UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et. al., Plaintiffs, v. ELECTION SYSTEMS and SOFTWARE, Inc., Defendant.	CASE NO.: 1:10-cv-00380 JUDGE: Bates, John D. DECK TYPE: Antitrust DATE STAMP:

RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case. After careful consideration of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

The United States and the States of Arizona, Colorado, Florida, Maine, Maryland, New Mexico, Tennessee, and Washington, and the Commonwealth of Massachusetts (the "Plaintiff States"), filed a civil antitrust Complaint on March 8, 2010, seeking injunctive and other relief to remedy the likely anticompetitive effects arising from the acquisition of Premier Election Solutions, Inc. and PES Holdings, Inc. (collectively, "Premier"), by Defendant Election Systems and Software, Inc. ("ES&S"). The Complaint alleged that ES&S's acquisition of Premier likely

would result in higher prices, a reduction in quality, and less innovation in the U.S. voting equipment systems market, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and an Asset Preservation Stipulation and Order ("APSO") signed by the plaintiffs and the defendant, consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. § 16. Pursuant to those requirements, the United States filed its Competitive Impact Statement ("CIS") with the Court on March 8, 2010; published the proposed Final Judgment and CIS in the *Federal Register* on March 15, 2010, *see United States, et. al. v. Election Systems and Software, Inc.*, 75 Fed. Reg. 12256; 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 March 19, 2010 and ending on March 25, 2010. The sixty-day period for public comments ended on May 24, 2010; three comments were received as described below and attached hereto.

I. THE INVESTIGATION AND PROPOSED RESOLUTION

On September 2, 2009, ES&S executed a Purchase Agreement to acquire Premier from Diebold, Inc ("Diebold") in exchange for $5 million in cash and 70 percent of certain receivables. ES&S consummated the acquisition on the same day the agreement was executed. Because the purchase price for this transaction fell below the reporting thresholds of the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976, ES&S was not required to report the acquisition to the Department of Justice or the Federal Trade Commission before consummation. *See* 15 U.S.C. § 18a(a)(2)(B)(i) (2000); 75 Fed. Reg. 3468 (Jan. 21, 2010). As soon as the United States Department of Justice ("Department") became aware of the

acquisition, it opened an investigation into the likely competitive effects of the transaction that spanned nearly six months. As part of this investigation, the Department obtained substantial documents and information from ES&S and Diebold, took oral testimony from ES&S and Diebold executives, and issued several Civil Investigative Demands to third parties. In total, the Department received and considered more than 500,000 electronic documents. The Department also conducted over 100 primary interviews and multiple follow-up interviews with customers, competitors, regulators, industry groups and other individuals with knowledge of the voting equipment system industry. The investigative staff carefully analyzed the information provided and thoroughly considered all of the issues presented. The Department considered the potential competitive effects of the transaction on the development, sale and service of voting equipment systems in the United States, and concluded that ES&S's acquisition of Premier substantially lessened competition in the development, sale and service of voting equipment systems.

A voting equipment system consists of the integrated collection of customized hardware, software, firmware and associated services used to electronically record, tabulate, transmit and report votes in an election. The number, variety, and operation of electronic components within a voting equipment system vary depending on the needs of the jurisdiction responsible for administering elections, which may be the state, county or local government, depending on state law. Voting equipment systems typically are sold to state, county and municipal jurisdictions pursuant to request for proposals, and a winning bid is selected after a public procurement process. Jurisdictions evaluate vendors based on a wide variety of technical and commercial criteria, including compliance with state law, technical standards, certification standards, experience in other jurisdictions and commercial standards such as price, delivery schedule, financial wherewithal, and other terms of sale. Vendors typically provide multi-year service

agreements.

As explained more fully in the Complaint and CIS, the acquisition of Premier by ES&S combined two firms that many customers considered the two closest competitors in the provision of voting equipment systems, as well as the two largest providers of U.S. voting equipment systems. As a result of ES&S's acquisition of its closest competitor, ES&S has a reduced incentive both to compete as aggressively for bids and to invest in new products, thereby likely increasing the price and reducing the quality of the voting equipment systems available to most jurisdictions. Therefore, the Complaint alleged that the acquisition of Premier likely would substantially lessen competition in the United States market for voting equipment systems, which likely would lead to higher prices, lower quality and less innovation, in violation of Section 7 of the Clayton Act. The proposed Final Judgment will restore competition by making available to an independent entity the Premier assets necessary to equip an economically viable competitor to ES&S in the provision of voting equipment systems in the United States.

