

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

ALCAN INC.,  
ALCAN ALUMINUM CORP.,  
PECHINEY, S.A., and  
PECHINEY ROLLED PRODUCTS, LLC,

*Defendants.*

Case No. 1:030 CV 02012-GK

Judge Gladys Kessler

Deck Type: Antitrust

**MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO  
WEST VIRGINIA’S MOTION TO INTERVENE PURSUANT TO  
RULE 24(A) OR FOR LEAVE TO APPEAR AS *AMICUS CURIAE***

The United States opposes the State of West Virginia’s motion to intervene as of right (or alternatively, to appear as an *amicus curiae*) in the settlement of this government civil antitrust merger case. There is no legal basis for this motion for intervention as of right under the Tunney Act, 15 U.S.C. §§ 16(b)-(h). Intervention would be especially counterproductive here, for West Virginia essentially would force the parties to try the settled claims of the government’s antitrust Complaint. Granting West Virginia *amicus curiae* status would also be unnecessary and unproductive, since the state has already filed an extensive public comment, placing before the Court its views on the proposed Judgment (and the government’s response). Accordingly, the Court should deny the state’s motion.

**I. STATEMENT OF FACTS**

A. The Government’s Antitrust Complaint and the Proposed Final Judgment.

On September 29, 2003, the United States filed a Complaint, which alleged that defendant Alcan’s acquisition of Pechiney would substantially lessen competition in the sale of brazing sheet in North America in violation of Section 7 of the Clayton Act, 15 U.S.C. §18.

Brazing sheet is a rolled aluminum alloy widely used by auto parts makers to fabricate critical components of heat exchange systems (*e.g.*, heaters, air conditioners, and radiators) for automobiles, trucks, and other types of motor vehicles. According to the Complaint, the acquisition would result in a single firm – Alcan – with a market share of over 40 percent, and the industry’s two largest firms having a combined share of over 80 percent, of all sales of brazing sheet in North America. Complaint, ¶ 19. The Complaint alleged that the attendant reduction in competition in this highly concentrated market would likely lead to an increase in brazing sheet prices, and a reduction in product quality and innovation, to the detriment of consumers in North America. *Id.* at ¶¶ 20-24.

The defendants chose not to contest the allegations of the government’s Complaint. They agreed instead to enter into a consent decree that essentially would provide the United States the relief it would have sought from the Court had the government prevailed after a full trial on the merits. The proposed Final Judgment would require the defendants promptly to divest Pechiney’s entire “brazing sheet business,” a term defined in the Judgment, § II (E), to include, *inter alia*, the tangible and intangible assets of Pechiney’s aluminum rolling mill in Ravenswood, West Virginia, which produces all of the brazing sheet and many other rolled aluminum products developed and sold by Pechiney in North America. The United States filed the proposed Judgment simultaneously with its Complaint in this case.

B. The Parties’ Compliance with the Tunney Act.

The Antitrust Procedures and Penalties Act (hereinafter, the “Tunney Act”), 15 U.S.C. §§ 16(b)-(h), establishes procedures that govern the entry of consent decrees in civil antitrust cases brought by the United States. Pursuant to the Tunney Act, the proposed Judgment, the parties’

Stipulation and Hold Separate Order, and the United States's Competitive Impact Statement were published in the Federal Register. 68 Fed. Reg. 70287 (Dec. 17, 2003). Notice and a summary of the terms of the proposed settlement were also published in the Washington Post for a week-long period in December 2003.

The publication of the terms of the government's settlement of its antitrust case elicited eleven written public comments, including an extensive comment submitted by the State of West Virginia. *See* United States's Certificate of Compliance, *esp.* Exhibits 3 and 15. The United States responded to these public comments on March 15, 2004. Publication of the public comments and the government's responses in the Federal Register (15 U.S.C. § 16(d)) will complete the parties' obligations under the Tunney Act. The United States will then move the Court to enter the proposed Judgment.

