

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,
Department of Justice
Antitrust Division
1401 H Street, NW, Suite 3000
Washington, DC 20530

STATE OF ILLINOIS,
Antitrust Bureau
Office of the Attorney General
State of Illinois
100 W. Randolph
Chicago, IL 60601
and
STATE OF MISSOURI,
Office of the Attorney General
State of Missouri
1530 Rax Court
Jefferson City, MO 65109

Plaintiffs,

v.

ALLIED WASTE INDUSTRIES, INC.
15880 Greenway-Hayden Loop, Suite 100
Scottsdale, AZ 85260
and
BROWNING-FERRIS INDUSTRIES, INC.,
757 North Eldridge at Memorial Drive
Houston, TX 77079

Defendants.

Civil No.: 99 CV 0894
Judge Ricardo Urbina

Filed: 4/22/99

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

The United States filed a civil antitrust Complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25, on April 8, 1999, alleging that the proposed acquisition of Browning-Ferris Industries, Inc.'s ("BFI") small container commercial waste hauling assets in the St. Louis market by Allied Waste Industries, Inc. ("Allied") would constitute a violation of Section 7 of Clayton Act, 15 U.S.C. § 18. The States of Illinois and Missouri, by and through their respective Attorneys General, are co-plaintiffs with the United States in this action.¹

The Complaint alleges that the effect of the acquisition may be substantially to lessen competition in small containerized commercial waste hauling services in the St. Louis market, which includes the City of St. Louis and St. Louis County in Missouri, and the Illinois counties of St. Clair, Madison and Monroe.

Plaintiffs seek, among other relief, a permanent injunction preventing the defendants from, in any manner, combining their small container commercial waste hauling assets in the St. Louis market. By the terms of a Hold Separate Stipulation and Order, which was filed simultaneously with the proposed Final Judgment, defendant Allied must take certain steps to ensure that, until the required divestiture has been accomplished, the BFI assets as outlined in the proposed Final Judgment will be held separate and apart from defendant Allied's other assets

¹ The APPA obligates only the United States to file a Competitive Impact Statement.

and businesses. Allied must, until the required divestiture is accomplished, preserve and maintain the specified BFI assets as saleable and economically viable ongoing concerns.

The United States, its co-plaintiffs, and the defendants also have filed a Hold Separate Stipulation and Order by which the parties consented to the entry of a proposed Final Judgment designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, as explained more fully below, Allied would be required within 120 days after the filing of the Hold Separate Stipulation and Order, or 5 days after notice of the entry of the Final Judgment by the Court, to divest, as viable business operations, a specified number of BFI's small container commercial waste hauling routes and assets serving the St. Louis market. If Allied did not do so within the time frame in the proposed Final Judgment, a trustee appointed by the Court would be empowered for an additional six months to sell those assets. If the trustee is unable to do so in that time, the Court could enter such orders as it shall deem appropriate to carry out the purpose of the trust, which may, if necessary, include extending the trust and the trustee's appointment by a period requested by the United States, after consultation with its co-plaintiffs.

Additionally, under the proposed Final Judgment, as explained more fully below, defendant Allied would be required to offer less restrictive contracts to its small container commercial waste hauling customers in the St. Louis market; and be prohibited from acquiring any commercial waste hauling company, any commercial waste hauling route, or any relevant

hauling assets in the St. Louis market for 5 years after notice of the entry of proposed Final Judgment.

The United States, its co-plaintiffs, and the defendants 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

Allied and BFI are two of the three largest companies engaged in the commercial waste hauling and disposal business, with operations throughout the United States. In 1998, Allied reported domestic revenues of nearly \$1.6 billion while BFI reported domestic revenues of nearly \$4.7 billion.

Allied and BFI agreed to a sale to Allied of BFI's small container commercial waste hauling assets in the St. Louis market, as part of an asset swap agreement dated February 11, 1999.

A. The Solid Waste Hauling Industry

Solid waste hauling involves the collection of paper, food, construction material and other solid waste from homes, businesses and industries, and the transporting of that waste to a landfill or other disposal site. These services may be provided by private haulers directly to

residential, commercial and industrial customers, or indirectly through municipal contracts and franchises.