II. SUMMARY OF PUBLIC COMMENTS AND THE UNITED STATES'S RESPONSE

During the sixty-day comment period, the United States received three comments, all of which addressed only the proposed Final Judgment provision that released current and former Premier employees from noncompete agreements. The comments, all submitted anonymously, are attached hereto in the Appendix to this Response.[1]

The proposed Final Judgment requires that ES&S "waive all nondisclosure and

[1] The first comment was submitted without signature, *see* Appendix at 1; the other two comments were signed "The Public," and are identical in every respect. *See* Appendix at 2 and 3.

noncompete agreements for all of the current and former employees of Premier for a period of six (6) months following the date of the divestiture of the Divestiture Assets, for the exclusive purpose of allowing those employees to seek employment with the Acquirer." Section IV(D). This clause is intended to give the Acquirer an opportunity to recruit employees with experience serving current Premier customers and to obtain expertise related to the development, sale, repair and service of Premier voting equipment system products. The commenters argue that ES&S should be required to void or waive all Premier noncompete agreements for a much broader period of time and for any purpose, in order to allow Premier employees to avoid legal liability for violating those agreements. In response, the United States contends that the limited waiver of noncompete agreements in the proposed Final Judgment will allow the Acquirer to collect the expertise it needs to replace the competition lost when Premier was purchased by ES&S, and that the commenters' proposed modifications would not serve that purpose and might even undermine the Acquirer's ability to build a competitive work force.

The United States has reviewed the comments submitted and has determined that the proposed Final Judgment remains in the public interest.

A. Summary of Public Comments

The commenters argue that the proposed Final Judgment's requirement that ES&S waive Premier noncompete agreements should be modified to excuse all current and former employees from noncompete agreements that were breached in the past, agreements that might be breached more than six months following the divestiture, and agreements that are breached by an employee's defection to a competitor other than the Acquirer. The comments submitted by "The Public" state that (1) ES&S should not be permitted to enforce noncompete agreements against former employees who already have begun working for other vendors because "these former

employees would be subject to legal action from ES&S"; (2) the six-month period is unnecessary because "the agreements are already set to expire in September 2011," and (3) "these former employees should also be able to go to work for any company in the election industry, not just the acquirer." *See* Appendix at 2 and 3. The unsigned comment likewise argues that noncompete agreements should be waived retroactively to the date that ES&S acquired Premier, to "prevent ES&S from filing suit against any former Premier employees prior to this judgment." *See* Appendix at 1. The comments provide no further explanation of the proposed modifications, nor do they identify any link between the proposed modifications and the competitive harm arising from the acquisition of Premier by ES&S.

B. The United States's Response

The proposed Final Judgment requires that ES&S waive noncompete agreements for current and former employees for a period of six months following the divestiture, to allow the Acquirer to develop the expertise necessary to develop, sell, repair and service voting equipment systems for current Premier customers. As the Acquirer becomes able to offer the experience and expertise that Premier enjoyed before its acquisition by ES&S, that acquirer will be better able to restore competition in the sale of voting equipment systems. The requirement that ES&S waive noncompetes is limited to six months in order to encourage the Acquirer to solicit staff expeditiously and to minimize the disruption to ES&S customers preparing for upcoming elections, which otherwise might result from significant staff turnover.

The commenters do not suggest that their proposed modification will have any effect on the remedial impact of the proposed Final Judgment. Indeed, if the provision were modified as they suggest, employees would have no more incentive to seek a position with the Acquirer than with any other vendor, which actually might undermine the competitive efficacy of the proposed

Final Judgment by reducing the pool of expertise from which the Acquirer could successfully recruit. Further, if the six-month limitation on the noncompete waiver were removed, as "The Public" suggests, the Acquirer's incentive to recruit a complete work force quickly, so as to be prepared to compete immediately, would be sharply reduced. Likewise, because significant employee attrition will unavoidably disrupt vendor support of the installation, service and repair of Premier voting equipment systems, limiting the waiver to six months minimizes the impact of that disruption on upcoming elections.[2]

The commenters do not suggest that the proposed Final Judgment itself would cause current or former employees any injury. Instead, the comments appear to seek a form of amnesty for employees who already have left ES&S's employ, and may have violated their noncompete agreements long before the Complaint and proposed Final Judgment were filed. *See* Appendix at 2 and 3 ("...some of these former employees have already started working with other vendors."). The proposed Final Judgment does not create new liability for Premier employees, but merely removes the disincentive of potential liability for employees who are otherwise willing to bring their expertise to the Acquirer, helping to ameliorate the anticompetitive impact of ES&S's acquisition of Premier.

