**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>*Plaintiff,*<br><br>v.<br><br>ALCAN INC.,<br>ALCAN ALUMINUM CORP.,<br>PECHINEY, S.A., and<br>PECHINEY ROLLED PRODUCTS, LLC,<br><br>*Defendants.* | Case No. 1:030 CV 02012-GK<br><br>Judge Gladys Kessler<br><br>Deck Type: Antitrust |

**UNITED STATES'S REVISED CERTIFICATE OF COMPLIANCE**
**WITH THE ANTITRUST PROCEDURES AND PENALTIES ACT**

The United States of America certifies that, as explained below, it has complied with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), with respect to the proposed Amended Final Judgment.

1. The Complaint in this case was filed on September 29, 2003. The proposed Amended Final Judgment (or "AFJ"), Revised Competitive Impact Statement, and Revised Hold Separate Stipulation and Order ("Revised Hold Separate Order"), by which the parties agreed to the Court's entry of the Amended Final Judgment following compliance with the APPA, were filed on May 26, 2004.

2. Pursuant to 15 U.S.C. § 16(b), the proposed Amended Final Judgment, Revised Hold Separate Order, and the Revised Competitive Impact Statement were published in the *Federal Register* on June 15, 2004 (69 Fed. Reg. 33406). A copy of the *Federal Register* notice is attached hereto as Exhibit 1.

3. Pursuant to 15 U.S.C. §16(b), the United States furnished copies of the Complaint, Revised Hold Separate Order, proposed Amended Final Judgment, and Revised Competitive Impact Statement to anyone requesting them.

4. Pursuant to 15 U.S.C. § 16(c), a summary of the terms of the proposed Amended Final Judgment, Revised Hold Separate Order, and Revised Competitive Impact Statement was published in *The Washington Post*, a newspaper of general circulation in the District of Columbia, during a seven-day period in June 2004 (June 7th-13th). A copy of the Proof of Publication from *The Washington Post* is attached hereto as Exhibit 2.

5. Defendants will soon serve and file with the Court a declaration that describes their communications with employees of the United States concerning the proposed Amended Final Judgment, as required by 15 U.S.C. § 16(g).

6. The sixty-day public comment period specified in 15 U.S.C. § 16(b) began on June 15, 2004, and ended on August 16, 2004. During that period, the United States received eight comments on the proposed settlement. The United States evaluated and responded to each comment, and caused the comments and the government's responses to be published in the *Federal Register*, pursuant to 15 U.S.C. §§ 16 (b) and (d). The public comments and the United States's responses, attached hereto as Exhibits 3-10, are briefly summarized below.

*A. Public Comments on the Proposed Amended Settlement*

The United States received five comments from state and local government officials – *viz.,* the governor of West Virginia (Ex. 3), the mayors of Ripley and Ravenswood, West Virginia (Exs. 4 and 5), the president of the Jackson County (WV) Development Authority (Ex. 6), and the Jackson County Commission (Ex. 7) – who represent the interests of residents of towns in West

Virginia in which current or retired employees of the Ravenswood facility live. The United States also received a comment from an individual who represents the interests of retired salaried employees of the Ravenswood facility (Ex. 8).

These comments raised general questions about the necessity and scope of the divestiture relief in the proposed Amended Final Judgment, and, in particular, the possibility that under the terms of the settlement, Alcan could elect to divest Pechiney's brazing sheet business (and the Ravenswood rolling mill) instead of its own brazing sheet business. Several of the commenters asserted that the proposed Amended Final Judgment is unnecessary because Alcan's acquisition of Pechiney did not substantially diminish competition. Others contended that even if Alcan's initial acquisition was unlawful, requiring it to divest Pechiney's brazing sheet business (and the Ravenswood plant) would be excessive because brazing sheet accounts for a fraction of this rolling mill's production. Finally, these commenters asserted that requiring Alcan to divest Pechiney's brazing sheet business may risk the jobs and retirement benefits of the Ravenswood plant's current and retired workers. As they see it, any new owner of Pechiney's brazing sheet business cannot possibly be a vigorous and viable competitor – and thus would be significantly more likely to fail – since it will not have the financial wherewithal or technical expertise to develop, produce, and sell brazing sheet and other rolled aluminum products and may begin operations saddled with the former owners' "legacy costs" (*i.e.,* retiree pension and health insurance benefit obligations).

