These filings are designed to eliminate the anticompetitive effects of Heraeus' acquisition of Minco. The proposed Final Judgment, which is explained more fully below, requires Heraeus, among other things, to divest the assets that it acquired from Minco that are located in the United States and Mexico.

The United States and Heraeus have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

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

A. Heraeus and the Minco Acquisition

Defendant Heraeus, a Delaware corporation with its headquarters in Langhorne, Pennsylvania, is a subsidiary of Heraeus Electro-Nite International N.V. ("HEN"), a Belgian company, which itself is a subsidiary of Heraeus Holding GmbH, a privately held German corporation based in Hanau, Germany. HEN's U.S. subsidiary, Heraeus, had approximately $92 million in revenue in fiscal year 2011.

Minco was a privately held company headquartered in Hartland, Wisconsin that also sold S&I. In 2011, Minco's U.S. revenues were approximately $29 million. Minco's manufacturing facilities were located in Hartland, Wisconsin, Johnson City, Tennessee and Monterrey, Mexico.

On September 7, 2012, Heraeus acquired substantially all of the assets of Minco. The

transaction was not subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), which requires companies to notify and provide information to the Department of Justice and the Federal Trade Commission before consummating certain acquisitions. As a result, the Department of Justice did not learn of the transaction until after it had been consummated.

B. The Competitive Effects of the Acquisition on the Market for S&I

1. Industry Background

S&I products are integral to the steel-making process. Steel makers cannot produce steel without using S&I such as those developed, produced and sold by Heraeus and, formerly, by Minco. Steel making is a continuous process, in which the chemistry and temperature of each batch of steel must be measured and monitored in order to ensure the quality, reliability, and consistency of the finished steel, as well as the safety and efficiency of the manufacturing operation. S&I are used to measure and monitor the temperature and chemical composition of the molten steel. Steel companies rely on S&I; moreover, they rely on S&I suppliers as virtual partners in the steel-making process.

The temperature and chemical composition of molten steel must be measured and monitored throughout the steel-making process, and each stage of production has specific chemical concentration and temperature requirements. The accuracy, reproducibility and reliability of the measurement of molten steel temperature and chemical properties directly influence the quality of the end product, as well as the safety and productivity of the steel mill. Because the finished steel product may be used in demanding applications, such as steel beams for a building or automotive exterior panels, steel mills must ensure the molten steel exactly meets the required specifications. Testing and sampling the molten steel to ensure that it meets these specifications is a critical aspect of the steel-making process.

An S&I system consists of four basic parts: (1) the single-use sensor; (2) the cardboard tube; (3) the pole; and (4) the instrument, or display. The single-use sensor, typically encased in heavy paper or cardboard and attached to a cardboard tube, contains the actual measurement device. The cardboard encasement provides momentary protection to allow the single-use sensor to transmit a reading to the instrument before the heat from the molten steel consumes the sensor. For standard single-use sensors, the cardboard tube is attached to a long, hollow metal pole that allows a steel mill worker safely to dip the sensor into the liquid steel to obtain the desired measurement. The instrument is a specialized electronic component or computer that interprets the signal from the single-use sensor and displays the temperature or chemical content measurement on a display screen or print-out. Unlike the single-use sensor, which is consumed in molten steel, the instrument is a long-lived component that can be used for years.

S&I are used to monitor temperature, oxygen content, steel and slag chemistry, hydrogen concentration and the carbon content of molten steel and are differentiated primarily by the type of sensor used. A particular steel mill may utilize one type or multiple types of S&I during a particular batch depending upon its proprietary steel-making process and the specifications of the steel's end use. The three main categories of S&I used by steel mills are thermocouples, sensors and samplers, though "combination" single-use sensors are designed to conduct two or more tests at once. Thermocouples measure the temperature of molten steel in the furnace and in other stages of steel processing. Sensors measure the dissolved oxygen, carbon, hydrogen, or other elements present in molten steel. Oxygen and carbon sensors are used in most steel-making processes, while hydrogen sensors typically are needed to produce high-purity, high-grade steel. Each type of sensor has a distinct design. Samplers are used during the steel-making process to withdraw a sample of molten steel for analysis outside of the molten bath. While most samplers

do not contain internal electronics, they can be manufactured as a combination unit that includes a thermocouple or a type of sensor.