Service to commercial customer accounts for a large percentage of total hauling revenues. Commercial customers include restaurants, large apartment complexes, retail and wholesale stores, office buildings, and industrial parks. These customers typically generate a substantially larger volume of waste than that generated by residential customers. Waste generated by commercial customers is generally placed in metal containers of one to ten cubic yards provided by their hauling company. One to ten cubic yard containers are called “small containers.” Small containers are collected primarily by frontend load vehicles that lift the containers over the front of the truck by means of a hydraulic hoist and empty them into the storage section of the vehicle, where the waste is compacted. Specially-rigged rearend load vehicles can also be used to service some commercial small container customers, but these trucks generally are not as efficient as frontend load vehicles and are limited in the sizes of containers they can safely handle. Frontend load vehicles can drive directly up to a container and hoist the container in a manner similar to a forklift hoisting a pallet; the containers do not need to be manually rolled into position by a truck crew as with a rearend load vehicle. Service to commercial customers that use small containers is called “small containerized hauling service.”

Solid waste hauling firms also provide service to residential and industrial (or “roll-off”) customers. Residential customers, typically households and small apartment complexes that generate small amounts of waste, use noncontainerized solid waste hauling service, normally

placing their waste in plastic bags or trash cans at curbside. Rear-end load vehicles are generally used to collect waste from residential customers and from those commercial customers that generate relatively small quantities of solid waste, similar in the amount and kind to those generated by residential customers. Generally, rear-end loaders use a one or two person crew to manually load the waste into the rear of the vehicle.

Industrial or roll-off customers include factories and construction sites. These customers either generate non-compactible waste, such as concrete or building debris, or very large quantities of compactible waste. They deposit their waste into very large containers (usually 20 to 40 cubic yards) that are loaded onto a roll-off truck and transported individually to the disposal site where they are emptied before being returned to the customer's premises. Some customers, like shopping malls, use large, roll-off containers with compactors. This type of customer generally generates compactible trash, like cardboard, in very great quantities; it is more economical for this type of customer to use roll-off service with compactor than to use a number of small containers picked up multiple times a week.

B. Small Containerized Commercial Waste Hauling Service

There are no practical substitutes for small containerized commercial waste hauling service. Small containerized commercial waste hauling service customers will not generally switch to noncontainerized service because it is too impractical and costly for those customers to bag and carry their trash to the curb for hand pick-up. Small containerized commercial waste hauling service customers also value the cleanliness and relative freedom from scavengers

afforded by that service. Similarly, roll-off service is much too costly and takes up too much space for most small containerized commercial waste hauling service customers. Only customers that generate the largest volumes of solid waste can economically consider roll-off service, and for customers that do generate large volumes of waste, roll-off service is usually the only viable option. Accordingly, small container commercial waste hauling service is a line of commerce and a relevant product market.

Solid waste hauling services are generally provided in very localized areas. Route density (a large number of customers that are close together) is necessary for small containerized commercial waste hauling firms to be profitable. In addition, it is not economically efficient for heavy trash hauling equipment to travel long distances from customers without collecting significant amounts of waste. Thus, it is not efficient for a hauler to serve major metropolitan areas from a distant base. Haulers, therefore, generally establish garages and related facilities within each major local area served. Local laws or regulations that restrict where waste can be disposed of may further localize markets. Flow control regulations designate the disposal facilities where trash picked up within a geographic area must be disposed. Other local regulations may also prohibit the depositing of trash from outside a particular jurisdiction in disposal facilities located within that jurisdiction. These laws and regulations dictate that haulers operate only in these local jurisdictions so that they may use the designated disposal facilities.

The Complaint alleges the St. Louis market as a relevant geographic market for small containerized commercial waste hauling services. This market includes the City of St. Louis and St. Louis County in Missouri, and the Illinois counties of St. Clair, Madison and Monroe.

Allied and BFI compete with each other in small containerized commercial waste hauling services in the relevant geographic market, which is highly concentrated and becomes substantially more concentrated as a result of the proposed acquisition. In the St. Louis market, Allied and BFI each have over a 25% share of the small containerized commercial waste hauling business. The acquisition would increase the Herfindahl-Hirschmann Index (“HHI”)², a measure of market concentration, by about 1400 to about 3900 in the St. Louis market.

