UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff v. L.B. FOSTER COMPANY and PORTEC RAIL PRODUCTS, INC. Defendants	Case: 1:10-cv-02115 Assigned To : Urbina, Ricardo M. Assign. Date : 12/14/2010 Description: Antitrust

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 L.B. Foster Company ("Foster") and Portec Rail Products, Inc. ("Portec") entered into an Agreement and Plan of Merger, dated February 16, 2010. Pursuant to the Merger Agreement, on February 26, 2010, Foster made a cash tender offer to acquire all the outstanding shares of common stock of Portec for $11.71 per share. Foster later increased its offer to $11.80 per share. The transaction value is currently approximately $114 million.

The United States filed a civil antitrust Complaint on December 14, 2010, seeking to enjoin the proposed acquisition, alleging that it likely would substantially lessen competition in two separate product markets—bonded insulated rail joints ("bonded joints") and polyurethane-

coated insulated rail joints ("poly joints")—in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Foster and Portec are virtually the only manufacturers of bonded joints in the United States. The loss of competition from the acquisition likely would result in higher prices, lower quality, less customer service, and less innovation in the development, manufacture, and sale of bonded joints in the United States. In addition, Foster and Portec are two of only three suppliers of poly joints in the United States. The loss of competition from the acquisition likely would result in higher prices and less customer service in the development, manufacture, and sale of poly joints in the United States.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects that would result from Foster's acquisition of Portec. Under the proposed Final Judgment, which is explained more fully below, Foster is required to divest Portec's entire rail joint business,[1] including Portec's only U.S. manufacturing facility, located in Huntington, West Virginia. Foster is also required to divest several other products currently manufactured in Portec's Huntington facility. Under the terms of the Hold Separate, Foster's and Portec's operations will remain entirely separate until the divestiture takes place. Pursuant to the Hold Separate, Foster and Portec must take certain steps to ensure that the assets being divested continue to be operated in a competitively and economically viable manner and that competition for the products being divested is maintained during the pendency of the divestiture.

[1] This excludes, however, Portec's Coronet products, which are manufactured in the United Kingdom. The Coronet rail joints are based on different specifications than the rail joints manufactured and sold by Portec in the United States. In addition, the Coronet rail joints have never been sold in the United States.

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 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

Foster manufactures and distributes numerous products and services for the rail, construction, energy, and utility industries. For the rail industry, Foster manufactures, among other products, bonded joints, poly joints, tie plates, and rails. Foster had total revenues of approximately $512 million in 2008 and approximately $382 million in 2009. Foster supplies approximately 51 percent of the bonded joints and 21 percent of the poly joints in the United States.

Portec also manufactures and distributes numerous products and services for the rail industry and other industries. For the rail industry, Portec manufactures, among other things, bonded joints, poly joints, rail lubricators, end posts, and curv blocks. Portec had total revenues of approximately $109 million in 2008 and approximately $92.2 million in 2009. Portec supplies approximately 44 percent of the bonded joints and 33 percent of the poly joints in the United States.

B. The Competitive Effects of the Acquisition on the U.S. Markets for Bonded Joints and Poly Joints

1. Relevant Markets

Railroad tracks are divided into discrete sections, called track circuits. Electricity flows through the rail in each track circuit, and each track circuit is electrically isolated from the others.

As the train enters a track circuit, the circuit allows the train to signal that it is passing through that particular circuit, which leads to the operation of automatic signals at rail crossings and switches. The track circuits also enable the railroad operator to monitor the location of the trains.

Most pieces of railroad track are welded together within a track circuit, forming the strongest possible bond. However, welding cannot be used to connect the pieces of rail between separate track circuits because that would allow the electric current to flow between the circuits and interfere with the train's signaling. Using an insulated rail joint is the only method available to connect the rail pieces at the ends of the track circuits and insulate the circuits from one another. Rail joints consist of steel bars that are bolted onto the ends of each of the rail pieces and are used to connect the abutting ends of the rails. Insulated rail joints contain material placed on the steel bars and between the two abutting pieces of rail, which prevents the electric current from flowing between the track circuits.