The United States also received comments from two suppliers to Pechiney's brazing sheet business, Century Aluminum (Ex. 9) and American Electric Power (Ex. 10), who expressed a somewhat different, though parallel concern, *viz.,* that if Alcan chooses to divest that business,

then it must be sold to a purchaser who possess the resources to continue operating the Ravenswood rolling mill as part of a viable, ongoing business enterprise. These commenters also questioned whether a new owner could succeed if it is burdened with the legacy costs of the Ravenswood facility's former owners, Alcan and Pechiney.

### *B. The United States's Responses to the Public Comments*

Responding to the comments, the United States generally explained that the appropriate legal standard for assessing the proposed Amended Final Judgment is whether its entry would be in the "public interest." To make that determination the Court must carefully review the relationship between the relief in the proposed Amended Final Judgment and the allegations of the government's Complaint that initiated the case. Only if the proposed decree is ambiguous, unenforceable, "positively" injurious to others, or makes a "mockery" of judicial power – *e.g.,* by mandating relief that would not alleviate the competitive ills alleged in the complaint – should the Court decline to enter it. *Massachusetts School of Law at Andover, Inc. v. United States,* 118 F.3d 776, 783 (D.C.Cir. 1997). This "narrow," "deferential" standard of judicial review reflects the fact that a Tunney Act proceeding is not an open forum for commenters – or a court – to "second-guess" the United States's exercise of its broad discretion to file a civil complaint to enforce the nation's antitrust laws.[1] A proposed settlement cannot, as several commenters have

[1] *Id.* at 783. "The Tunney Act cannot be interpreted as an authorization for a district court to assume the role of Attorney General," *United States v. Microsoft Inc.,* 56 F.3d 1448, 1462 (D.C. Cir. 1995). "[T]he court is only authorized to review the decree itself" and has no legal authority to "effectively redraft the complaint" to inquire into matters that the government might have but did not pursue. *Id.* at 1459-60. "Such limited review is obviously appropriate for a consent decree entered into before a trial on the merits because 'the court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion in the first place,'" *Commonwealth of Massachusetts v. Microsoft,* 2004 WL 1462298, 302 (D.C.Cir. June 30, 2004) (citation omitted).

urged, be rejected simply because it provides relief that is "not necessary" or "to which the government might not be strictly entitled." *United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir.), *cert. denied,* 454 U.S. 1083 (1981). *See United States v. Alex Brown & Sons, Inc.,* 169 F.R.D. 532, 541 (S.D.N.Y. 1996) (purpose of Tunney Act is to ascertain whether proposed relief is in the public interest, "not to evaluate the strength of the [g]overnment's case"). Thus, the United States is not required to prove major elements of its antitrust complaint before the Court can evaluate the appropriateness of the parties' agreed-upon relief. *Microsoft Inc.,* 56 F.3d at 1459; *Alex Brown & Sons, Inc.,* 169 F.R.D. at 541.

Applying those principles to this case, the Court's entry of the proposed Amended Final Judgment surely would be "within the reaches" of the public interest (*Bechtel Corp.* 648 F.2d at 666). The proposed Amended Final Judgment would alleviate the serious competitive concerns regarding defendants' proposal to combine two of North America's three major producers of brazing sheet by requiring Alcan promptly to divest either Alcan's or Pechiney's brazing sheet business (and the Ravenswood rolling mill), which produces all of the brazing sheet made and sold by either firm in North America. If Alcan chooses to divest Pechiney's brazing sheet business, its sale to a viable new owner would create another competitor in the North American brazing sheet market and leave competition no worse off after Alcan's acquisition of Pechiney than before it.

