**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. | CAS Case: 1:07-cv-00710<br>Assigned To : Bates, John D.<br>Assign. Date : 4/18/2007<br>JUL Description: USA v. AMSTED INDUSTRIES<br><br>DECK TYPE: Antitrust<br><br>DATE STAMP: |

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 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

This case was brought because Defendant Amsted Industries, Inc. ("Amsted") acquired all of the assets of FM Industries, Inc. ("FMI"), a business unit of Progress Rail Services Holding Corporation, Inc. ("Progress Rail").[1] On April 25, 2006, Amsted dismantled FMI by firing its employees and disposing of virtually all FMI plant equipment through an auction. The United States filed a civil antitrust Complaint on April 18, 2007, alleging that the acquisition lessened competition substantially for the design, manufacture, and sale of new and reconditioned end-of-

[1] Progress Rail was subsequently acquired by Caterpillar Inc. on May 16, 2006.

car cushioning units ("EOCCs") in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 2 of the Sherman Act, 15 U.S.C. § 2. This loss of competition has impacted the rail industry through higher prices, reduced services, and decreased innovation.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, Amsted is required to divest without compensation all intellectual property and other intangible assets that it acquired from Progress Rail. In addition, Amsted is required to grant a perpetual, royalty-free license to certain Amsted-generated intellectual property and notify the United States of future acquisitions related to EOCCs. Under the terms of the Hold Separate Stipulation and Order, Amsted will take steps to ensure that the divested assets remain economically viable during the pendency of the ordered divestiture.

The United States and the defendant 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

### *A. The Parties to the Consummated Transaction*

Amsted is a diversified manufacturer of industrial components for the railroad, vehicular, and construction markets. Its products include a range of railroad car parts, including couplers, side frames, bolsters, draft gears, and EOCCs. Amsted's EOCC sales in the United States are

made through its wholly owned subsidiary, ASF-Keystone. ASF-Keystone is a Delaware corporation with its principal place of business in Granite City, IL.

Progress Rail, a wholly owned subsidiary of Caterpillar, Inc., is one of the largest suppliers of new and reconditioned railroad car parts, rail and trackwork components, and railroad car repair services to the railroad industry in the United States. Progress Rail's EOCC sales in the United States were made through its wholly owned subsidiary, FMI, formerly a Texas corporation with its principal place of business and EOCC manufacturing facility in Fort Worth, Texas.

Prior to the merger, Amsted and FMI were the only two manufacturers of new EOCCs and two of only three manufacturers of reconditioned EOCCs. The transaction lessened competition substantially for these products. As a result, prices for new and reconditioned EOCCs have increased and likely will continue to increase, the quality of EOCCs likely will decline, innovation relating to EOCCs likely will decline, and services currently offered in the EOCC markets have become and will continue to be less favorable to railroad customers.

*B. The Relevant Product Market: End-of-Car Cushioning Units*

Railroad freight cars undergo considerable stress during transit due to longitudinal forces known as draft and buff forces. Draft forces are pulling forces caused by train acceleration when freight cars are stretched or pulled apart. Buff forces are compressive forces caused by train deceleration when freight cars are pushed together. If not absorbed and dissipated, the energy from draft and buff forces can cause considerable damage to both car and cargo. Freight cars also undergo considerable stress during switching and coupling at train depots. In order for a railroad to connect one freight car to another, it must collide the cars at significant speed. The

impact sustained during switching and coupling, like draft and buff forces, can cause serious damage to sensitive cargo inside a freight car.

Railroads must equip all freight cars with energy absorption devices to mitigate the effects of draft, buff, and coupling stresses. The most common device is known as a draft gear, which provides the minimum protection required for safe railroad operation. Draft gears rely on friction between two steel plates to absorb and dissipate the energy created by longitudinal forces impacting the freight car. Another type of device is commonly referred to as an "elastomeric" device. These devices use an elastic substance (e.g., rubber) and steel coils to absorb the draft, buff, and coupling stresses. Elastomeric devices are lightweight and low cost, but they are not suitable for all applications as they return much of the absorbed energy back into the draft system. Neither draft gears nor elastomers are sufficient to protect sensitive cargos.