Shortly after the parties' filing of the proposed settlement, the defendants began soliciting bids for Pechiney's brazing sheet business in anticipation of the Court's entry of the Judgment. Many prospective buyers have expressed an interest in purchasing Pechiney's brazing sheet business. At least eight firms have made initial proposals, contingent on a due diligence review of the business that would be divested and further negotiations with the defendants concerning the price and other key aspects of the sale.<sup>1</sup>

C. West Virginia's Motion to Intervene As of Right in this Case.

On March 4, 2004, the State of West Virginia filed a motion to intervene (or alternatively, to file papers as an *amicus curiae*) in this Tunney Act settlement proceeding. Essentially

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<sup>1</sup>The defendants recently requested 30 additional days to finalize any sale to a prospective purchaser. The United States will likely approve that request.

repeating the arguments advanced in its comment on the proposed Judgment, West Virginia urges the Court to reject the proposed settlement because the United States’s initial antitrust suit was unfounded and the negotiated divestiture relief is therefore unnecessary.<sup>2</sup> The state also asserts (Memo in Support of Motion to Intervene, pp. 4-6, 10) that the Judgment is “defective” because an acceptable buyer cannot be found; if a buyer is found and the assets are divested, then the buyer might subsequently fail (*id.* at 6, 10); and finally, if the buyer does not immediately fail, it may seek to reduce its costs by “avoid[ing] pension obligations undertaken by Pechiney or its predecessor owners” (*id.* at 6).

West Virginia would resolve these and other perceived “defects” in the proposed Judgment by having the Court conduct a full evidentiary hearing of the allegations of the government’s Complaint (*id.* at 11), *inter alia*, and replace the settlement negotiated by the parties with Court-imposed “relief” that would allow Alcan to retain Pechiney’s brazing sheet business (*id.* at 10) – a remedy that West Virginia assumes, without ever fully explaining, would guarantee continued employment and pension benefits for the state’s residents.<sup>3</sup>

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<sup>2</sup>Memorandum in Support of Motion to Intervene or in the Alternative Memorandum Amicus Curiae of the State of West Virginia in Opposition to Proposed Consent Judgment (hereafter, “Memo in Support of Motion to Intervene”), pp. 2, 4, 8-9.

<sup>3</sup>Curiously, nowhere in its papers does West Virginia attempt to explain why Alcan is not likely to seek to reduce the costs of Pechiney’s brazing sheet business by seeking to modify or renegotiate current employee wage and benefit packages, which the state and many commenters concede have played a major role in the previous owners’ inability to profitably operate the business.

## II. ARGUMENT

The United States urges the Court to deny West Virginia's motion in all respects. The United States – not West Virginia – represents the nation's public interest in government antitrust cases. West Virginia can stand in for the United States only if it can show government incompetence, bad faith, or malfeasance in negotiating the terms of settlement. However, West Virginia has not alleged – much less demonstrated – any such misconduct here. Nor would any useful purpose be served by granting West Virginia's alternative request for *amicus* status. The Court already has before it West Virginia's views on the proposed Judgment. Further participation by West Virginia in this proceeding would serve only to delay the Court's ruling on whether the proposed Judgment is in the public interest.

### A. West Virginia Has No Unconditional Right to Intervene in this Tunney Act Proceeding.

The Tunney Act grants the Court discretion to employ a variety of procedures in determining whether a proposed final judgment submitted for entry in a government antitrust case would be in the “public interest,” 15 U.S.C. § 16(e). The Court may permit intervention as a means to obtain information to inform its public interest determination, but intervention is available only if the movant would otherwise satisfy standard prerequisites for intervention, set forth in the Federal Rules of Civil Procedure. 15 U.S.C. § 16(f)(3).

In this case, West Virginia has moved to intervene as of right in this proceeding pursuant to Rule 24 (a) of the Federal Rules of Civil Procedure. Rule 24(a) provides that anyone shall be permitted to intervene in an action when:

- (1) a statute of the United States confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The first prong of Rule 24(a) provides no support for West Virginia's intervention because the Tunney Act is not a statute that provides an "unconditional right to intervene."<sup>4</sup> The second prong also provides no support because West Virginia has not identified any cognizable "interest relating to the . . . transaction" that the United States and the defendants are not adequately representing. As bases for intervention, West Virginia has identified two interests: its interest in proper enforcement of the antitrust laws and its interest in preserving employment and retirement benefits for its residents. Neither interest, however, is sufficient for intervention pursuant to Rule 24(a).

