**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>BEMIS COMPANY, INC.,<br><br>and<br><br>RIO TINTO PLC,<br><br>and<br><br>ALCAN CORPORATION,<br><br>Defendants. | Case: 1:10-cv-00295<br>Assigned To : Kollar-Kotelly, Colleen<br>Assign. Date : 02/24/2010<br>Description: Antitrust<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

Defendants Bemis Company, Inc. and Rio Tinto plc entered into a Sale and Purchase Agreement, dated July 5, 2009, pursuant to which Bemis agreed to acquire the Alcan Packaging Food Americas business from Rio Tinto for $1.2 billion.

The United States filed a civil antitrust Complaint against Bemis, Rio Tinto, and Alcan Corporation on February 24, 2010, seeking to enjoin Bemis's acquisition of the Alcan Packaging Food Americas business. The Complaint alleged that the acquisition likely would substantially

lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, in the United States and Canada, for the design, development, production, marketing, servicing, distribution, and sale of: (1) flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale; (2) flexible-packaging rollstock for shredded natural cheese packaged for retail sale; and (3) flexible-packaging shrink bags for fresh meat (hereinafter, collectively, the "Relevant Products"). That loss of competition likely would result in higher prices, decreased quality, less favorable supply-chain options, reduced technical support, and lesser innovation in the markets for the Relevant Products.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of Bemis's acquisition of the Alcan Packaging Food Americas business. Under the proposed Final Judgment, which is explained more fully below, Bemis is required to divest all of the intangible assets (i.e., intellectual property and know-how) related to the production of Alcan Relevant Products[1] in the United States and Canada and two of the plants involved in the production of the Alcan Relevant Products. Bemis is also required to divest all of the tangible assets necessary to operate the divested plants and all tangible assets used exclusively or primarily in the production of any Alcan Relevant Product in the United States or Canada.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would

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[1] The term "Alcan Relevant Products" refers specifically to those Relevant Products produced by Alcan, rather than to Relevant Products produced by Bemis or others.

terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

## II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS

### A. The Defendants

Bemis is a worldwide provider of packaging materials, including flexible packaging for natural cheese and fresh meat. In 2008, Bemis and its subsidiaries had total sales of approximately $3.8 billion, including approximately $2.1 billion in sales of flexible packaging in the United States.

Rio Tinto is an international mining company headquartered in the United Kingdom, with approximately $58 billion in sales in 2008. Alcan is a wholly owned subsidiary of Rio Tinto. The Alcan Packaging Food Americas business produces and sells flexible packaging in the United States, Canada, and Latin America. In 2008, the Alcan Packaging Food Americas business sold approximately $1.5 billion of flexible packaging.

### B. The Competitive Effects of the Acquisition in the Markets for Flexible Packaging for Natural Cheese and Fresh Meat

Flexible packaging is any package the shape of which can be readily changed. Flexible packaging for food encompasses a wide range of products, including bags and wrappings for cheeses and meats, snack bags, and cereal-box liners. Flexible packaging is distinguishable from rigid packaging, such as jars, cans, cups, trays, and hard plastic bottles.

Varying degrees of design and manufacturing sophistication are required to produce flexible packaging for different end uses. Some flexible packaging, such as single-layer packaging, is relatively simple to manufacture, and customers can choose from a number of

producers for these types of flexible packaging. Flexible packaging for other end uses, such as natural cheese and fresh meat, however, has multiple layers, is subject to more rigorous performance standards, requires greater scientific knowledge and technical know-how to engineer, and requires that technical support be readily available, and, therefore, is more difficult to produce and commercialize successfully.

Bemis and Alcan are the two leading suppliers in the United States and Canada of flexible packaging products suitable for a variety of natural cheese products packaged for retail sale. Bemis and Alcan are also two of the three primary suppliers of shrink bags for fresh-meat packaging in the United States and Canada.

*1. Relevant Product Markets*

a. Natural-Cheese Packaging

Natural cheese is sold in several forms, including chunk cheese, sliced cheese, and shredded cheese. The films used in flexible packaging for some natural cheese products are sold in the form of rollstock, which is a continuous sheet of film that is cut for each package. Most natural cheese sold at retail is packaged using rollstock films.