When transporting sensitive cargos in traditional freight cars, railroads must use EOCCs to absorb and dissipate the maximum buff, draft, and coupling forces. These devices use hydraulics (e.g., pressurized nitrogen gas and oils) to minimize longitudinal forces and 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. EOCCs are critical components for freight cars carrying sensitive commodities, such as steel products, automobile products, electronics, lumber, and paper products. 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. Railroads and new freight car builders do not consider prices or availability of draft gears or elastomeric devices when soliciting prices for EOCCs from prospective suppliers.

Though sensitive cargos can be transported by "intermodal" freight cars with articulated connectors, railroads cannot substitute intermodal transportation for freight cars equipped with EOCCs. Intermodal freight cars are specially designed railcars that allow standard cargo containers to be stacked for rail transport. The cars must travel in groups connected by a "slackless" articulated coupling system. The coupling system transfers longitudinal forces to the ends of the intermodal group, protecting the containers from damage. Despite their suitability for certain applications, intermodal freight cars do not provide sufficient cushioning for some sensitive commodities, cannot physically transport certain sensitive commodities (such as automobiles and certain lumber products), and are typically much more expensive to own and operate than freight cars equipped with EOCCs. The intermodal groups must also travel to the same destination due to their slackless connection. Because of these additional costs and operational constraints, intermodal rail transportation in North America tends to be most economical for large shipments manufactured outside of North America and imported by sea. When soliciting prices for EOCCs from prospective suppliers, railroad customers do not consider the cost of transporting goods using intermodal freight cars with articulated connectors.

Railroad customers may use either new or reconditioned EOCCs when equipping freight cars. However, customers building new freight cars are almost always required to use only new EOCCs in construction. Though higher cost, these new units are highly durable and invariably protected by an industry standard ten-year warranty. The vast majority of customers building new freight cars would be unable to use reconditioned EOCCs in construction. 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. Accordingly, the design, manufacture, and sale of new EOCCs is a separate and distinct line of commerce and a relevant product market for the purpose of analyzing the effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 2 of the Sherman Act, 15 U.S.C. § 2. Likewise, 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 such a price increase unprofitable. Accordingly, the design, manufacture, and sale of reconditioned EOCCs is also a separate and distinct line of commerce and a relevant product market for the purpose of analyzing the effects of the acquisition under Section 7 of the Clayton Act and Section 2 of the Sherman Act.

*C. The Relevant Geographic Market*

All EOCCs in the United States are designed, manufactured, and sold in the United States. Amsted sells, and FMI sold, EOCCs to customers located throughout the United States. The United States is the relevant geographic market for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act and Section 2 of the Sherman Act.

*D. The Competitive Effects of the Transaction on End-of-Car Cushioning*

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. Thus, the markets were highly concentrated and became substantially more so following the acquisition. Using the Herfindahl-Hirschman Index ("HHI"),[3] the consolidation in the market for reconditioned EOCCs resulted in a post-merger concentration of over 7000 (an increase of over 2700), while the consolidation in the market for new EOCCs resulted in a monopoly.

Amsted and FMI directly constrained each other's prices, limiting overall price increases for new and reconditioned EOCCs. Prior to the transaction, Amsted created forecasts that contemplated significant price increases resulting from the merger. These price increases were aimed at achieving certain margin targets each year that would result in total additional profits of

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[2] American Hydraulics, Inc. is the only other manufacturer certified by the Association of American Railroads ("AAR") to build new units. However, American Hydraulics historically has had no revenue in this product area, and customers uniformly viewed the merging parties as the only suppliers of new EOCCs.