#### 1. West Virginia Is Not Entitled to Intervene to

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<sup>4</sup>Courts in this Circuit have consistently held that the Tunney Act confers no right to intervene under Rule 24(a)(1) when a would-be intervenor seeks to weigh in on the public interest. *See, e.g., United States v. Thomson Corp.*, 1996-2 Trade Cas. (CCH) ¶ 71,620, at 78,386, 1996 WL 554557, at \*2 (D.D.C. 1996) ("[I]t is clear from the language of the Tunney Act, its legislative history and the case law that there is no right to intervene"); *United States v. Microsoft Corp.*, 159 F.R.D. 318, 328 (D.D.C.) ("Intervention is not a matter of right under the Tunney Act"), *rev'd on other grounds*, 56 F.3d 1448 (D.C. Cir. 1995); *United States v. Airline Tariff Publ'g Co.*, 1993-1 Trade Cas. (CCH) ¶ 70,191, at 69,894, 1993 WL 95486, at \*1 (D.D.C. 1993) ("[T]here is no right to intervene in a Tunney Act proceeding to determine whether a proposed consent decree is in the public interest"); *United States v. Western Elec. Co.*, 1987-1 Trade Cas. (CCH) ¶ 67,438, at 59,826, 1987 WL 56667, at \*1 (D.D.C. 1987) ("In Tunney Act proceedings, there is no right to intervene"); *United States v. AT&T*, 552 F. Supp. 131, 218 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983). Nor has this Court has ever found that a person seeking to intervene in a Tunney Act proceeding has met Rule 24(a)(2)'s standards for intervention as a matter of right.

### Challenge the United States's Antitrust Complaint.

West Virginia's view as to whether the United States should have filed the antitrust complaint that initiated this action provides no basis for West Virginia's intervention, as of right, in this Tunney Act proceeding. As a matter of law, it is the United States which has responsibility for representing the public interest in a government antitrust case brought by the United States pursuant to federal antitrust law. West Virginia's disagreement with the wisdom of the United States concerning the adequacy of the proposed relief provides no legal basis for concluding that the government has not adequately represented the public interest. In a judicial proceeding under the Tunney Act to determine whether entry of a proposed decree would be in the public interest, neither West Virginia nor the Court has the authority to second-guess the United States's prosecutorial decision as to whether the government should have filed the civil complaint that initiated the antitrust case. "[T]he 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). Indeed, 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," in making a public interest determination under the Tunney Act, "the court is only authorized to review the decree itself," and has no authority to "effectively redraft the complaint" to inquire into matters that the United States might have but did not pursue, *Microsoft Corp.*, 56 F.3d at 1459-60. See generally *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997) (Because "constitutional questions . . . would be raised if courts were to subject the government's exercise of its prosecutorial discretion to nondeferential review" the public interest inquiry must be "narrowly construed" under the

Tunney Act). Nor, for that matter, does the Tunney Act provide the court the authority to reject a proposed settlement because it is convinced that a proposed decree 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 (9<sup>th</sup> Cir. 1981).

Thus, courts routinely deny intervention to third parties whose primary basis for intervention is their disagreement with the United States’s assessment of what would enhance competition. *See United States v. Archer-Daniels-Midland Co.*, 272 F. Supp.2d 1, 6 (D.D.C. 2003) (“A district court must accord due respect to the government’s prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case. . . . [T]he court is not to review allegations and issues that were not contained in the government’s complaint, . . . nor should it ‘base its public interest determination on antitrust concerns in markets other than those alleged in the government’s complaint. . . .’”) (citations omitted); *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 public interest, “not to evaluate the strength of the Government’s case”). *See generally, United States v. Microsoft Corp.*, 2003-1 Trade Cas. (CCH) ¶73,952, 2003 W.L. 1191753 (D.D.C. 2003) (motion to intervene as of right denied where movant and United States sought to advance by different means similar interest in continued competition post-decree, and thus movant could not show that its interest was inadequately represented by existing party to lawsuit).