As to the commenters' contention that the divestiture relief in the Amended Final Judgment is too broad, the United States noted that the competitive problems created by Alcan's acquisition of Pechiney could not be cured simply by requiring a piecemeal sale or "partial divestiture" of only those portions of the Ravenswood facility devoted to developing, producing,

and selling brazing sheet. The commenters acknowledged that brazing sheet is produced on the same production lines that make many other important rolled aluminum alloy products (*e.g.,* common alloy coil and aerospace sheet) at Pechiney's Ravenswood rolling mill. The United States is unaware of – and no commenter pointed to – any evidence that would suggest that requiring Alcan to dismantle and sell off a few parts of the Ravenswood rolling mill that might be exclusively committed to producing brazing sheet would produce a viable new firm capable of replacing the significant competition that would be lost by Alcan's acquisition of Pechiney. Drawing on its considerable experience with business divestitures under the federal antitrust laws, the United States reasonably concluded that divestiture of Pechiney's entire brazing sheet business (and the Ravenswood rolling mill) as an ongoing business enterprise (AFJ, §§ II (E); IV(A); IV(J); and V(B)) is a critical prerequisite for ensuring the new owner's long-term competitive viability in the brazing sheet business. *See* Federal Trade Commission, A Study of the Commission's Divestiture Process 12 (1999) ("[D]ivestiture of an ongoing business is more likely to result in a viable operation than divestiture of a more narrowly defined package of assets and provides support for the common sense conclusion that [antitrust enforcement agencies] should prefer the divestiture of an ongoing business.")

The United States also noted that it shares the commenters' interest in ensuring that if Alcan chooses to divest Pechiney's brazing sheet business, it is sold to an owner that promises to be a viable competitor capable of long-term survival. In fact, a lynchpin of the proposed Amended Final Judgment is the requirement that Pechiney's brazing sheet business (including the Ravenswood rolling mill) must be divested to a person who, in the United States's judgment, is able to successfully operate it as part of a "viable, ongoing" business enterprise in competition

against Alcan and others. *See* AFJ §§ IV(J) and V(B). To that end, the proposed Amended Final Judgment requires Alcan to divest any tangible and intangible assets used in the development, production, or sale of Pechiney's brazing sheet, including the entire Ravenswood facility, and any research, development, or engineering facilities, wherever located, used to develop or produce any product – not just brazing sheet – currently rolled at the Ravenswood facility. *See* AFJ, §§ II(E)(1)-(3). Thus, the amended settlement ensures that any new owner of Pechiney's brazing sheet business will obtain every tangible and intangible asset previously used by Pechiney to compete in developing, making, and selling brazing sheet and any other aluminum products sold by the Ravenswood facility (including aerospace grade aluminum plate).

Nor is there any reasonable basis for concluding, at this stage, that that business can only survive if it remains in the hands of a dominant brazing sheet manufacturing concern, such as Alcan.[2] Such a "failing firm" defense to what would otherwise be a severely anticompetitive transaction may be invoked only after there has been a compelling showing that the resources of Pechiney's brazing sheet business are so depleted and its future prospects are so bleak, that it cannot be successfully reorganized in a Chapter 11 bankruptcy proceeding *and* that every effort has been made to identify and divest Pechiney's brazing sheet business to an alternative purchaser that poses less of a threat to competition. *Citizens Pub. Co. v. United States*, 394 U.S. 131, 137-38 (1969); *FTC v. Harbour Group Investments, LP*, 1990-2 Trade Cas. (CCH) ¶ 69,247 (D.D.C.

[2]Several commenters implicitly assume Alcan should be permitted to retain Pechiney's brazing sheet business since it would be more likely than any other owner to maintain current levels of employment and benefits at the Ravenswood plant. That assumption runs squarely against economic reality. *Ceteris paribus,* a firm that acquires market power through acquisition will be more prone to raise its prices and reduce output, risking a *reduction* in premerger employment levels.

1990). *See generally*, Horizontal Merger Guidelines ¶ 5.2 (1992 ed.); Areeda, Hovenkamp, and Solow, Antitrust Law ¶ 952 (rev. ed.).

In this case, one cannot conclude that *any* effort to divest Pechiney's brazing sheet business will fail to produce an acceptable, viable new owner capable of continuing the firm's competition against Alcan and others in developing, producing, and selling brazing sheet in North America when neither Alcan nor a trustee has been allowed to complete its search for, and negotiations with, a prospective purchaser for Pechiney's brazing sheet business.[3] The proposed amended settlement cannot be rejected on the basis of commenters' fears that an alternative purchaser will not turn up when the reasonable canvass the parties envisioned has not been allowed to run its course. *Citizens Pub. Co.*, 394 U.S. at 138; *Dr. Pepper/Seven Up Cos. Inc. v. FTC*, 991 F.2d 859, 864-66 (D.C. Cir. 1993) ("good faith attempt to locate an alternative buyer" must be pursued before anticompetitive acquisition of failing firm may be allowed); *Harbour Group Investments,* 1990-2 Trade Cas. (CCH) ¶ 69,247 (D.D.C. 1990). *See generally*, Horizontal Merger Guidelines ¶ 5.2 (1990 ed.); Areeda, Hovenkamp, and Solow, Antitrust Law ¶ 952 (rev. ed.). If neither Alcan nor the trustee can find an acceptable buyer for Pechiney's brazing sheet