[3] "HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is 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 thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. See *Merger Guidelines* ¶ 1.51.

over $17 million during the first three years following the transaction. According to the forecasts, achieving this goal would require an overall price increase of 4% in 2006, 10% in 2007, and 5% in 2008, beyond materials cost increase surcharges. Amsted pricing data shows that Amsted raised prices substantially following its acquisition of FMI. For new EOCCs, customers who did not have the pricing protection of long-term contracts paid on average approximately 14% more in February 2006 than they did in November 2005. For reconditioned EOCCs, customers without long-term contracts paid an average increase of approximately 5% more during the same time period.

Purchasers of new and reconditioned EOCCs in the United States benefitted from vigorous and aggressive competition between Amsted and FMI through lower prices, higher quality, more innovation, and better service. Without the competitive constraint of head-to-head competition from FMI, Amsted has had and will continue to have the ability to exercise market power by raising prices, lowering product quality, lessening innovation, and decreasing the level of services.

Entry into the design, manufacture, and sale of new or reconditioned EOCCs will not be timely, likely, or sufficient to counter the anticompetitive effects of the transaction. A new entrant to either market would require certifications and approvals from the Association of American Railroads ("AAR"), including facility certification and design certification for each EOCC model to be manufactured or reconditioned. Additionally, the AAR requires that a new entrant undergo a conditional approval period during which production is monitored and significantly limited.

It is also essential that a new entrant into either the new or reconditioned EOCC markets have sufficient technical know-how regarding the product in order to design and sell EOCCs. Thus, a new entrant must invest in significant design and engineering expertise in order to create the necessary tooling and intellectual property required to successfully manufacture new or reconditioned EOCCs according to AAR standards and railroad customer requirements.

A new entrant into the new or reconditioned EOCC markets also must produce EOCCs in sufficient quantities and with sufficiently consistent quality to assure railroad customers that the new and reconditioned EOCCs will provide the necessary level of cushioning required to protect sensitive cargo. Achieving this quality reputation requires an additional investment in time and money by any new entrant.

Although the manufacturing processes for new and reconditioned EOCCs are similar, both require unique inputs that are not readily available in the marketplace. For example, the manufacture of new EOCCs requires the use of patented designs and proprietary molds that are not needed in the reconditioning process. Similarly, the manufacture of reconditioned EOCCs requires the application of certain machining techniques and testing processes that are unique to the EOCC reconditioning market.

For these reasons, entry by any firm into the new or reconditioned EOCC markets would not be timely, likely, or sufficient to counter anticompetitive price increases imposed by Amsted.

## III.

## EXPLANATION OF THE PROPOSED FINAL JUDGMENT

Because the FMI business was discontinued as a result of the transaction and Amsted now has only one facility that manufactures EOCCs, the divestiture of a going concern in this case would be difficult and potentially disruptive to the railroad industry. Instead, the divestiture

and license requirements of the proposed Final Judgment are designed to create an independent and economically viable competitor by providing to a new entrant the market-specific intellectual assets needed for successful competition. The proposed Final Judgment requires that Amsted divest these assets, without compensation, to a pre-approved acquirer operating in the railroad industry. Amsted must divest all of the acquired FMI intangible assets 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 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 and resolve questions concerning the completeness of the available FMI assets. The license includes all patents, blueprints, drawings, castings, dies, molds, toolings, fixtures, specifications, quality assurance plans, manufacturing plans, and product tracking information.

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 AAR certification process, while also providing customers with assurance that the designs used by the acquirer are field tested and historically successful. The proposed Final Judgment provides that for the divestiture to be approved, it must be demonstrated to the satisfaction of the United States, in its sole discretion, that the acquirer will enter the market to remedy the competitive harm alleged in

the Complaint. The divestiture must be made to an acquirer that in the United States' judgment has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the design, manufacture, and sale of EOCCs; the divestiture also must be accomplished in a manner that satisfies the United States, in its sole discretion, that none of the terms of any agreement between an acquirer and the defendant gives the defendant the ability unreasonably to raise the acquirer's costs, reduce the acquirer's efficiency, or otherwise interfere in the ability of the acquirer to compete effectively in the design, manufacture, and sale of EOCCs. The defendant must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with the acquirer.

