UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

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

The United States of America hereby certifies that it has complied with the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), and states:

1. The Complaint, proposed Final Judgment ("Judgment"), and Hold Separate Stipulation and Order ("Hold Separate Order"), by which the parties have agreed to the Court's entry of the Final Judgment following compliance with the APPA, were filed on September 29, 2003. The United States filed its Competitive Impact Statement on November 14, 2003.

2. Pursuant to 15 U.S.C. § 16(b), the proposed Judgment, Hold Separate Order, and Competitive Impact Statement were published in the *Federal Register* on December 17, 2003 (68 Fed. Reg. 70287). 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, Hold Separate Order, proposed Judgment, and Competitive Impact Statement to anyone requesting them.

4. Pursuant to 15 U.S.C. § 16(c), a summary of the terms of the proposed Judgment, Hold Separate Stipulation and Order, and 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 December 2003 (December 13th - December 19th). A copy of the Proof of Publication from *The Washington Post* is attached hereto as Exhibit 2.

5. On March 15, 2004, defendants served on the United States, and attempted to file with this Court, declarations that describe their communications with employees of the United States concerning the proposed Judgment, as required by 15 U.S.C. § 16(g). *See* Exhibit 16.

6. The sixty-day public comment period specified in 15 U.S.C. § 16(b) began on December 17, 2003, and ended on February 17, 2003. During that period, the United States received a total of eleven comments on the proposed settlement. The United States evaluated and responded to each comment, and has arranged to publish the comments and its responses in the *Federal Register*, pursuant to 15 U.S.C. §§ 16 (b) and (d). Copies of the comments and the United States's responses are attached hereto as Exhibits 3 through 15; they are summarized below.

A. Comments from State and Local Government Officials and Labor Leaders[1]

The United States received four comments from state and local government officials, *viz.,* the governor of West Virginia (Exhibits 3 and 15), the mayors of Ripley and Ravenswood, West Virginia (Exhibits 4 and 6), and the president of the Jackson County (WV) Development Authority (Exhibit 5). The officials represent the interests of constituents who are current or

[1]The United States received Tunney Act comments from two members of the public (Exhibits 12 and 14), whose concerns generally echoed those voiced by state and local officials and labor leaders.

retired employees of the Ravenswood facility, which comprises the bulk of Pechiney's "brazing sheet business" subject to divestiture under the terms of proposed Judgment (§§ II (E) and IV(A)). The United States also received comments from labor leaders, who represent the interests of current and retired hourly wage workers (Exhibit 7) and retired salaried employees at the Ravenswood facility (Exhibits 8 and 13).[2]

These comments raise three broad concerns about the proposed Judgment and the scope of the ordered divestiture. First, these commenters assert that the proposed Judgment is unnecessary because, in their view, Alcan's acquisition of Pechiney would not substantially diminish competition. Second, they contend that even if the acquisition was unlawful, requiring the parties to sell the Ravenswood facility is excessive because brazing sheet accounts for only a fraction of the facility's production. And finally, they contended that, by requiring defendants to divest the Ravenswood facility, the proposed Judgment would jeopardize jobs and retirement benefits of the facility's current and retired workers. The commenters reasoned that a purchaser of the Ravenswood facility would not be a vigorous and viable competitor – and thus, would be significantly more likely to fail – if it does not have the technical expertise to develop, produce, and sell brazing sheet and other rolled aluminum products and begins its operations saddled with the "legacy costs" (*i.e.,* retiree pension, life, health care insurance benefits) of its former owners, Alcan and Pechiney.

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[2]Two individuals sent comments not only to the Department of Justice, but also to their Congressional representatives. The United States promptly responded to those comments (Exhibits 15 and 13), and submitted more expansive replies (Exhibits 3 and 7) after it had received and reviewed all other public comments received during the sixty-day comment period. The United States also considered and responded to another public comment that had been sent to Congressional representatives (Exhibit 14), but which was never submitted directly to the Department of Justice.

In its responses, the United States generally explained that the appropriate legal standard for assessing the proposed Judgment is whether its entry would be in the "public interest." To make that determination the Court, *inter alia,* must carefully review the relationship between the relief in the proposed Judgment and the allegations of the government's Complaint. 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. "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 authority to "effectively redraft the complaint" to inquire into matters that the government might have but did not pursue, *Microsoft Corp.*, 56 F.3d at 1459-60. In the context of a Tunney Act proceeding, a court cannot, as several commenters urged, reject the proposed settlement 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. 1981). *See United Sates 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 [g]overnment's case"). Thus, the United States is not required to prove the allegations of its antitrust complaint before the Court can evaluate the appropriateness of the parties' agreed-upon relief. Imposing such a requirement on the United States would effectively turn every government antitrust case into a full-blown trial on the merits of the parties' claims, 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.