Cheese packaging customers demand a long shelf-life for natural cheese. The flexible-packaging rollstock for natural cheese must include a barrier layer that keeps out oxygen to prevent the cheese from spoiling. The packaging must also prevent moisture from leaking into or out of the package. Some cheeses emit gasses as they age; such cheeses require packaging that allows gasses to escape. In addition, the packaging film must be sufficiently transparent to present the cheese well to the consumer, but also avoid discoloration from fluorescent lights. The packaging must also resist abrasion and cracking during distribution and run smoothly and

efficiently on the customer's filling machines. Finally, the packaging must be inert, so that the flavor of the cheese is not compromised by the plastic.

(i) Flexible-Packaging Rollstock for Chunk and Sliced Natural Cheese

Chunk natural cheese is sold in bricks of specific sizes, typically eight, but ranging to thirty-two, ounces. Sliced natural cheese is typically sold in packages with roughly ten or more slices. Producers of chunk and sliced natural cheese generally use the same films for packaging. Specialized rollstock films are designed specifically for packaging chunk and sliced natural cheese for retail sale. While some chunk and sliced natural cheeses for retail sale are packaged in other forms of packaging (e.g., shrink bags or rigid trays), these are more expensive to purchase than rollstock packaging and cannot be used on the same packaging equipment as rollstock. A small but significant increase in the price of flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale likely would not cause customers faced with such an increase to substitute other forms of packaging, or otherwise purchase sufficiently less of the product, so as to render the price increase unprofitable. Accordingly, the United States has alleged that flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

(ii) Flexible-Packaging Rollstock for Shredded Natural Cheese Packaged for Retail Sale

Shredded natural cheese packaged for retail sale typically is packaged in bags, which often come with an easy-open mechanism and an easy-close attachment. The easy-open mechanism is either laser scored or mechanically scored, such that some of the package's layers

are perforated (making the package easy to tear), while leaving the oxygen and moisture barriers intact (preventing contamination of the product). The scoring process presents significant challenges to flexible-packaging producers. The sealing process also is difficult because the bags typically are filled with cheese while in a vertical position and the release of cheese into the bags is continuous and fast.

Specialized films are designed specifically for shredded natural cheese packaged for retail sale. A small but significant increase in the price of flexible-packaging rollstock for shredded natural cheese packaged for retail sale likely would not cause customers faced with such an increase to switch to other forms of packaging, or otherwise purchase sufficiently less of the product, so as to render the price increase unprofitable. Accordingly, the United States has alleged that flexible-packaging rollstock for shredded natural cheese packaged for retail sale is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

b. Flexible-Packaging Shrink Bags for Fresh Meat

Several characteristics are common to most flexible packaging films for fresh meat (i.e., beef, veal, pork, and lamb). First, most films for fresh meat contain a layer that prevents oxygen from coming into contact with the meat. Second, fresh meat films must prevent moisture from leaking out and contaminants from entering the packaging. Third, fresh meat films must run effectively on the customer's packaging equipment. Finally, the sealant must bond through fatty and oily substances.

The most common type of flexible packaging film for fresh meat is a shrink bag, which is designed to shrink to the contours of the contents when heated, forming a tight seal. Shrink bags

are particularly suitable for use with fresh meat, in particular for wholesale distribution of meat to be cut for retail sale in grocery stores. Shrink bags used for fresh meat must be durable enough to survive the rigors of distribution while maintaining its oxygen and moisture barriers and allowing the meat to retain its flavor. The bag must also meet shelf-life requirements of 30 days or more and, when used for retail packaging, have a high degree of transparency for optimal presentation.