Also misplaced is West Virginia’s suggestion that the Court cannot assess the appropriateness of the parties’ agreed-upon relief in this case unless it conducts an evidentiary



hearing on the validity of the allegations of the government's initial Complaint. Imposing such a requirement in a Tunney Act proceeding would turn every government antitrust settlement into a full-blown trial on the merits and seriously undermine the effectiveness of antitrust enforcement by use of consent decrees. *Microsoft Inc.*, 56 F.3d at 1459; *Alex Brown & Sons, Inc.*, 169 F.R.D. at 541.

2. West Virginia's Interest in Employment and Retiree Benefits Is Insufficient to Warrant Intervention.

West Virginia's interest in protecting its residents' jobs and retirement benefits does not warrant intervention as of right under Rule 24(a). As noted in *United States v. Paramount Pictures, Inc.*, 333 F.Supp. 1100 (S.D.N.Y.), *aff'd mem. sub nom., Syufy Enterprises v. United States*, 404 U.S. 802 (1971), government antitrust actions typically have repercussions on a very wide variety of business relationships. No court could ever control its civil antitrust docket if every person whose business or livelihood could be affected by a court-ordered divestiture were allowed to intervene, as of right, in the Tunney Act proceedings conducted prior to the Court's entry of a proposed decree, and force the parties to continue litigating the settled claims. *Id.* at 1101. West Virginia's interest in opposing any change in ownership of Pechiney's Ravenswood facility cannot be allowed to outweigh the public interest in effective antitrust enforcement represented by the United States. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 327 (1961) ("If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result. . . . This proposition is not novel; it is deeply rooted in antitrust law and has never been successfully challenged.")

In addition, West Virginia has not shown, as required by Rule 24(a), that entry of the proposed Judgment will “impair or impede” the state’s ability to protect its concerns about the employment prospects of its residents. As West Virginia itself points out, the proposed Judgment contains no provision that addresses whether the new owner of Pechiney’s brazing sheet business will be bound to any labor agreements negotiated by the former owners. That question is left to be resolved under any future agreement or other arrangement that may be negotiated between the defendants, the new owner, and employees and retirees of Pechiney’s brazing sheet business. The Final Judgment is neutral on this labor-management issue, leaving it to collective bargaining or other legal process. It would be highly inappropriate for this Court to write a labor contract or future employment guarantees into the proposed Final Judgment, especially where, as here, West Virginia and other commenters have indicated that labor agreements and so-called “legacy” costs (retiree pension and health care benefits) may have already played a role in hindering the Ravenswood facility’s ability to compete effectively. *See, e.g.,* United States’s Certificate of Compliance, Exhibit 7 (Comment of L.D. Whitman, Chairman of Ravenswood Aluminum Retired Salary Association Committee) .

Finally, West Virginia’s intervention in these proceedings is essentially predicated on a long series of speculative “ifs:” *if* defendants and the trustee are both unsuccessful in finding a buyer for the divested assets; *if* a buyer is found, but is later unable to compete; and *if* a buyer chooses to change wages and retiree benefits, then – and only then – may employment and benefits of West Virginia residents be affected by the ordered divestiture.<sup>5</sup> This speculative injury

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<sup>5</sup>Specifically, although the defendants have solicited offers for Pechiney’s brazing sheet business, they have not selected a proposed buyer. In the event the defendants are unable to find an acceptable buyer on their own, the proposed Judgment permits the United States to nominate,

to jobs and retiree benefits in West Virginia, even if it should occur, is not likely to be a consequence of the challenged combination of Alcan and Pechiney, which is the Rule 24(a) “transaction” that is the subject of the government’s present antitrust action. Indeed, West Virginia actually favors this transaction, which it perceives as enhancing both employment and competition in the brazing sheet market. Nor would any injury to West Virginia’s interest in local jobs necessarily result from the Court’s entry of the proposed Judgment. By its terms, the Judgment requires prompt divestiture only to a buyer who, in the United States’s judgment, can operate the Ravenswood facility as part of a “viable and ongoing” enterprise engaged in the development, production, and sale of brazing sheet. (*See* Judgment, § IV(J) and note 5, *supra*.).

