UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. ALCOA INC., ACX TECHNOLOGIES, INC., and GOLDEN ALUMINUM COMPANY, *Defendants*.	)	Civil No.: 99-2943 Filed: December 6, 1999

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 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 November 5, 1999 the United States filed a civil antitrust Complaint alleging that the proposed acquisition by Alcoa Inc. ("Alcoa") of ACX Technologies, Inc.'s ("ACX") interest in Golden Aluminum Company ("Golden") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that the transaction would result in Alcoa increasing its already dominant share of the aluminum food and beverage can lid stock ("lid stock") production business in North America. Alcoa is the largest producer of lid stock in North America. Golden is a small, but low cost producer of lid stock. They compete to produce and sell the best quality

lid stock at the lowest prices, and to provide the best technological, marketing, and customer support services. Alcoa and ACX have proposed a transaction that would eliminate this competition, further increase concentration in the already highly concentrated lid stock business, and further increase the market power of the dominant firm -- Alcoa. The proposed transaction would make it more likely that the few remaining lid stock producers will engage in anticompetitive coordination to increase prices, reduce quality, and decrease production of lid stock.

The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) a permanent injunction preventing Alcoa from acquiring Golden from ACX.

When the Complaint was filed, the United States also filed a proposed settlement that would permit Alcoa to complete its acquisition of Golden, but requires a divestiture that will preserve competition in the relevant market. This settlement consists of a Stipulation and Order, Hold Separate Stipulation and Order, and a proposed Final Judgment.

The proposed Final Judgment orders Alcoa to divest, within sixty (60) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of entry of this Final Judgment by the Court, whichever is later, Golden's Fort Lupton Assets (as defined in the Final Judgment) as an ongoing business to an acquirer acceptable to the Antitrust Division of the Department of Justice ("DOJ"). "Fort Lupton Assets" means all assets included within Golden's Fort Lupton, Colorado aluminum operation including all tangible and intangible assets, and all facilities which provide engineering support to the Fort Lupton, Colorado facility.

Until such divestiture is completed, the terms of the Hold Separate Stipulation and Order entered into by the parties apply to ensure that the Fort Lupton Assets shall be maintained as an independent competitor from Alcoa.

The plaintiff and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate the 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. The Defendants and the Proposed Transaction

Alcoa is a Pennsylvania corporation, with its principal offices located in Pittsburgh, Pennsylvania. Alcoa is the world's largest integrated aluminum company, engaging in all phases of the aluminum business -- from the mining and processing of bauxite to the production of primary aluminum and fabrication of products. In 1998, Alcoa had revenues of over $15 billion. Alcoa produces lid stock at its rolling mill located in Warrick, Indiana. Alcoa's 1998 sales of lid stock in North America were approximately $700 million.

ACX is a Colorado corporation, headquartered in Golden, Colorado. ACX owns 100% of the stock of Golden, whose primary assets are two continuous cast facilities. At its facility located in Fort Lupton, Colorado, Golden produces lid stock. Golden produces a variety of aluminum sheet products (but not lid stock) at its facility located in San Antonio, Texas. In 1998, ACX reported total sales of about $988.4 million.

On August 17, 1999, Alcoa and ACX entered into an agreement under which Alcoa

would acquire all of ACX's interest in Golden. This transaction, which would increase concentration in the already highly concentrated lid stock market, precipitated the government's suit.

B. Lid Stock Market

Lid stock is a flat rolled aluminum product that is typically manufactured in a rolling mill. A typical rolling mill contains a hot mill, which performs the initial reduction of the thickness of the ingot, one or more cold mills, which finish the metal to the desired thickness and width, and a variety of ancillary equipment. Lid stock can also be produced in a continuous cast facility. In a continuous cast facility, a thin sheet of molten metal is poured onto a base and pressed between two blocks or belts to achieve the desired thickness and width.

Lid stock differs from other aluminum sheet products. Lid stock is made from a harder alloy than other aluminum sheet products, such as the sheet product from which the bodies of beverage cans are made ("can body stock"). Consequently, lid stock requires more powerful mills and more mill time to produce than can body stock and other sheet products. Lid stock is therefore more expensive to produce per pound than many other sheet products.

Lid stock is sold to can makers in large coils that are fed into lid making machines, which stamp out rings and scored circles to form the ends, tabs, and pull-off lids of food and beverage cans. Because of the metallurgical characteristics of lid stock, can makers cannot use their equipment to produce lids from can body stock or other materials, such as steel.

Can makers sell lids to food and beverage companies which use them to seal their beer, soft drink, and food cans. The food and beverage companies cannot use other types of lids to seal their cans.

As a result, a small but significant increase in lid stock prices would not cause a significant number of customers to substitute other products for lid stock.

C. Harm to Competition as a Consequence of the Acquisition

The proposed acquisition would likely lessen competition in the manufacture and sale of lid stock. Alcoa controls over 50 percent of the aluminum can lid stock market in North America. Golden is one of only five other companies that manufactures lid stock in North America. The proposed transaction will make it more likely that the few remaining lid stock producers will engage in anticompetitive coordination to increase prices, reduce quality, and decrease production of lid stock.

The Complaint alleges that the transaction would likely have the following effects, among others: actual and potential competition between Alcoa and Golden in the lid stock market would be eliminated; competition generally in the sale and manufacture of lid stock would be lessened substantially; prices for lid stock would increase; and the quality and amount of lid stock produced would decrease.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The provisions of the proposed Final Judgment are designed to eliminate the anticompetitive effects of the acquisition of Golden by Alcoa.

The proposed Final Judgment provides that Alcoa must divest, within sixty (60) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of entry of this Final Judgment by the Court, whichever is later, Golden's Fort Lupton Assets as an ongoing business to an acquirer acceptable to DOJ. If defendants fail to divest the Fort Lupton Assets, a

trustee (selected by DOJ) will be appointed.

The Final Judgment provides that Alcoa will pay all costs and expenses of the trustee. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee and the parties will have the opportunity to make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the Final Judgment, including extending the trust or the term of the trustee's appointment.

Divestiture of the Fort Lupton Assets preserves competition because it will restore the lid stock market to a structure that existed prior to the acquisition and will preserve the existence of an independent competitor. Thus, the divestiture will preserve and encourage ongoing competition in the production and sale of lid stock.

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 defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants 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 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 days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

Roger W. Fones
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
325 Seventh Street, N.W., Suite 500
Washington, D.C. 20004

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 defendants Alcoa, ACX and Golden.

The United States is satisfied that the divestiture of the described assets specified in the proposed Final Judgment will encourage viable competition in the production and sale of lid stock. The United States is satisfied that the proposed relief will prevent the acquisition from having anticompetitive effects in this market. The divestiture of the Fort Lupton Assets will restore the lid stock market to a structure that existed prior to the acquisition and will preserve the existence of an independent competitor.

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

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." In making that determination, the court may consider:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment 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). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, 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 United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the 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."[1/] Rather,

> 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.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, 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), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981); see also, Microsoft, 56 F.3d 1448 (D.C. Cir.1995). Precedent requires 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

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[1] 119 Cong. Rec. 24598 (1973). See also United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

> 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.[2/]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[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.' (citations omitted)."[3/]

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.

FOR PLAINTIFF UNITED STATES OF AMERICA:

Dated: December 6, 1999

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[2] United States v. Bechtel, 648 F.2d at 666 (internal citations omitted) (emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983).

[3] United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

Respectfully submitted,

"/s/"

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