A small but significant increase in the price of flexible-packaging shrink bags for fresh meat likely would not cause customers faced with such an increase to substitute to other forms of packaging, or otherwise purchase sufficiently less of the product, so as to render the price increase unprofitable. Accordingly, the United States has alleged that flexible-packaging shrink bags for fresh meat constitute a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

*2. Relevant Geographic Market*

Producers of the Relevant Products ship the products to customers throughout the United States and Canada. Producers outside the United States and Canada are not good alternatives for customers in the United States and Canada, and producers outside the United States and Canada have not been able to obtain significant business from customers in the United States and Canada. Customers using producers outside the United States and Canada would face longer lead times and an increased potential for supply-chain complications. Moreover, major customers demand that producers of flexible packaging provide frequent technical and operational service and support at the customer's premises and do not believe that foreign suppliers can provide the level of service and support they demand. A small but significant

increase in the price of the Relevant Products in the United States and Canada would not cause a sufficient number of customers in the United States and Canada to turn to manufacturers of the Relevant Products outside the United States and Canada so as to make such a price increase unprofitable. Accordingly, the United States has alleged that the United States and Canada comprise a relevant geographic market within the meaning of Section 7 of the Clayton Act.

*3. Anticompetitive Effects*

a. Flexible-Packaging Rollstock for Chunk and Sliced Natural Cheese Packaged for Retail Sale

Bemis and Alcan dominate sales of flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale. Due to Bemis's and Alcan's collective overall expertise in meeting the needs of customers and other technical and commercial factors for flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale, including, among other things, price, delivery times, service, and technical support, Bemis and Alcan frequently are perceived by each other, by other bidders, and by customers as being the two strongest competitors in that market. Currently, Bemis and Alcan account for approximately 37 and 54 percent, respectively, of sales in the United States and Canada for this product. Absent the divestitures, Bemis and Alcan combined would account for approximately 91 percent of sales in the United States and Canada for this product.

Market shares are best measured using revenues in the markets for the Relevant Products because suppliers with the capacity to produce similar goods outside of those markets cannot quickly and easily shift that capacity to supply customers with the Relevant Products. Thus, the mere possession of similar capacity does not make a supplier an "uncommitted entrant" as that

term is used in the *Horizontal Merger Guidelines*; meeting the requirements of customers in a cost-efficient manner also requires specialized know-how, experience, qualification, and the ability to innovate.

Bemis's bidding behavior often has been constrained by the threat of losing business to Alcan. By eliminating Alcan, Bemis would gain the incentive and likely ability to profitably increase its bid prices higher than it otherwise would without the acquisition. Customers have also benefitted from competition between Bemis and Alcan through higher quality, better supply-chain options (including delivery times and volume-purchase requirements), technical support, and numerous innovations. The combination of Bemis and Alcan would eliminate this other competition and future benefits to the customers.

The proposed acquisition, therefore, likely would substantially lessen competition in the United States and Canada for flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale, which likely would lead to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation, in violation of Section 7 of the Clayton Act.

b. Flexible-Packaging Rollstock for Shredded Natural Cheese Packaged for Retail Sale

Bemis and Alcan are two of only a few credible competitors that might successfully bid to supply a customer with flexible packaging rollstock for shredded natural cheese packaged for retail sale. Although other flexible packaging suppliers market competing products, customers have stated that Bemis's and Alcan's products are technologically superior to other available packaging and have uniquely effective features (e.g., easy-open and reclose mechanisms). Bemis

and Alcan have also massed a collective expertise in meeting the needs of customers with respect to price, delivery times, service, technical support, scale, breadth of product offering, and new product development that other competitors have not been able to match. Therefore, Bemis and Alcan frequently are perceived by each other, by other bidders, and by customers as being the two strongest competitors in that market. Currently, Bemis and Alcan account for approximately 27 and 49 percent, respectively, of sales in the United States and Canada for this product. Absent the divestitures, Bemis and Alcan combined would account for approximately 76 percent of sales in the United States and Canada for this product.

Market shares are best measured using revenues in the markets for the Relevant Products because suppliers with the capacity to produce similar goods outside of those markets cannot quickly and easily shift that capacity to supply customers with the Relevant Products. Thus, the mere possession of similar capacity does not make a supplier an "uncommitted entrant" as that term is used in the *Horizontal Merger Guidelines*; meeting the requirements of customers in a cost-efficient manner also requires specialized know-how, experience, qualification, and the ability to innovate.