Thus, West Virginia’s status as a would-be intervenor appears to be indistinguishable from that of labor unions, whose attempts to intervene in a Tunney Act case to prevent the loss of their members’ jobs and benefits have been held to be interests “too remote or contingent in the context of an antitrust consent decree proceeding to sustain intervention as of right.” *United States v. Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,782, 71,829, 1982 W.L. 1852, at \* 1 (D.D.C. 1982). *See also United States v. Carrols Development Corp.*, 454 F.Supp. 1215, 1219 (N.D.N.Y. 1978) (landlord’s fear that divestiture to third party could not be achieved and that theaters might have to be closed was deemed too “remote or contingent” and not sufficiently “direct and substantial” to warrant Rule 24(a) intervention).

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and the Court to appoint, a trustee responsible for conducting an independent search for an acceptable purchaser and selling Pechiney’s brazing sheet assets “at such price and on such terms as are then obtainable upon reasonable effort” (Judgment, § V(B)). At this point in the divestiture process, however, it would be inappropriate to conclude that the defendants’ – or if necessary, the trustee’s – efforts to sell Pechiney’s brazing sheet assets will not produce an acceptable, viable purchaser capable of vigorously competing in the development, production, and sale of brazing sheet in North America.

B. West Virginia Should Not Be Allowed to Permissively Intervene in this Tunney Act Proceeding.

West Virginia has not sought, nor is there any legal basis for, permissive intervention in this Tunney Act proceeding. Rule 24(b), Fed.R.Civ.P., allows the Court to exercise its discretion to permit intervention where an applicant shows that a federal statute confers a conditional right of intervention<sup>6</sup> or where the applicant's claim and the main action raise common questions of fact and law. In either event, the would-be intervenor must also show that its intervention would not unduly delay or prejudice the original parties.

In a Tunney Act proceeding, permissive intervention is appropriate only when an applicant offers "some strong showing that the government is not vigorously and faithfully representing the public interest," *Massachusetts School of Law at Andover, Inc.*, 118 F.3d 776 at 783, such as might occur if the United States had engaged in "bad faith" or "malfeasance" in negotiating the terms of the proposed settlement submitted for the court to review. "[O]nly if the would-be intervenor can point to . . . some discrepancy between the remedy and substantially undisputed facts so broad as to render the decree a 'mockery of judicial power,' will intervention under Rule 24(b)(2) . . . be warranted." *Id.*

In this case, West Virginia has not asserted, much less shown, any decree discrepancy or government misconduct. As the government's Competitive Impact Statement (pp. 2-9) makes clear, the proposed Judgment would fully resolve the competitive concerns identified by the

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<sup>6</sup>The Tunney Act does not appear to be a statute that confers such a conditional right to intervene. Although the Court of Appeals for the District of Columbia Circuit has not decided this issue, it has noted that finding that the Tunney Act contains a conditional right to intervene would be a "wholly circular exercise" since that statute "looks entirely to Fed.R.Civ.P. 24 to supply the legal standard for intervention." *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 780 n. 2 (D.C. Cir. 1997).

United States in its Complaint by requiring the defendants to divest Pechiney's entire brazing sheet business as a "viable, ongoing business," Judgment, § IV(J), which would return the North American market for brazing sheet to its competitive condition prior to Alcan's acquisition of Pechiney. The proposed Judgment "would fully respond to the anticompetitive concerns raised by the merger because it would maintain the status quo. . .," and hence, there is no legal or factual basis "for the Court to conclude that the proposed Final Judgment makes 'a mockery of judicial power'. . . . To the contrary, . . . the Judgment is well 'within the reaches of the public interest,'" *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp.2d 1, 10 (D.D.C. 2003) (citations omitted), and should be entered. *See also Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783-84 (D.C. Cir. 1997) ("[A]s measured by the Department's *complaint*, the decree clearly represents a material accomplishment" and thus there is "no reason to infer a sellout by the Department.")). And West Virginia's disagreement as to the strength of the United States's antitrust suit does not reflect federal government "misconduct" that warrants permissive intervention. *United States v. Microsoft Inc.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