Applying those legal principles to this case, the Court's entry of the proposed Judgment surely would be "within the reaches" of the public interest (*United States v. Bechtel Corp., Inc.,* 648 F.2d 660, 666 (9th Cir.), *cert. denied,* 454 U.S. 1083 (1981)). The proposed 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 defendants promptly to divest Pechiney's Ravenswood rolling mill, which produces all of the brazing sheet made and sold by Pechiney in North America. The sale of the Ravenswood facility to a viable purchaser would create a new competitor in brazing sheet, and thus leave competition in the North American brazing sheet market no worse off after Alcan's acquisition of Pechiney than before it.

Responding to the argument that the divestiture relief in the proposed 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, aerospace sheet) at Ravenswood. The United States is unaware of any evidence that would warrant a conclusion that dismantling the Ravenswood facility to sell off a few parts exclusively committed to the production of brazing sheet would produce a viable new firm capable of replacing the competition lost by Alcan's acquisition of Pechiney. In these circumstances, the proposed Judgment's mandated complete divestiture of the Ravenswood facility as an ongoing business enterprise is an appropriate means of ensuring the new purchaser'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.")

Finally, the United States shares the commenters' keen interest in ensuring that the purchaser of the Ravenswood facility is a viable competitor capable of long-term survival. Indeed, a lynchpin of the proposed decree is its requirement that Pechiney's brazing sheet business (including the Ravenswood facility) be divested to a person who, in the United States's judgment, is able to successfully operate it as an ongoing business enterprise in competition with Alcan and others. (*See* Judgment § IV(J).) But it is far too early to assume that defendants' legacy costs will automatically doom or scare off any potential purchaser of the Ravenswood facility, especially since defendants' are still negotiating with prospective buyers.[3] Even if defendants are unable to find an acceptable purchaser through their own efforts, the proposed Judgment permits the Department of Justice to nominate, and the Court to appoint, a trustee to conduct an independent search for an acceptable purchaser and sell Pechiney's brazing sheet business "at such price and on such terms as are then obtainable upon reasonable effort" (Judgment §§ V(A) and (B)). In short, there is no reason for the Court to conclude, as some commenters have urged, that Alcan must retain Pechiney's brazing sheet business (and the Ravenswood facility) because defendants' – and if necessary, the trustee's – efforts to sell Pechiney's brazing sheet business will not produce an acceptable, viable purchaser capable of

[3]In fact, defendants recently notified the United States that they soon will request, pursuant to the terms of the Judgment (§IV(A)), an extension of the ordered deadline for their efforts to find an acceptable purchaser.

vigorously competing in the development, production, and sale of brazing sheet in North America.[4]

B. Comments from Customers and Suppliers of the Ravenswood Facility

The United States also received comments from customers and suppliers of the Ravenswood facility (Exhibits 9 through 11). The comments emphasized that the Ravenswood facility must be sold to a purchaser with the financial, technical, and marketing resources to continue operating Pechiney's brazing sheet business (and the Ravenswood facility) as part of a competitively vigorous, viable, ongoing enterprise. Like the state and government officials, these commenters doubted whether a new purchaser could manage that responsibility if it is burdened with the legacy costs of the Ravenswood facility's former owners, Alcan and Pechiney.

In response, the United States noted that the ordered divestiture should provide the new purchaser with the means to continue successfully competing against Alcan and others in the development, production, and sale of brazing sheet and other rolled aluminum products. For instance, the proposed Judgment requires defendants to sell any tangible and intangible assets used in the production and sale of brazing sheet, including the entire Ravenswood facility and any research, development, or engineering facilities, wherever located, used to develop and produce any product – not just brazing sheet – currently rolled at the Ravenswood facility, including R&D for aluminum plate used in military and aerospace applications. (*See* Judgment §§ II(E), IV(J).) As to their contention that there may not be an acceptable purchaser, the United States reiterated

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[4]Obviously, an "acceptable purchaser" of Pechiney's brazing sheet business would not be a firm so burdened by its former owners' legacy costs that it is unviable. *See* Judgment, §IV(J): divestiture terms must not give 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."

its view that it would be premature to rule out the existence of such a purchaser, since neither defendants – nor for that matter, the trustee – have exhausted all efforts to find one.

7. The public comments did not persuade the United States to withdraw its consent to entry of the proposed Judgment. At this stage, with the United States having published its proposed settlement and its responses to public comments, and defendants having certified their pre-settlement contacts with government officials, the parties have fulfilled their obligations under the APPA. Pursuant to the Hold Separate Stipulation and Order the Court entered on September 30, 2003, and 15 U.S.C. §16(e), this Court may now enter the Final Judgment, if it determines that the entry of the Final Judgment is in the public interest.

8. For the reasons set forth in the Competitive Impact Statement and its Motion for Entry of Final Judgment, the United States strongly believes that the Final Judgment is in the public interest and urges the Court to enter the Final Judgment without further 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 Notice of Filing and United States's 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 those parties, as follows:

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