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The proposed acquisition, therefore, likely would substantially lessen competition in the United States and Canada for flexible-packaging rollstock for shredded natural cheese packaged for retail sale, which likely would lead to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation, in violation of Section 7 of the Clayton Act.

c. Flexible-Packaging Shrink Bags for Fresh Meat

Currently, Bemis and Alcan account for approximately 20 and 8 percent, respectively, of the sales in the United States and Canada for flexible-packaging shrink bags for fresh meat. If the proposed acquisition is not enjoined, Bemis and Alcan combined would account for approximately 28 percent of sales of flexible-packaging shrink bags for fresh meat in the United States and Canada, and leave Bemis and one other firm with over 90 percent of sales.

Market shares are best measured using revenues in the markets for the Relevant Products because suppliers with the capacity to produce similar goods outside of those markets cannot quickly and easily shift that capacity to supply customers with the Relevant Products. Thus, the mere possession of similar capacity does not make a supplier an "uncommitted entrant" as that term is used in the *Horizontal Merger Guidelines*; meeting the requirements of customers in a cost-efficient manner also requires specialized know-how, experience, qualification, and the ability to innovate.

Although the third supplier of flexible-packaging shrink bags for fresh meat is the dominant supplier, some customers desire two or more suppliers. As a result, Bemis and Alcan often find themselves competing to be the second supplier, and their price competition exerts

pricing pressure also on the dominant firm. Unless the proposed acquisition is enjoined, that bidding dynamic would be eliminated because Bemis and Alcan no longer would bid against one another. In addition, Bemis's elimination of Alcan as an independent competitor would result in only two suppliers accounting for nearly all of the market. Such an increase in concentration likely would make coordination more likely.

The proposed acquisition, therefore, likely would substantially lessen competition in the United States and Canada for flexible-packaging shrink bags for fresh meat, which likely would lead to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation, in violation of Section 7 of the Clayton Act.

d. Entry

Some customers in the United States and Canada have attempted to procure suitable flexible-packaging rollstock for chunk, sliced, and shredded natural cheese packaged for retail sale from producers that do not currently produce packaging for these uses. Similarly, some customers in the United States and Canada have attempted to procure suitable flexible-packaging shrink bags for fresh meat from producers beyond Bemis and Alcan and the dominant producer. Most of those flexible-packaging producers have not been able cost-effectively to achieve the required specifications or quality requirements. These suppliers likely would not be able to meet customers' required specifications or quality requirements cost-effectively within a commercially reasonable period of time, nor would they likely be able to produce Relevant Products that would run efficiently on their customers' packaging equipment. Indeed, many customers who have looked for alternative suppliers have not been able to find credible competitors other than Bemis,

Alcan, and, in the case of flexible-packaging shrink bags for fresh meat, the aforementioned dominant producer.

New entry into the markets for Relevant Products in the United States and Canada would be costly, difficult, and time consuming. A new supplier would need to construct production lines capable of producing films that meet the rigorous standards set forth by major buyers of such films. Construction of manufacturing facilities would require millions of dollars of capital investment, and the entrant would have to be committed to research and development. In addition, the technical know-how necessary to design and successfully manufacture packaging that is able to run efficiently on customers' equipment cost-effectively is difficult to obtain.

Even after a new entrant has developed the capability to supply the Relevant Products, the entrant must be qualified by potential customers, demonstrating that it is capable of manufacturing products that meet rigorous quality and performance standards. For example, because the qualifying process for natural cheese typically requires a shelf-life test, where sample products are wrapped in the candidate packaging and stored in retail-like conditions for extended periods of time, the process can take many months. Further, there is no guarantee that the attempted qualification will be successful, and the potential entrants may have to repeat the process multiple times. In some cases, the qualification process has taken multiple years and in other cases has failed repeatedly. Moreover, because customer specifications are unique, qualification with one customer does not guarantee qualification with another.

Entry of existing packaging firms that do not currently produce Relevant Products is also unlikely because the technical know-how necessary to create the Relevant Products is difficult to

obtain. Also, a company would have to pass each customer's rigorous qualification tests. Entry by new firms or by existing packaging firms into the markets for Relevant Products, therefore, likely would not be timely, likely, and sufficient to defeat a small but significant post-acquisition increase in price in the relevant markets.

## III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestitures required by the proposed Final Judgment will eliminate the anticompetitive effects that would otherwise likely result from Bemis's acquisition of the Alcan Packaging Food Americas business. These divestitures will preserve competition in the markets for the Relevant Products by creating an additional independent, economically viable competitor to Bemis in the United States and Canada for each of the Relevant Products.