In sum, the United States continues to believe that the proposed Final Judgment will remedy the competitive harm arising from ES&S's acquisition of Premier, and that the

[2] "The Public" argues that all Premier noncompete agreements expire on September 2011, but offers no support for this contention. Indeed, the Department's information is that the expiration of these agreements varies. Even if it were true that all agreements terminate in September 2011, extending the waiver for nearly a year past the six months provided in the proposed Final Judgment could disrupt an additional calendar year of election services, and could reduce the Acquirer's readiness to compete for new procurements that are expected to issue in late 2010 and early 2011.

commenters' proposed modifications to the noncompete waiver provision not only would fail to serve that goal, but also could well undermine it.

III. STANDARD OF JUDICIAL REVIEW

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, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, 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 mechanisms to enforce the Final Judgment are clear and manageable").

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 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).[3] In determining whether a

[3] *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"). *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'").

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' 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.

In its 2004 amendments to the Tunney Act,[4] Congress made clear its intent to preserve

[4] 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

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 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.[5]

IV. CONCLUSION

The issues raised in the public comments were among the many considered by the United States when it evaluated the sufficiency of the proposed remedy. The United States has determined that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public

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(concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[5] *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.").

interest. The United States will move this Court to enter the proposed Final Judgment after the comments and this response are published in the Federal Register.

Dated: June 17, 2010

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Stephanie A. Fleming, hereby certify that on June 17, 2010, I caused a copy of the foregoing Response of Plaintiff United States to Public Comments on the Proposed Final Judgment to be served upon defendant Election Systems and Software, Inc. and the Plaintiff States by mailing the documents electronically to their duly authorized legal representatives as follows:

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Appendix:
Public Comments

April 5, 2010

Maribeth Petrizzi
Chief Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 8700
Washington, DC 20530

Dear Ms. Petrizzi:

As an interested third party to the court case involving Election Systems & Software's purchase of Premier Election Solutions, I would like to request that the judgment stipulate that the signed employment and non-compete agreements of former Premier employees be waived as of the purchase date of Premier by ES&S, up to a period of six months following the judgment date. The reason for this request is to prevent ES&S from filing suit against any former Premier employees prior to this judgment based on those agreements.

I am aware that ES&S is not shy in bringing legal action against current or former employees for any reason and without regard to the facts surrounding the incidents. I am writing this letter anonymously to prevent the possible legal entanglements with ES&S should they find out who wrote it. You may think this is paranoid, but I have had first-hand experience dealing with their frivolous and destructive lawsuits.

I thank you for your consideration of this matter and hope my letter is taken seriously, for that is how it is intended.

Attention:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW; Suite 8700
Washington, DC 20530

UNITED STATES OF AMERICA, *et al.*,

Plaintiff,

v.

ELECTION SYSTEMS & SOFTWARE, Inc.,

Defendant.

As a friend of a former employee of Premier Election Solutions who was terminated as a result of this illegal acquisition by Election Systems & Software (ES&S), I would like to file a suggestion to the court. The former employees of Premier Elections should not be restricted to continue working their trade in elections or be prevented from earning a living for their families as a result of a noncompetition agreement and Separation Agreement in this illegal purchase. The agreements should be considered null and void. Election Systems & Software (ES&S) should not have the right to ever pursue former Premier Associates in legal matters with respect to those Agreements. The Agreements should **not** be void as of the Date of the Final Judgment as some of these former employees have already started working with other vendors. These former employees would be subject to legal action from ES&S since they wouldn't fall within the window set forth in the Final Judgment. **These Agreements should be considered void as of the date of the employee's termination date.** Also the agreements are already set to expire in September 2011 so there is no reason to have a 6 month window for any acquirer to hire these former employees. These former employees should also be able to go to work for any company in the election industry, not just the acquirer, without fear or threat from ES&S. Below is my consideration to the wording set forth in the Final Judgment.

All restrictive covenants contained within any employment agreement or separation agreement entered into between Premier Election Solutions, Inc., its' parent corporation, subsidiaries, officers, directors, supervisors and/or representatives (collectively referred to as "Premier") and any individuals formerly employed by Premier who were terminated in 2009 are declared void. Premier may not institute or maintain a cause of action or any claim based on a restrictive covenant against any individual formerly employed by Premier who was terminated in 2009. Premier has consented to waive all such claims and causes of action throughout the United States of America.

Thanks for your consideration.

The Public

Attention:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW; Suite 8700
Washington, DC 20530

UNITED STATES OF AMERICA, *et al.*,

Plaintiff,

v.

ELECTION SYSTEMS & SOFTWARE, Inc.,

Defendant.

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Thanks for your consideration.

The Public