Although single-use sensors appear to be simple, each one consists of tiny platinum wires and specialized electronic controls. The lowest-priced single-use sensors may be one to two dollars per unit, while higher-end single-use sensors may be priced at ten to twenty dollars per unit. Because single-use sensors are used continuously in the steel-making process, steel mills can use hundreds of units daily and up to millions of units annually. S&I suppliers must therefore be capable of producing thousands of these high-precision, high-reliability products daily at a very low cost.

The high temperature and harsh environment of the furnace necessitates the use of S&I capable of reliable, accurate measurement in extreme conditions. Temperatures in the furnace can approach or exceed 3,000 degrees Fahrenheit, and variation of only 20 to 30 degrees can critically affect the quality and properties of the final steel product. Failure of a single-use sensor can have catastrophic results. For example, if the molten steel overheats, the steel can melt through the vessel or "break-out," which is extremely dangerous and costly. Similarly, if the molten steel cools too quickly, or has the wrong chemical composition, it may slow or stall the production process and/or produce low-quality steel. The failure of a single-use sensor may cost a steel mill hundreds of thousands of dollars, if the steel fails to meet the desired physical characteristics and specifications.

2. Product Market

Within the broad category of S&I, each type of single-use sensor performs a distinct function and cannot be substituted for another type of sensor or a different type of measuring device. For example, a hydrogen sensor cannot detect temperature and a thermocouple does not

detect hydrogen. Accordingly, they are not interchangeable or substitutable for one another. There is separate demand for thermocouples, oxygen sensors, carbon sensors, hydrogen sensors, and other sensors. In the event of a small but significant price increase for a given type of single-use sensor, customers would not stop using that sensor in sufficient numbers so as to defeat the price increase. Thus, each type of S&I is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

Each steel-making customer purchases a different mix of S&I to suit the needs of the customer's steel mill, steel-making process, and application. Prior to the acquisition, Minco and Heraeus produced a full range of S&I and were, by far, the two producers with the largest market shares for each individual product. Minco and Heraeus competed across the full product line of S&I and typically provided customers with a mix of various single-use thermocouples, sensors and samplers. Although numerous narrower product markets also may be defined, the competitive dynamic for each individual single-use thermocouple, sensor and sampler is nearly identical. Therefore, they all may be aggregated for analytical convenience into a single relevant product market for the purpose of assigning market shares and evaluating the competitive impact of the acquisition. Accordingly, the development, production, sale and service of S&I is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

3. Geographic Market

The United States is a relevant geographic market because suppliers of S&I cannot make sales in the United States without having a U.S. service and sales network and U.S. manufacturing presence. The consumable portion of S&I consists of a single-use sensor and a cardboard tube. A single-use sensor is small and light and can be shipped economically from overseas. However, the cardboard tubes for S&I can be four to eight feet long and are mostly

air. They have a low value-to-volume ratio, so they cannot be shipped from overseas economically. For this reason, Heraeus and Minco both manufactured finished S&I in the United States.

Steel manufacturers can use up to hundreds of single-use sensors each day. The steel manufacturers are staffed leanly and do not employ in-house technicians or engineers to service S&I. A defective single-use sensor or malfunctioning instrument can shut down an entire steel line, so the steel manufacturers rely on the S&I suppliers to provide on-site technical service and support that is on call at all times. Heraeus and Minco have provided experienced service technicians and product engineers on-site to assist with inventory management, trouble-shooting, calibration, and other critical services. These service technicians and product engineers may visit a busy mill once or twice a week or more on a routine basis, and more frequently if the mill is implementing a new process, or is having trouble with a particular S&I. They also make service calls in the middle of the night to fix a problem that has shut down a line. Service and technical support have been critical to the success of Heraeus and Minco in selling S&I in the United States.

Because it is uneconomic to ship fully assembled S&I from overseas to the United States and U.S. customers require extensive on-site service, customers would not switch to producers outside the United States to defeat a small but significant price increase. Accordingly, the United States is a relevant geographic market for the development, production, sale and service of S&I within the meaning of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

4. Anticompetitive Effects

Heraeus' acquisition of Minco has increased concentration in a highly concentrated market. Concentration in relevant markets typically is measured by the Herfindahl-Hirschman

Index ("HHI"), which is defined and explained in Appendix A to the Complaint. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition. Markets in which the HHI is in excess of 2500 points are considered highly concentrated, and an increase in concentration by 150 points or more is considered significant.

Prior to the acquisition, Heraeus had a 60% market share, Minco had a 35% market share and a small third firm had the remaining five percent. Thus, the pre-acquisition HHI was 4850, and the post-acquisition HHI is 9050, an increase of 4200. Based on the pre- and post-acquisition market concentration measures, the acquisition is presumptively anticompetitive.