The Final Judgment requires the divestiture of the entire business that currently produces the Alcan Relevant Products, which includes all of the intangible and non-plant tangible assets associated with the those products, as well as two of the four plants currently producing those products. The divestiture of the intangible assets associated with the Alcan Relevant Products is critically important, as it is difficult to obtain the know-how necessary to design and successfully manufacture packaging that is able to run efficiently on customers' equipment. The divestiture package must also include plants that are already successful in producing the Relevant Products, as the know-how required to create competitive packaging includes specialized knowledge of the equipment used in producers' and customers' plants. The collective knowledge and experience of the plant management and employees will enable an Acquirer to compete successfully with Bemis for the manufacture and sale of the Relevant Products. Divestiture of all the plants

currently producing the Alcan Relevant Products is not necessary to remedy the competitive issues presented by the Transaction, however; once a critical base of knowledge and experience regarding the production of the Relevant Products is attained, an Acquirer will be able to create or expand its own physical facilities to accommodate its business.

To this end, the divestiture assets include: (1) all tangible assets used exclusively or primarily for the research and development of any Alcan Relevant Product in the United States or Canada; (2) all records and documents relating to any Alcan Relevant Product in the United States or Canada; (3) all intangible assets used exclusively or primarily in the design, development, production, marketing, servicing, distribution, or sale of any Alcan Relevant Product in the United States or Canada; and (4) with respect to any intangible assets not included in (3), above, and that prior to the filing of the Complaint in this matter were used in connection with the design, development, production, marketing, servicing, distribution, or sale of both any Alcan Relevant Product and any other Alcan product, a non-exclusive, non-transferable license for such intangible assets to be used for the design, development, marketing, servicing, distribution, or sale of any of the Relevant Products or the operation or use of the plants to be divested. These assets are to be divested regardless of whether they are currently used at the plants to be divested.

The proposed Final Judgment also requires the divestiture of two of the four plants currently manufacturing the Alcan Relevant Products. The first of these plants is the Alcan facility located at 905 W. Verdigris Parkway, Catoosa, Oklahoma (the "Catoosa facility"), which exclusively produces flexible-packaging shrink bags for fresh meat. The second plant is the Alcan facility located at 271 River Street, Menasha, Wisconsin (the "Menasha facility"), which

produces both flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale and flexible-packaging rollstock for shredded natural cheese packaged for retail sale. The Menasha facility also contains a wax-coating operation that is not associated with the Relevant Products and will be moved by Bemis to another of its plants.

The other two plants currently producing Alcan Relevant Products are the Alcan facility located at 901 Morrison Drive, Boscobel, Wisconsin (the "Boscobel facility") and the Alcan facility located at 1500 East Aurora Avenue, Des Moines, Iowa (the "Des Moines facility"). The Boscobel facility produces flexible-packaging rollstock for shredded natural cheese packaged for retail sale and packaging for processed meat (which is not a Relevant Product), while the Des Moines facility produces flexible packaging shrink bags for fresh meat and packaging for processed meat (which is not a Relevant Product). The Boscobel and Des Moines facilities produce such a substantial quantity of non-Relevant Products that a divestiture of those plants likely would require either that the plant be split, with both Bemis and the Acquirer occupying the plant for a significant period of time, or that a significant amount of business involving non-Relevant Products be transferred to the Acquirer.

By contrast, the Catoosa facility exclusively produces Relevant Products, and the Menasha facility, while also containing a non-relevant wax-coating operation, is uniquely situated because the wax-coating operation is largely confined to a discrete area of the plant and can be moved by Bemis to another facility with minimal disturbance to the Acquirer. The proposed Final Judgment requires, therefore, divestiture of the Catoosa facility and all related assets, and of the Menasha facility and all related assets, with the exception of the wax-coating operation.

The only near-term issue created by the fact that Bemis will be divesting only two of the plants currently producing the Relevant Products is that the Acquirer(s) may not immediately have the capacity to produce the quantities of Relevant Products currently demanded by customers. Thus, supply and transition services agreements are contemplated in the proposed Final Judgment to allow the Acquirer(s) time to build or adapt its own facilities to accommodate the new production.