In any event, permissive intervention is unwarranted since West Virginia's participation as a party in this Tunney Act proceeding would "unduly delay or prejudice . . . the rights of the original parties." Fed.R.Civ.P. 24(b). The parties have settled the claims of the government's Complaint and would like to promptly begin implementing the relief. West Virginia, on the other hand, intends for the Court to allow discovery and consider evidence that would establish West Virginia's contention that the allegations of the government's initial antitrust Complaint were unwarranted, that the proposed divestiture relief therefore is unnecessary, and that divestiture of Pechiney's brazing sheet business will very likely fail. As noted above, deciding these issues

would, in essence, require the government to prove the allegations of its Complaint, a process that would needlessly delay implementing a divestiture that promises to resolve the very competitive concerns that precipitated the suit. In these circumstances, the Court has no basis for exercising its discretion to permit intervention. *Compare United States v. Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,782, 71,829-30, 1982 W.L. 1852 at 2-3 (denying permissive intervention by unions to protect “job security” and “employment opportunities” where it would “shift attention” from court’s public interest determination under Tunney Act to original parties’ decision to forego litigation and settle the antitrust merger case).

C. West Virginia’s Specific Objections to the Proposed Judgment Lack Merit.

West Virginia’s specific objections to supposed “defects” in the proposed Judgment also provide no basis for its intervention.

1. The Ordered Divestiture to a Willing to Use the Assets to Compete in the Sale of Brazing Sheet Is Appropriate.

West Virginia contends that even if Alcan’s acquisition of Pechiney were anticompetitive, the ordered divestiture is excessive because, although only a portion of the Ravenswood facility’s production is brazing sheet, the ordered divestiture includes all assets used to produce all the rolled aluminum products made at the Ravenswood facility. It also asserts that the proposed Judgment’s requirement that Pechiney’s brazing sheet business be divested to a person willing to compete in brazing sheet creates unnecessary risks that a buyer may not be capable of developing, producing, or selling many of the other rolled aluminum products that are currently made at Pechiney’s Ravenswood plant. Neither objection has merit, as both of the state’s concerns are alleviated by the terms of the proposed Judgment.

The proposed Judgment requires that Pechiney's brazing sheet business be divested to a buyer that can demonstrate, to the United States's sole satisfaction, that the divested assets "can and will be used . . . as part of a viable, ongoing business, engaged in developing, manufacturing, and selling brazing sheet in North America." Judgment, § IV(J). To that end, the buyer must show, to the government's satisfaction, that the assets "will remain viable" and will be operated in such a manner as to "remedy the competitive harm alleged in the Complaint." A prospective buyer, under the proposed decree, must also possess the "managerial, operational, and financial capability to compete effectively" and not be tied to any agreement with the defendants that would otherwise impede or interfere with the buyer's ability to compete effectively against them. *Id.* Frequently, the best way to ensure that the divested assets remain a competitively vigorous and viable operation after their sale is to require that they be sold as part of a complete, ongoing business enterprise as opposed to a divestiture of a more narrowly defined package of assets. *See* Federal Trade Commission, *A Study of the Commission's Divestiture Process* 10-12 (1999) ("[D]ivestiture of an ongoing business is more likely to result in a viable operation than is divestiture of assets to facilitate entry. The general notion that the sale of an ongoing business is more likely to be successful in establishing a competitor than the sale of less than an entire business seems intuitively obvious and is consistent with Congressional concern about a lack of organic integrity of divested businesses.")<sup>7</sup>

The proposed Judgment in this case, reflecting that sensible approach, orders the defendants to divest all tangible and intangible assets that Pechiney has used to produce brazing sheet and all other rolled aluminum products at Ravenswood. After divestiture, the new owner of

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<sup>7</sup>The FTC study is available online at <http://www.ftc.gov/os/1999/08/divestiture.pdf>.

the assets will possess the entire set of assets that had been used to develop, produce, and sell all rolled aluminum products at Ravenswood. Thus, it is difficult to understand West Virginia's position that the Federal Trade Commission cautions against this divestiture approach. As noted above, the FTC actually embraces it as the "preferred" method. *Study of the Commission's Divestiture Process* at 12.

