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

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| UNITED STATES OF AMERICA,<br><br>*Plaintiff,*<br><br>v.<br><br>AMSTED INDUSTRIES, INC.,<br><br>*Defendant.* | CASE No.: 1:07-cv-00710<br><br>JUDGE: John D. Bates<br><br>DECK TYPE: Antitrust<br><br>DATE STAMP:<br><br>FILED: July 11, 2007 |

**MOTION AND MEMORANDUM OF PLAINTIFF UNITED STATES IN SUPPORT OF ENTRY OF FINAL JUDGMENT**

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States moves for entry of the proposed Final Judgment filed in this civil antitrust case. Defendant Amsted Industries, Inc. ("Amsted") has stipulated to the entry of the proposed Final Judgment upon compliance with the APPA and does not object to entry of this proposed Final Judgment without a hearing. The Competitive Impact Statement, filed April 18, 2007, explains why entry of the proposed Final Judgment is in the public interest. The United States is filing with this motion a Certificate of Compliance setting forth the steps taken by the parties to comply with all applicable provisions of the APPA and certifying that the statutory waiting periods have expired. Thus, the proposed Final Judgment may be entered at this time without further hearing if the Court determines that entry is in the public interest. 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.[1]

## MEMORANDUM

## I. Background

### A. Pre-Complaint Investigation

On December 1, 2005, Amsted entered into an Asset Purchase Agreement to acquire all the assets comprising FM Industries ("FMI"), a wholly owned subsidiary of Progress Rail Holding Corp. Pursuant to the Agreement, Amsted paid $8.6 million and transferred to Progress Rail its Quality Bearings Service roller bearing business unit. The United States Department of Justice ("Department") began investigating the competitive effects of the FMI acquisition in December 2005. On April 25, 2006, Amsted dismantled FMI by firing its employees and disposing of virtually all FMI plant equipment through an auction.

The Department considered the potentially competitive effects of the transaction with respect to a number of rail components and concluded that the combination of Amsted and FMI lessened competition in one market: end-of-car cushioning units ("EEOCs").

EEOCs are a specialized energy absorption device used when transporting sensitive cargos on freight cars. These shock-absorbing devices use hydraulics (e.g., pressurized nitrogen gas and oils) to minimize longitudinal forces by absorbing and dissipating the maximum buff,

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[1] In consent decrees requiring divestitures, it is standard practice to include a "preservation of assets" clause in the decree and to file a stipulation to ensure that the assets to be divested remain competitively viable. That practice was followed here. Proposed Final Judgment ¶ VIII.

draft, and coupling forces experienced during transit. By reducing and absorbing the forces exerted on freight cars, EOCCs ensure that sensitive cargo is not damaged during transit. Each EOCC unit consists of a piston, shaft, cylinder, end bells, and a rod that attaches the piston to the freight car coupler. Each EOCC-equipped freight car requires two EOCCs, one at each end of the freight car. Other energy absorption devices, such as draft gears and elastomeric devices, do not provide the necessary level of cushioning required by customers shipping sensitive goods on freight cars. EOCCs therefore are critical components for freight cars carrying sensitive commodities, such as steel coils, automobile products, electronics, lumber, and paper products.

Railroad customers use either new or reconditioned EOCCs when equipping freight cars. However, customers building new freight cars almost always are required to use only new EOCCs in construction. Thus, customers building new freight cars would be unable to substitute reconditioned EOCCs in building new cars. Similarly, customers servicing older freight cars that have been in service for more than a decade almost always choose reconditioned EOCCs because the cost of reconditioned units is substantially lower than the cost of new units. Thus, customers are unlikely to substitute new EOCCs for reconditioned EOCCs for use on older freight cars. A small but significant increase in the price of new EOCCs would not cause purchasers to substitute draft gear, elastomeric devices, intermodal cars, or reconditioned EOCCs so as to make such a price increase unprofitable. Similarly, a small but significant increase in the price of reconditioned EOCCs, would not cause purchasers to substitute draft gear, elastomeric devices, intermodal cars or new EOCCs so as to make a price increase unprofitable.

The Department found that, prior to Amsted's acquisition of FMI, the markets for EOCCs

were highly concentrated. For new EOCCs, the merging entities were the only two suppliers.[2] For reconditioned EOCCs, the market was limited to three suppliers, and the merging parties controlled over 80% of the market. Accordingly, on April 18, 2007, the Department filed a Complaint in this Court alleging competitive harm in the EEOC market in the United States.

### B. The Proposed Final Judgment and Post-Complaint Investigation

Along with the Complaint, the Department filed the proposed Final Judgment, Competitive Impact Statement ("CIS") and Hold Separate Stipulation and Order ("HSSO").[3] The proposed Final Judgment would preserve competition in the production, manufacture, and sale of EEOCs in the United States through the establishment of an independent and economically viable competitor by requiring Amsted to provide to a new entrant the market-specific intellectual assets needed for successful competition. The proposed Final Judgment identifies Wabtec Corporation as the approved acquirer of these assets. Amsted must divest all of the intangible assets acquired from FMI and all of the FMI tangible assets used for imparting the shape, form, or finish to EOCC components. The divestiture includes all trademarks, brands, certifications, patents, blueprints, drawings, castings, dies, molds, toolings, fixtures, specifications, quality assurance plans, manufacturing plans, and related financial data.