A new entrant cannot constrain the prices of larger incumbents until it achieves minimum efficient scale and operating efficiencies comparable to the incumbent firms. In small containerized commercial waste hauling service, achieving comparable operating efficiencies requires achieving route density comparable to existing firms, which typically takes a substantial period of time. A substantial barrier to entry is the use of long-term contracts coupled with selective pricing practices by incumbent firms to deter new entrants into small containerized

²The Herfindahl-Hirschmann Index (“HHI”) is a measure of market concentration calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2600 (30 squared (900) plus 30 squared (900) plus 20 squared (400) plus 20 squared (400) = 2600). The HHI, which takes into account the relative size and distribution of the firms in a market, ranges from virtually zero to 10,000. The index approaches zero when a market is occupied by a large number of firms of relatively equal size. The index increases as the number of firms in the market decreases and as the disparity in size between the leading firms and the remaining firms increases.

commercial waste hauling service and to hinder them in winning enough customers to build efficient routes. Further, even if a new entrant endures and grows to a point near minimum efficient scale, the entrant will often be purchased by an incumbent firm and will be removed as a competitive threat.

Solid waste hauling is an industry highly susceptible to tacit or overt collusion among competing firms. Overt collusion has been documented in more than a dozen criminal and civil antitrust cases brought in the last decade and a half. Such collusion typically involves customer allocation and price fixing, and where it has occurred, has been shown to persist for many years.

The elimination of one of a small number of significant competitors, such as would occur as a result of the proposed transaction in the St. Louis market, significantly increases the likelihood that consumers in these markets are likely to face higher prices or poorer quality service.

Based on the foregoing and other facts, the Complaint alleges that the effect of the proposed acquisition may be substantially to lessen competition in the above-described geographic area in the small containerized commercial waste hauling service market in violation of Section 7 of the Clayton Act.

III.
EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The provisions of the proposed Final Judgment are designed to eliminate the anticompetitive effects of the acquisition in small containerized commercial waste hauling services in the St. Louis market by establishing a new, independent and economically viable competitor in that market. The proposed Final Judgment requires Allied, within 120 days after the filing of the Hold Separate Stipulation and Order, or 5 days after notice of the entry of the Final Judgment by the Court, to divest, as a viable ongoing business or businesses, a specified number of BFI's small container commercial waste hauling routes and assets serving the St. Louis market. The divestiture would include both the small containerized commercial waste hauling service assets and other assets as may be necessary to insure the viability of the small container business. If Allied cannot accomplish this divestiture within the above-described period, the proposed Final Judgment provides that, upon application by the United States as plaintiff, the Court will appoint a trustee to effect the divestiture.

The proposed Final Judgment provides that the assets must be divested in such a way as to satisfy plaintiff United States (after consultation with the states of Illinois and Missouri) that the operations can and will be operated by the purchaser or purchasers as a viable, ongoing business or businesses that can compete effectively in the relevant market. Similarly, if the divestiture is accomplished by the trustee, the assets must be divested in such a way as to satisfy plaintiff United States (after consultation with the states of Illinois and Missouri) that the business or businesses can and will be operated as viable, independent competitors by the purchaser or purchasers. The defendants must take all reasonable steps necessary to accomplish the divestiture and shall cooperate with prospective purchasers and, if one is appointed, with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that Allied will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which divestiture is accomplished. 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 months, if the divestiture has not been accomplished, the trustee and the parties will make recommendations to the Court which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The proposed Final Judgment also requires Allied to offer less restrictive contracts (attached to the proposed Final Judgment as Exhibit C) to small containerized commercial waste hauling customers in the St Louis market. These contractual changes involve shortening from three years to two years the term of contracts Allied uses, limiting renewals to one year periods, and substantially reducing the amount of liquidated damages. The proposed Final Judgment requires that these revised contracts shall be offered to all new, small, containerized commercial waste hauling customers and to existing customers that sign new contracts for small containerized commercial waste hauling service, effective beginning the date Allied acquires the BFI assets. By December 1, 1999, Allied must offer the revised contract to all other small containerized commercial waste hauling service customers in the St. Louis market.