Prior to the acquisition, Minco was the best alternative source to Heraeus for S&I, and customers benefited from robust competition between the firms on price, service and innovation. By 2000, Heraeus owned 85% of the market. At the same time, after several years of development, Minco began introducing high-tech products in order to compete against Heraeus. Minco expressly marketed itself to customers as a service-oriented, high-quality alternative to the dominant Heraeus and dedicated significant effort and resources toward meeting this standard. During the 2000s, Minco chipped away at Heraeus' share and customers benefited from the head-to-head competition between Heraeus and Minco on price, service, technology, and innovation. Through its acquisition of the Minco assets, Heraeus has substantially lessened competition in the U.S. market for the development, production, sale and service of S&I for molten steel, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Entry and/or expansion into the development, production, sale and service of S&I will not be timely, likely or sufficient to counteract the anticompetitive effects of Heraeus' acquisition of Minco. The development, production, sale and servicing of S&I requires highly

specialized know-how, specialized equipment, a full-line of S&I products, a U.S. production facility, and a U.S.-based sales and service network. S&I suppliers currently outside the United States cannot sell into the United States because it is uneconomic to transport fully assembled S&I into the United States and they do not have a U.S. sales and service network, which is a prerequisite to selling to U.S. customers. Development of a U.S. production/assembly facility, and even more importantly, development of a dependable sales and service network can take a long time, during which the potential entrant is not making sales. U.S.-based customers will not purchase S&I from a foreign supplier that does not maintain a dependable sales and support network that can provide on-call service for its S&I products.

Establishing a reputation for successful performance and gaining customer confidence in a specific firm's S&I are also significant barriers to expansion. Establishing a reputation for dependable, accurate supply and service is critical to success in the market. A track record and reputation for reliability must be earned over years. Entry in the development, production, sale, and service of S&I in the United States would not be timely, likely, or sufficient to counteract the anticompetitive effects of Heraeus' acquisition of Minco.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestiture Assets

The United States opened its investigation of the transaction in December 2012, three months after the transaction was consummated. Heraeus had by then integrated the former Minco assets into Heraeus' S&I business, including terminating certain supply contracts and closing foreign production facilities. The United States therefore designed the partial divestiture required by the proposed Final Judgment to facilitate entry of a new firm or expansion of an existing competitor in the S&I industry by providing that firm with market-specific assets needed

for successful competition.

The proposed Final Judgment directs Heraeus to sell a package of assets in the United States and Mexico, including the former Minco facilities located in Hartland, Wisconsin and Johnson City, Tennessee, along with tangible and intangible assets associated with those facilities (the "Divestiture Assets"). Heraeus is required to sell the Divestiture Assets to a qualified Acquirer that has the intention and ability to compete in the development, production, sale, and service of S&I in the United States. Thus, the divestiture provisions of the proposed Final Judgment are designed to make available to an Acquirer all of the remaining Minco assets acquired by Heraeus for the purpose of remedying the competitive harm from the acquisition. Under the proposed Final Judgment, however, the Acquirer, at its option, and with the consent of the United States, may elect to acquire less than the entire package of assets.

B. Identification of an Upfront Buyer

The goal of the proposed Final Judgment is to restore the competition in the development, production, sale, and service of S&I that was lost as a result of the transaction. The United States favors the divestiture of an existing business unit that has the necessary experience to compete in the relevant market. In this case, however, the divestiture of an existing, intact business is impossible because of the integration of assets undertaken by Heraeus. Under these circumstances, the United States may consider the divestiture of less than an existing business and may identify and approve an Acquirer at the outset to ensure that the sale of the assets will create a viable entity that will restore effective competition.[1]

[1] U.S. Department of Justice Antitrust Division Policy Guide to Merger Remedies (June 2011), available at http://www.justice.gov/atr/public/guidelines/27350.pdf (Identifying an upfront buyer provides greater assurance that the divestiture package contains the assets needed to create a viable entity that will preserve competition.)

In the proposed Final Judgment, the designated Acquirer of the Divestiture Assets is a new entrant, Keystone Sensors LLC, ("Keystone"), which was formed in May 2013 for the purpose of entering the U.S. market for S&I to provide an alternative to Heraeus. The founders have significant experience in the S&I industry and bring together experience in the U.S. market, as well as an innovative technology concept. Initially, Keystone had intended to enter the market with a limited portfolio of high-technology products and build sales incrementally. Through the purchase of the Divestiture Assets, Keystone will be able to enter the market more rapidly and compete more effectively with Heraeus and the other U.S. supplier. After its investigation, the United States has concluded that Keystone has the intention and ability to compete in the development, production, sale and service of S&I in the United States.