First, because the Alcan shrink bag product known as "Maraflex" is not produced at either the Menasha facility or the Catoosa facility, supply and transition services agreements may be necessary to ensure that the Acquirer will be able immediately to provide Maraflex products to customers. Therefore, the proposed Final Judgment provides that, at the option of the Acquirer of the assets relating to the Maraflex products, Bemis shall enter into a supply contract with that Acquirer for Maraflex products sufficient to satisfy that Acquirer's obligations under any customer contract for a period of up to one (1) year. The United States, in its sole discretion, may approve an extension of the term for a period of up to two (2) additional years. In addition, at the option of the Acquirer of the assets relating to Maraflex products, Bemis shall enter into a transition services agreement with that Acquirer sufficient to meet all or part of that Acquirer's needs for assistance in matters relating to the development, production, and service of the Maraflex products or technology for a period of at least six (6) months, but no longer than three (3) years.

Second, the proposed Final Judgment provides for a supply agreement relating to the provision of flexible-packaging rollstock for shredded natural cheese packaged for retail sale. Currently, flexible-packaging rollstock for shredded natural cheese is produced in the Menasha

facility and the Boscobel facility. While the Menasha facility will be divested to an Acquirer, the Boscobel facility will be retained by Bemis. As a consequence, an Acquirer's ability immediately to produce flexible-packaging rollstock for shredded natural cheese may not be sufficient to satisfy the Acquirer's existing supply obligations or to allow the Acquirer to expand the business in competition with Bemis. Therefore, the proposed Final Judgment provides that, at the option of the Acquirer of the Menasha facility, Bemis shall enter into a supply contract with that Acquirer for any Relevant Product produced at the Boscobel facility, sufficient to satisfy that Acquirer's obligations under any customer contract for a period of up to one (1) year. The United States, in its sole discretion, may approve an extension of the term of this supply contract for a period of up to one (1) additional year.

Third, because Bemis will retain the wax-coating operation currently housed in the Menasha facility and move it to another of its plants after the Transaction is closed, the proposed Final Judgment requires that the Acquirer of the Menasha facility enter into an agreement with Bemis permitting Bemis to occupy the portions of the Menasha facility utilized for the wax-coating operation for a period of no longer than three (3) years after the date the Transaction is closed. Also, at the option of Bemis, the Acquirer of the Menasha facility will be required to enter into an agreement with Bemis to provide Bemis with rotogravure printing services for the wax-coating operation at the Menasha facility for a period of up to twelve (12) months.

Finally, the proposed Final Judgment provides for a supply agreement relating to "Clearshield," which is another Alcan shrink bag product. Clearshield is produced exclusively at the Catoosa facility, which is to be divested. However, as a part of the Transaction, Bemis will be acquiring an obligation to supply Clearshield to certain of Alcan's South American and New

Zealand affiliates. In order to allow Bemis to meet those obligations, the proposed Final Judgment provides that, at the option of Bemis, the Acquirer of the Catoosa facility shall enter into a supply contract for the Clearshield products sufficient to satisfy Alcan's or Bemis's obligations to Alcan's South American and New Zealand affiliates for a period of up to one (1) year. The United States, in its sole discretion, may approve an extension of the term of this supply contract for a period of up to two (2) years. In addition, to allow Bemis to continue to supply the Clearshield products to those affiliates in the future, the proposed Final Judgment provides that, at the option of Bemis, the Acquirer of the assets relating to the Clearshield products shall enter into an agreement to provide Bemis with a non-exclusive, non-transferable license to enable Bemis to produce the Clearshield products for sale outside the United States and Canada. These agreements, along with the divestiture of the assets described previously, will ensure that the Acquirer(s) will be able to immediately and fully compete with Bemis for the production and sale of Relevant Products.

The proposed Final Judgment also provides that, at the option of Bemis, the Acquirer(s) must enter into an agreement to provide Bemis with a non-exclusive, non-transferable license for the intangible assets used primarily in the design, development, production, marketing, servicing, distribution, or sale of any Alcan Relevant Product in the United States or Canada that, prior to the filing of the Complaint in this matter, were also used in connection with any other Alcan product. Any such license, however, is to be granted for use solely in connection with products other than the Alcan Relevant Products. Bemis will have no rights to the intangible assets used exclusively in the design, development, production, marketing, servicing, distribution, or sale of any Alcan Relevant Product in the United States or Canada.