The United States concluded that a change in the types of contracts used with small containerized commercial waste hauling service customers in the St. Louis market, in conjunction

with the required divestiture, will adequately address the competitive concerns posed by Allied's acquisition of the BFI assets. Several factors led to the decision, including the number of existing competitors in the market; the size of the population and number and density of commercial establishments requiring small containerized commercial waste hauling service; and the number of haulers that currently do not provide, but, absent the long-term contracts that now exist, could provide small containerized commercial waste hauling service in the market. Requiring Allied to offer less restrictive contracts within the St. Louis market eliminates a major barrier to entry and expansion. Haulers already serving the market will be able to more easily expand their current or build new routes and nearby haulers will be able to build routes, thus constraining any possible anticompetitive price increase by the post-acquisition firm.

The proposed Final Judgment also prohibits Allied from acquiring any commercial waste hauling company, any commercial waste hauling route, or any relevant hauling assets in the St. Louis market for 5 years after notice of the entry of the proposed Final Judgment. The United States concluded that this restriction would ensure continued competition in the market by preventing Allied from acquiring small containerized commercial waste hauling routes which would have had the effect of undercutting the relief required by the proposed Final Judgment by effecting the entry and expansion of other market participants and stifling competition in small containerized commercial waste hauling.

The relief sought in the St. Louis market alleged in the complaint has been tailored to insure that, given the specific conditions in this market, the relief will protect consumers of small

containerized commercial waste hauling services from higher prices and poorer quality service that might otherwise result from the acquisition

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 the 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 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 (60) 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 Final 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:

J. Robert Kramer II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
Washington, DC 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, litigation against defendants Allied and BFI. The United States could have brought suit and sought preliminary and permanent injunctions against Allied's acquisition of the BFI assets. The United States is satisfied, however, that the divestiture of the assets, the contract relief, and the prohibition on acquisitions, as outlined in the proposed Final Judgment, will promote small containerized commercial waste hauling service competition in the St. Louis market and lower entry barriers that would otherwise substantially lessen competition in this market. The United

States is satisfied that the proposed relief will prevent the acquisition from having anticompetitive effects in the St. Louis market, will maintain the structure of the St. Louis market that existed prior to the acquisition, will preserve the existence of independent competitors in this area, and will allow for new entry and expansion by existing firms in this market.

VII.
STANDARD OF REVIEW UNDER THE APPA
FOR THE PROPOSED SUPPLEMENTAL ORDER

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 supplemental Order "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) (emphasis added). 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, 1458-62 (D.C. Cir. 1995). The courts have recognized that the term " 'public interest' take[s] meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to preserve "free and unfettered competition as the rule of trade," Northern Pacific Railway Co. V. United States, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the APPA is whether the proposed Final Judgment would serve the public interest in free and unfettered competition. United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir.1983), cert. denied, 465 U.S. 1101 (1984); United States v. Waste Management, Inc., 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). 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."³ Rather,

³119 Cong. Rec. 24598 (1973). See 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

(continued)

resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S.

[a]bsent 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.), cert. denied, 454 U.S. 1083 (1981). See also Microsoft, 56 F.3d 1448 (D.C. Cir.1995). Precedent requires that:

the 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.⁴

Code Cong. & Ad. News 6535, 6538.

⁴ United States v. Bechtel, 648 F.2d at 666 (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); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d at 565.

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

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)."⁵

⁵ United States v. American Tel. and 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 United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

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.

Dated: April , 1999

Respectfully submitted,

_____/s/_____
Arthur A. Feiveson

IL Bar # 3125793

_____/s/_____
David R. Bickel

DC Bar #393409

_____/s/_____
Thomas J. Horton

_____/s/_____
Denise Cheung

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Antitrust Division, Litigation II Section
1401 H Street, NW, Suite 3000
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon Allied Waste Industries, Inc., Browning-Ferris Industries, Inc., the Office of the Attorney General of the State of Illinois, and the Office of the Attorney General of the State of Missouri, by placing a copy of this Competitive Impact Statement in the U.S. mail, directed to each of the above-named parties at the addresses given below, this day of April , 1999.

Allied Waste Industries, Inc.
c/o Tom D. Smith
Jones Day Reavis & Pogue
Metropolitan Square
1450 G Street NW
Washington, DC 20005-2088

Browning-Ferris Industries, Inc.,
c/o David M. Foster
Fulbright & Jaworski
801 Pennsylvania Avenue, NW
Washington, DC 20004-2615

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_____/s/_____
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