[3]Nor, for that matter, has it been shown that the resources of Pechiney's brazing sheet business are so depleted that it would not survive a Chapter 11 proceeding *(Citizens Pub. Co.*, 394 U.S. at 137-38), which, ironically, could reduce the legacy costs that some assert hinder this firm's ability to succeed as a viable enterprise. Also, one cannot assume, as several commenters have, that defendants' legacy costs will automatically scare off any potential purchasers of the Ravenswood facility. Whether a prospective buyer will assume none, some, or all of the facility's legacy costs is, in our view, a matter of negotiation between the prospective buyer and Alcan (or if need be, the trustee). It should be noted, however, that under the proposed amended decree, an "acceptable purchaser" of Pechiney's brazing sheet business should not be a firm so burdened by its former owners' legacy costs that it would not be viable, ongoing enterprise. *See* AFJ, § IV(J): Divestiture terms must not give the defendants "the ability unreasonably to raise the [new firm's] costs, to lower [its] . . . efficiency, or otherwise to interfere in . . . [its] ability . . . to compete effectively."

business, the United States noted, then the Court has the power to consider what additional measures should be taken, presumably including whether to relieve Alcan of its obligation to divest the Pechiney brazing sheet business. AFJ, § V(G). *See Dr. Pepper/Seven Up Cos. Inc.*, 991 F.2d at 864-66.

7. The public comments did not persuade the United States to withdraw its consent to entry of the proposed Amended Final Judgment. At this stage, with the United States having published the eight comments (and the government's responses) on the proposed settlement, and the defendants having certified their pre-settlement contacts with government officials, the parties have fulfilled their obligations under the APPA. Pursuant to the terms of the Revised Hold Separate Order and 15 U.S.C. §16(e), this Court may now enter the Amended Final Judgment, if it determines that its entry would be in the public interest.

8. For the reasons set forth in the Revised Competitive Impact Statement and its responses to the public comments, the United States strongly believes that the Amended Final Judgment is in the public interest and urges the Court to enter it promptly upon receipt of defendants' certification of government contacts pursuant to 15 U.S.C. § 16(g).

Dated: September 20, 2004.

Respectfully submitted,

/s/
Anthony E. Harris (IL Bar #1133713)
U.S. Department of Justice
Antitrust Division, Litigation II Section
1401 H Street, NW, Suite 3000
Washington, DC 20530
(202) 307-6583
Attorney for Plaintiff

## CERTIFICATE OF SERVICE

I, Anthony E. Harris, hereby certify that on September 20, 2004, I caused copies of the foregoing United States's Revised Certificate of Compliance with the Antitrust Procedures and Penalties Act to be served by mail by sending them first-class, postage prepaid, to duly authorized legal representatives of the parties, as follows:

**Counsel for Defendants Alcan Inc., Alcan Aluminum Corp., Pechiney, S.A., and Pechiney Rolled Products, LLC**

Michael B. Miller, Esquire
New York Bar # MM1154
Sullivan & Cromwell
125 Broad Street
New York, NY 10004-2498

Peter B. Gronvall, Esquire
Sullivan & Cromwell
1701 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006

**Counsel for Intervenor State of West Virginia**

Andrew G. Fusco, Esq.
West Virginia Bar # 1317
Special Assistant Attorney General
Eckert Seamans Cherin & Mellot, PPLC
2400 Cranberry Square
Morgantown, WV 26508-9209

Edward J. Longosz, II, Esq.
DC Bar # 368932
Eckert Seamans Cherin & Mellot, LLC
1747 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006

/s/
Anthony E. Harris, Esquire
U.S. Department of Justice
Antitrust Division
1401 H Street, NW, Suite 3000
Washington, DC 20530
Telephone No.: (202) 307-6583