In addition, because certain of the intangible assets to be divested currently are encumbered by existing third-party rights, the proposed Final Judgment provides that the Acquirer of any asset thus encumbered must enter into an agreement with the affected third party to provide it with a right to that asset under terms and conditions sufficient to satisfy defendants' obligations to that third party.

Bemis is also required to provide the Acquirer(s) of the divestiture assets information relating to personnel involved in the design, development, production, marketing, servicing, distribution, or sale of the Alcan Relevant Products to enable them to make offers of employment, and prevents Bemis, Rio Tinto or Alcan from interfering with any negotiations by the Acquirer(s) to employ any employee whose primary responsibility is the design, development, production, marketing, servicing, distribution, or sale of the Alcan Relevant Products. The proposed Final Judgment further requires Bemis, Rio Tinto, and Alcan to waive all noncompete agreements for any current or former Alcan employee involved in the design, development, production, marketing, servicing, distribution, or sale of any Alcan Relevant Product.

In addition, Bemis may not solicit business for any Relevant Product that is subject to an unexpired Alcan customer contract transferred to an Acquirer for a period of one (1) year from the date of the divestiture or the remaining term of the contract, whichever is shorter. This provision is necessary to ensure that the Acquirer has the full benefit of the transferred contracts and the time to demonstrate its ability to independently produce the Relevant Products. This provision does not prevent a customer from seeking alternative suppliers at any time that it chooses, subject to the terms and conditions of its own contract.

The assets required to be divested must be divested in such a way as to satisfy the United States in its sole discretion that these assets can and will be operated by the Acquirer(s) as viable, ongoing businesses that can compete effectively in the design, development, production, marketing, servicing, distribution, or sale of the Alcan Relevant Products in the United States and Canada. These assets may be divested to one or more Acquirers, provided that the asset listed in paragraphs II(E)(2) of the proposed Final Judgment (the Menasha facility) is divested to the same purchaser as any tangible or intangible assets related to the design, development, production, marketing, servicing, distribution, or sale of the Alcan Relevant Products produced at the Boscobel facility. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

In the event that defendants do not accomplish the divestiture within ninety (90) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment of the Court, whichever is later, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Bemis 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 and terms obtained and 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 six (6) months, 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 divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects that likely would result if Bemis acquired the Alcan Packaging Food Americas business because the Acquirer(s) will have the ability to design, develop, produce, market, service, distribute, and sell the Alcan Relevant Products in the United States and Canada, in competition with Bemis.

## IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendants.

## V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (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 sixty (60) 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 United States 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
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 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 defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions preventing Bemis's acquisition of the Alcan Packaging Food Americas business. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will preserve competition for the design, development, production, marketing, servicing, distribution, and sale of the Relevant Products in the United States and Canada. Thus, the proposed Final Judgment would achieve all or

substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by 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 in accordance with the statute, the court 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
>
> (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). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965

(JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").

As the United States Court of Appeals for the District of Columbia 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 Microsoft*, 56 F.3d at 1458-62. 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; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. 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).[2] In determining whether a

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[2] *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*

proposed settlement is in the public interest, the court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant 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).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[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). Therefore, 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*, 489 F. Supp. 2d at 17.

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*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"). *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; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). 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. *Microsoft*, 56 F.3d at 1459-60. As this Court 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." 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[3] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating: "[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). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which

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[3] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

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*, 489 F. Supp. 2d at 11.[4]

## 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: February 24, 2010

Respectfully submitted,

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[4] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

## CERTIFICATE OF SERVICE

I, Rachel J. Adcox, hereby certify that on February 24, 2010, I caused a copy of the foregoing Competitive Impact Statement to be served upon defendants Bemis Company, Inc., Rio Tinto plc, and Alcan Corporation by mailing the documents electronically to the duly authorized legal representatives of defendants as follows:

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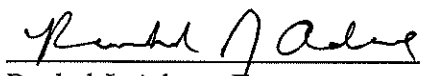

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