C. Procedure

The proposed Final Judgment requires Heraeus to divest the Divestiture Assets to Keystone within sixty (60) calendar days after the Court signs the Asset Preservation Stipulation and Order in this matter. The Divestiture Assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer to compete effectively in the relevant market. Heraeus must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with the Acquirer.

In the unlikely event that the sale to Keystone does not occur as anticipated, the proposed Final Judgment provides that a trustee would be appointed to effect the sale of the Divestiture Assets. In that event, the alternative Acquirer similarly would be able to determine which portion of the Divestiture Assets it would need to compete in the development, production, sale, and service of S&I in the United States.

D. Waiver of Noncompete Provisions

To be an effective S&I supplier, a firm must employ a network of dedicated sales and service representatives that can provide on-call service to steel mill customers. A robust sales and service organization is critical to establishing the firm's reputation to provide accurate and reliable service. Following the transaction, Heraeus terminated several experienced sales and service employees of Minco and/or Heraeus, and imposed, as a condition of the employees' severance agreements, a two-year ban on employment in the S&I industry. The United States has concluded that, under the facts and circumstances of this case, these noncompete provisions are overbroad and have impeded the expansion and/or entry of other S&I firms. Accordingly, the proposed Final Judgment requires Heraeus to waive any existing noncompete agreement or other restrictive covenant that may bind any former employee of either Heraeus or Minco in the United States, without imposing any financial penalty on any such former employee. Heraeus also shall not enter into any noncompete or other restrictive covenant with any former, current, or future employee of Heraeus or Minco during the two years following the filing of the Complaint. The United States has determined that the availability of experienced personnel may help facilitate the entry and/or expansion of other S&I firms in the United States.

E. Notice of Future Acquisitions

Because the transaction was not reportable under the HSR Act, the Division did not learn of the transaction until after it was consummated and Heraeus had undertaken significant integration of the former Minco assets. The proposed Final Judgment requires Heraeus to provide the United States with notice (similar to HSR Act notice) of any future acquisition by Heraeus of any firm that provides S&I in the United States. This provision will ensure that the United States has the opportunity to review any future transaction before the assets are

integrated.

F. Other Provisions

The proposed Final Judgment provides that, at the Acquirer's option, Heraeus shall enter into an agreement to provide training and technical support regarding the operation of any purchased Divestiture Asset to the personnel of the Acquirer. The proposed Final Judgment also requires Heraeus to provide the Acquirer with information relating to Heraeus and former Minco personnel in the United States to enable the Acquirer to make offers of employment, and prevents Heraeus from interfering with any negotiations to employ any current or former Heraeus or Minco employee.

Moreover, because the customer qualification process can be a high barrier to entry, the proposed Final Judgment provides that Heraeus shall allow customers to use Heraeus products and equipment in the testing and/or qualification of any S&I, and that Heraeus must waive any contractual restrictions that otherwise would preclude such usage.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under 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 Heraeus.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Heraeus 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. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification,

interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Heraeus. The United States could have continued the litigation and sought divestiture of the Minco assets. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of S&I in the relevant market identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, and avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 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); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), 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.").[2]

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

[2] 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

(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).[3] 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 as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United*

2004 amendments "effected minimal changes" to Tunney Act review).

[3] *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

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; see also *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As 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

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'reaches of the public interest'").

"[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.[4]

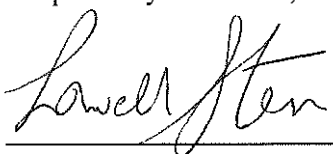
VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

[4] *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.").

Dated: January 2, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Lowell R. Stern, hereby certify that on January 2, 2014, I caused a copy of the foregoing Competitive Impact Statement, as well as the Complaint, Asset Preservation Stipulation and Order, proposed Final Judgment, and Explanation of Consent Decree Procedures, to be served upon defendant Heraeus Electro-Nite Co., LLC, by mailing the documents electronically to its duly authorized legal representative as follows:

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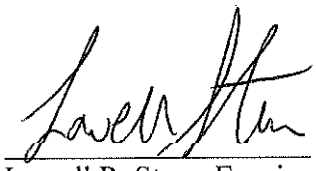

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