It is also difficult to fathom West Virginia's concern that the proposed Judgment may force a divestiture to a buyer who solely intends to produce brazing sheet. Since that product only accounts for about 30 percent of the production of the Ravenswood facility, a prospective buyer who only intends to produce brazing sheet could not convince the United States, under Section IV(J) of the Judgment, that its purchase of Pechiney's brazing sheet business could be successfully operated as "part of a viable, ongoing business" concern.<sup>8</sup>

2. The Judgment Need Not Contain a Provision that Would Prevent a Buyer from Closing the Ravenswood Facility.

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<sup>8</sup>Also, West Virginia's concern for how the proposed divestiture may affect competition in markets for rolled aluminum not addressed in the Complaint is misplaced. *See United States v. Archer-Daniels-Midland Co.*, 272 F. Supp.2d at 10 ("[T]he court is not to review allegations and issues that were not contained in the government's complaint, . . . nor should it 'base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint. . . .'"); *United States v. Pearson PLC*, 55 F. Supp.2d 43, 45 (D.D.C. 1999).



West Virginia claims that the proposed Judgment is defective because it does not expressly prohibit the buyer of Pechiney's brazing sheet business from ever closing the Ravenswood facility. Such a prohibition would be manifestly improper. Pechiney faced no such court-imposed constraint before its acquisition by Alcan, and it would be extraordinary for the government to request that a court order a private business to remain open, post-divestiture. A successful divestiture will create a business that replaces competition that may otherwise be lost through an anticompetitive merger, but like any business enterprise, the divested firm should be permitted to prosper or fail on its own merits. In any event, it is highly unlikely that a buyer, having paid millions of dollars to obtain the Ravenswood facility, would soon afterward compromise the value of that investment by turning around and closing the plant. Before pursuing such a drastic alternative, a buyer is likely do everything within its power to maximize the return on its investment while maintaining the plant as part of a viable, ongoing business enterprise.

### 3. The Judgment Contains Assurances that the Divestiture Will Occur.

West Virginia contends that there is no provision in the proposed Judgment to ensure that the defendants will retain Pechiney's brazing sheet business (and the Ravenswood plant) if neither they nor the trustee finds a buyer acceptable to the United States. This contention ignores the terms of Section IV(F) of the proposed Final Judgment. That provision governs what will occur in the unlikely event that Pechiney's brazing sheet business is not sold. After receiving a recommendation from the trustee and after affording the parties an opportunity to be heard, "the Court shall enter such orders as it shall deem appropriate." The Court, at that point, has unlimited flexibility to order whatever further steps are necessary to assure a divestiture. Uncertainty about whether the Court would order additional actions under this broad open-ended provision should

encourage the defendants to spare no effort to accomplish the required divestiture before the matter reverts to the trustee or to the Court's discretion.

D. West Virginia Should Not Be Permitted Leave to Appear as an *Amicus Curiae*.

West Virginia has alternatively moved for leave to participate as an *amicus curiae* in this Tunney Act proceeding. The state has, however, already placed its views of the proposed Judgment before the Court by filing an extensive public comment and a motion for leave to intervene. West Virginia has not identified what additional benefit there would be to the parties or the Court if the state's request for *amicus curiae* status were granted, particularly where, as here, the state has already taken advantage of its opportunity to submit public comments on the Judgment under the Tunney Act. There is, however, a real and serious risk that West Virginia's further participation in this proceeding will unduly delay the Court's public interest determination, and entry of effective relief. In these circumstances, the Court should exercise its discretion and deny the state's request for *amicus* status.

### III. CONCLUSION

For the foregoing reasons the Court should deny West Virginia's Motion to Intervene or to Appear as *Amicus Curiae* in this proceeding.

Dated: March 15, 2004.

Respectfully submitted,

/s/  
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**CERTIFICATE OF SERVICE**

I, Anthony E. Harris, hereby certify that on March 15, 2004, I caused copies of the foregoing Memorandum of the United States in Opposition to West Virginia's Motion to Intervene Pursuant to Rule 24(a) or for Leave to Appear as *Amicus Curiae* to be served by mail by sending them first-class, postage prepaid, to duly authorized legal representatives of those parties, as follows:

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