UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	Case No. 98 CV01497 (PLF)
	:	
v.	:	PLAINTIFF'S RESPONSE TO
	:	PUBLIC COMMENT
ALUMINUM COMPANY OF AMERICA and ALUMAX INC.	:	
	:	
Defendants.	:	

Pursuant to the requirements of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16 (b)-(h) ("Tunney Act"), the United States hereby responds to the single public comment received regarding the proposed Final Judgment in this case.

I.

Background

On June 15, 1998, the United States Department of Justice ("the Department") filed the Complaint in this matter. The Complaint alleges that the proposed acquisition of Alumax Inc. ("Alumax") by Aluminum Company of America ("Alcoa") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Alumax and Alcoa are the two largest of the three producers of aluminum cast plate ("cast plate") in the world. Alcoa's proposed acquisition of Alumax would have combined under single ownership almost 90% of the cast plate manufacturing business in the world. As a result, the proposed acquisition would substantially lessen competition in the manufacture and sale of cast plate world wide in violation of Section 7 of the Clayton Act. 15 U.S.C. § 18.

Simultaneously with the filing of the Complaint, the plaintiff filed the proposed Final Judgment and a Stipulation signed by all the parties that allows for entry of the Final Judgment following compliance with the Tunney Act. A Competitive Impact Statement ("CIS") was also filed, and subsequently published in the Federal Register on July 1, 1998. The CIS explains in detail the provisions of the proposed Final Judgment, the nature and purposes of these proceedings, and the transaction giving rise to the alleged violation.

As the Complaint and the CIS explained, the merger as originally proposed was likely to reduce or eliminate competition between Alcoa and Alumax in the worldwide market for production and sale of aluminum cast plate ("cast plate"). Alcoa and Alumax are the two largest of three firms that compete in this market. The proposed Final Judgment is intended to prevent the expected lessening of competition the merger would cause in that market.

As a remedy to competitive harm in the cast plate market, the Department and Alcoa and Alumax agreed to a divestiture of Alcoa's division that manufactures and sells cast plate. This divestiture is intended to protect consumers by ensuring continued vigorous competition among three firms in the market.

The 60-day comment period for public comments expired on August 30, 1998. As of September 11, 1998, plaintiff had received comments from one person.[1] The comment came from General Motors Corporation ("General Motors"), a self-described worldwide consumer of aluminum products.

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[1]The comment is attached. The Department plans to publish promptly the comment and this response in the Federal Register. The Department will provide the Court with a certificate of compliance with the requirements of the Tunney Act and file a motion for entry of final judgment once publication takes place.

II.

Response to the Public Comment

General Motors believes that the Department's decision to allow the Alcoa/Alumax transaction to go forward subject only to the divestiture of Alcoa's cast plate division was based on an overly narrow view of competition. General Motors believes that the Department should have challenged the transaction's competitive impact on a product market it calls "integrated aluminum production," *i.e.*, all aspects of Alcoa and Alumax's aluminum businesses, including mining, refining, smelting, hot rolling, cold rolling, extruding, forging, casting and other processes. General Motors claims that Alcoa now owns, as a result of its acquisition of Alumax, a dominant share of the assets used for integrated aluminum production all around the world. General Motors is concerned that consumers will suffer at the hands of Alcoa's dominance, which will not be curbed by the other worldwide aluminum producers.

The Department of Justice Antitrust Division's review of mergers is governed by the Clayton and Sherman Acts, judicial precedent, and the Horizontal Merger Guidelines issued jointly by the Department and the Federal Trade Commission in 1992 (and slightly revised in 1997). The first step is defining a relevant product and geographic market. In its investigation into the many different aspects of the two companies' aluminum businesses, the Department determined that what General Motors calls integrated aluminum production actually consists of numerous separate product markets with varying geographic dimensions — some are local, some are worldwide. The Department then assessed the competitive implications of the loss of an independent Alumax in those markets in which the merging firms actually compete with each other. After a thorough investigation, the Department determined that the only product market

adversely affected by the proposed acquisition was the worldwide manufacture and sale of cast plate. Accordingly, the Department brought its case on that basis, and obtained as relief a divestiture designed to remedy the competitive harm posed by the proposed acquisition in that market.

III.

The Legal Standard Governing the Court's Public Interest Determination

Once the United States moves for entry of the proposed Final Judgment, the Tunney Act directs the Court to determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e). In making that determination, the "court's function is not to determine whether the resulting array of rights and liabilities is one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest." *United States v. Western Elec. Co.*, 993 F.2d at 1576.[2] The Court should evaluate the relief set forth in the proposed Final Judgment and should enter the Judgment if it falls within the government's "rather broad discretion to settle with the defendant within the reaches of the public interest." *Microsoft*, 56 F.3d at 1461; *accord United States v. Associated Milk Producers*, 534 F.2d 113, 117-18 (8th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976).

Because it argues for a different case than the one that the Department brought, and does not address the relief ordered by the proposed Final Judgment, General Motors' comment raises issues not relevant to this Tunney Act proceeding. The Tunney Act does not contemplate a judicial reevaluation of the government's determination of which violations to allege in the

[2]The *Western Electric* decision concerned a consensual modification of an existing antitrust decree. The Court of Appeals assumed that the Tunney Act was applicable.

Complaint. The government's decision not to bring a particular case based on the facts and law before it at a particular time, like any other decision not to prosecute, "involves a complicated balancing of a number of factors which are peculiarly within [the government's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Thus, the Court may not look beyond the Complaint "to evaluate claims that the government did not make and to inquire as to why they were not made." *United States v. Microsoft*, 56 F.3d 1448, 1459 (D.C. Cir. 1995); *see also Milk Producers*, 534 F.3d at 117-18.

Similarly, the government has wide discretion within the reaches of the public interest to resolve potential litigation. *E.g., Western Elec.*, 993 F.2d at 1577; *AT&T*, 552 F. Supp. at 1521. The Supreme Court has recognized that a government antitrust consent decree is a contract between the parties to settle their disputes and differences, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-38 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), "and normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *Armour*, 402 U.S. at 681. This Judgment has the virtue of bringing the public certain benefits and protection without the uncertainty and expense of protracted litigation. *Id.; Microsoft*, 56 F.3d at 1459.

Finally, the entry of a governmental antitrust decree forecloses no private party from seeking and obtaining appropriate antitrust remedies. Thus, defendants will remain liable for any illegal acts, and any private party may challenge such conduct if and when appropriate. If the commenting party has a basis for suing the defendants, it may do so. The legal precedent discussed above holds that the scope of a Tunney Act proceeding is limited to whether entry of

this particular proposed Final Judgment, agreed to by the parties as settlement of this case, is in the public interest.

IV.

Conclusion

After careful consideration of the comment, the plaintiff concludes that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is in the public interest. The Plaintiff has moved the Court to enter the proposed Final Judgment after the public comment and this Response has been published in the Federal Register, as 15 U.S.C. § 16(d) requires.

Dated this 19th day of September, 1998.

Respectfully submitted,

/s/

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Certificate of Service

I, Mary Ethel Kabisch, hereby certify that, on September _, 1998, I caused the foregoing document to be served on defendants Alumax Inc. and Aluminum Company of America by having a copy mailed, first-class, postage prepaid, to:

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Mary Ethel Kabisch