The proposed Final Judgment requires the defendant, within sixty (60) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, (1) to divest the Divested Assets to the acquirer, and (2) to grant the Supplemental Asset License to the acquirer. The defendant agrees to use its best efforts to accomplish the license grant and divestiture expeditiously.

In the event that the approved acquirer is unable or unwilling to receive the divested assets, the Court will appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the assets to an alternative acquirer acceptable to the United States. Amsted 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 speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of 60 days, if the divestiture has not been accomplished, the trustee and the United States 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 requires Amsted to release all industry participants of restrictive covenants that might otherwise inhibit the acquirer's access to employees, customers, or suppliers. Amsted must also release Progress Rail from an acquisition-related "covenant not to compete" if the acquirer is unable to deliver its first manufactured or reconditioned unit within twelve months after the entry of the Final Judgment.

Finally, the proposed Final Judgment prohibits Amsted from acquiring any assets of or any interest in the development, production, or sale of EOCCs in the United States if the value of such acquisition exceeds $1,000,000 without first notifying the United States through procedures set out in the Final Judgment, unless the transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act. This notification requirement runs for a period of ten years.

The provisions of the proposed Final Judgment will facilitate new entry in order to eliminate the anticompetitive effects of the acquisition in the design, manufacture, and sale of EOCCs.

## 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 defendant.

V.

## PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendant 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, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. 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:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, 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, a full trial on the merits against the defendant. The United States could have commenced litigation and sought a judicial order requiring Amsted to recreate FMI as a separate business unit that could be divested as a going concern. This alternative would have substantially delayed relief while introducing a significant risk that the divestiture would be unsuccessful. This alternative may have also increased the potential for harm to the markets through supply disruption and a decrease in available capacity. The United States is satisfied that the divestiture and license described in the proposed Final Judgment will facilitate entry in order to recreate competition for the design, manufacture, and sale of EOCCs in the relevant markets identified by the United States, and thus would achieve substantially all of the relief that the United States would have obtained through litigation, but without the cost and risks associated with trial.

VII.

STANDARD OF 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 shall consider:

(A) 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, 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

(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). As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, 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 Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

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.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).[4] In making its public interest determination, a district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case. *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 that is 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. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *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). The Court "must accord deference to the government's predications about the efficacy of its remedies, and may not require the remedies to perfectly match the alleged violations because this may only reflect underlying weaknesses in the government's case or concessions made during negotiations." *United States v. SBC Commc'ns, Inc.*, Nos. 05-2102 and 05-2103, 2007 WL 1020746, at *16 (D.D.C. Mar. 29, 2007).

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[4] *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (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"). *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 Commc'ns*, 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*, at *14.

In 2004, Congress amended the APPA to ensure that courts take into account the above-quoted list of relevant factors when making a public interest determination. *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). These amendments, however, did not change the fundamental role of courts in reviewing proposed settlements. To the contrary, 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:

> [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. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

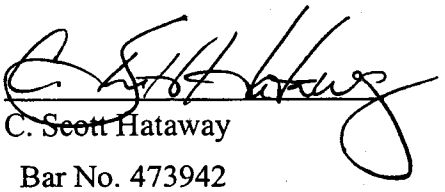
This Court recently examined the role of the district court in reviewing proposed final judgments in light of the 2004 amendments, confirming that the amendments "effected minimal changes[] and that this Court's scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *See United States v. SBC Commc'ns, Inc.*, Nos. 05-2102 and 05-2103, 2007 WL 1020746, at *9 (D.D.C. Mar. 29, 2007). This Court concluded that the amendments did not alter the articulation of the public interest standard in *Microsoft*. *Id.* at *15.

## 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 18, 2007

Respectfully submitted,



C. Scott Hataway
Bar No. 473942
U.S. Department of Justice
Antitrust Division, Lit II Section
1401 H Street NW
Washington, DC 20530
202-514-8380