The proposed Final Judgment also requires Amsted to provide to the acquirer a royalty-free, perpetual license to all Amsted-generated intangible assets and a limited license to the use

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[2] One other manufacturer has been certified by the Association of American Railroads to build new units; however, that manufacturer historically has had no revenue in this product area, and customers uniformly viewed the merging parties as the only suppliers of new EOCCs.

[3] In the HSSO, Amsted agreed to comply with both the terms of the HSSO and the proposed Final Judgment pending entry of the proposed Final Judgment by the Court.

of all Amsted-generated casting patterns needed for the production of EOCC components. The license should effectively fill any intellectual property gaps in the FMI divestiture package. The license includes all patents, blueprints, drawings, castings, dies, molds, toolings, fixtures, specifications, quality assurance plans, manufacturing plans, and product tracking information.

The Department is confident that the divestiture of FMI's intellectual assets to Wabtec will remedy the violation alleged in the Complaint. Combined with readily available manufacturing equipment, these assets will provide the acquirer with immediate access to the technical know-how required to make new and reconditioned EOCCs. The engineering information should accelerate the necessary Association of American Railroads certification process, while also providing customers with assurance that the designs used by the acquirer are field tested and historically successful. The creation of a new independent competitor in the market is likely to remedy the loss of competition threatened by Amsted's acquisition of FMI. As of this filing, Amsted is making substantial efforts to divest the assets in compliance with the proposed Final Judgment.

## II. Compliance with the APPA

The APPA requires a sixty-day period for the submission of public comments on a proposed Final Judgment. *See* 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed the CIS in this Court on April 18, 2007; published the CIS in the *Federal Register* on April 30, 2007, *see United States v. Amsted Industries, Inc.*, 72 Fed. Reg. 21286-01, 2007 WL 1234777; and published summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in *The Washington Post* for seven days beginning on May 7, 2007 and ending on May

13, 2007.

The sixty-day period for public comments ended on July 5, 2007; the Division received no comments. As recited in the Certificate of Compliance filed simultaneously with this Motion, all the requirements of the APPA now have been satisfied. It is therefore appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the Final Judgment.

## III. Standard of Judicial Review Under the APPA for the 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." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with amendments to the APPA in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, 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)(1)(A) & (B); *see generally United States v. SBC Commc'ns, Inc.*, Nos. 05-2102 and 05-2103, 2007 WL 1020746, at *9-16 (D.D.C. Mar. 29, 2007) (assessing public

interest standard under APPA and effect of 2004 amendments).[4] Courts in this circuit have held – both before and after the 2004 amendments – that the United States is entitled to deference in crafting its antitrust settlements, especially with respect to the scope of its complaint and the adequacy of its remedy, which are the "two most significant legal questions" relating to a public interest determination. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995);[5] *SBC Commc'ns*, 2007 WL 1020746, at *12-*16.

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) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Courts have held 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 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.

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[4] *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006) (substituting "shall" for "may" in directing relevant factors for court to consider and amending list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms). The 2004 amendments do not affect the substantial precedent in this and other circuits analyzing the scope and standard of review for APPA proceedings. *See SBC Commc'ns*, 2007 WL 1020746, at *9 ("[A] close reading of the law demonstrates that the 2004 amendments effected minimal changes . . . .").

[5] The *Microsoft* court explained that a court making a public interest determination under the APPA should 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. *Microsoft*, 56 F.3d at 1458-62.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).[6] In making its public interest determination, a district court must accord due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case. *SBC Commc'ns*, 2007 WL 1020746, at *16 (United States entitled to "deference" as to "predictions about the efficacy of its remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003).

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.'" *United States v. AT&T Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 2007 WL 1020746, at *16.

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[6] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. 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," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 2007 WL 1020746, at *14.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). This language codified the intent of the original 1974 statute, expressed by Senator Tunney in the legislative history: "[t]he 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." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 2007 WL

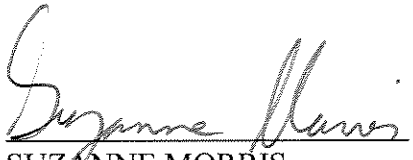
1020746, at *9.[7]

## VIII. CONCLUSION

For the reasons set forth in this Motion and the CIS, the Court should find the proposed Final Judgment is in the public interest and should enter the attached proposed Final Judgment without further hearings. The United States respectfully requests that the attached Final Judgment be entered as soon as possible.

Dated: July 11, 2007

Respectfully submitted,



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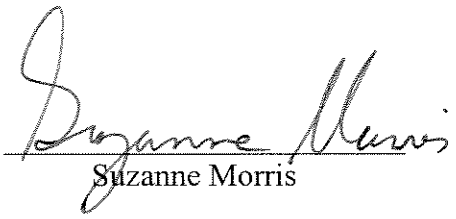
[7] *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("[T]he Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.").

**CERTIFICATE OF SERVICE**

I hereby certify that on the 11th day of July 2007, I caused a copy of the foregoing Motion and Memorandum of Plaintiff United States in Support of Entry of Final Judgment to be mailed, by U.S. mail, postage prepaid, to the attorneys listed below.



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