The reliability of an insulated rail joint is critical to the safety and efficient operation of the railroad. It is difficult to develop and manufacture insulated rail joints that can successfully withstand railroads' usage without failing, particularly in the most demanding applications. Rail connected by a rail joint is inherently weaker than rail that has been welded together, and if the joint is subjected to heavy usage, the joint may wear down over time and eventually break. An insulated rail joint may also lose its insulating properties over time. The consequences of a failed insulated joint can be quite serious, as the railroad operator will not know the location of the train and the signals will not operate properly.

It is vital to the railroads that insulated rail joints last for their expected life without failure. To that end, the largest U.S. railroads engage in extensive, multi-year testing to ensure than any new insulated rail joint product, or any insulated rail joint offered by a new supplier,

will meet their reliability and quality needs. The railroads must be assured that the joints are designed to last and the supplier's manufacturing processes are sufficiently well controlled that all joints will last the requisite time without failing. Railroads gain substantially from improvements in the reliability and effective life of joints. Consequently, research and development is an important component of the competitive process, and insulated joint manufacturers must make substantial investments in research and development to compete effectively for sales to the major railroads.

The two primary types of insulated rail joints are bonded joints and poly joints. Customers seek bids for either bonded joints or poly joints, based on the particular application. Bonded joints use epoxy in addition to bolts to bind the steel bars to the rails. With the addition of epoxy, the rails, bars, bolts, and insulating material that make up the joint are less subject to movement when a railcar passes over the joint, and thus suffer less wear and tear. Bonded joints are able to withstand the heaviest loads for extended periods of time, and are typically guaranteed to last until 500 million gross tons have passed over them.

Because of their strength, bonded joints are necessary for the freight railroads' high-usage main track lines. This is especially true for the Class 1 railroads, which are the largest U.S. railroads and handle most of the heavy freight rail traffic in the United States. No other insulated rail joint is strong enough to withstand the heavy loads on these lines over time. Bonded joints are also necessary for some heavily traveled areas on main passenger lines and regional and short line railroads. Bonded joints have specific applications, for which any other type of joint can rarely, if ever, be employed.

The vast majority of Foster's and Portec's sales of bonded joints are made to large customers located in the United States. Major U.S. customers consider only those suppliers of

bonded joints located in the United States because of these suppliers' proximity to their rail lines, which significantly reduces both freight costs and delivery times and allows better customer service.

A small but significant increase in the price of bonded joints would not cause U.S. customers of bonded joints to substitute a different joint or any other type of product, reduce purchases of bonded joints, or turn to suppliers outside the United States, in volumes sufficient to make such a price increase unprofitable. Thus, the development, manufacture, and sale of bonded joints in the United States is a line of commerce and relevant market within the meaning of Section 7 of the Clayton Act.

Like bonded joints, poly joints also are used to electrically isolate track circuits. Unlike bonded joints, the electrical insulation in poly joints is provided by a polyurethane-covered bar that is bolted to the rail. The joint components are not bound together by epoxy, and no mechanism is added to provide additional strength to the joint. Poly joints are not as strong and do not last as long as bonded joints. They are also significantly less expensive than bonded joints. Because they are weaker than bonded joints, freight railroads typically use poly joints to create track circuits in areas with lesser loads and traffic than on the main tracks or on other less-heavily used sections of track. Poly joints also may be used as temporary replacements for bonded joints, but only until bonded joints can be installed. Poly joints are used by some passenger railroads or other smaller railroads, which carry less weight on their tracks. A customer whose requirements will be satisfied by a poly joint would rarely, if ever, substitute a bonded joint, even if the price of poly joints were to rise.

The three primary suppliers of poly joints in the United States ship poly joints to customers located throughout the United States. Because all three suppliers are located within

approximately 200 miles of one another, customers pay only minimal differences in freight costs. U.S. customers of poly joints consider only those suppliers located in the United States to avoid higher freight costs, reduce delivery times, and allow better customer service.

A small but significant increase in the price of poly joints would not cause U.S. customers of poly joints to substitute a different joint or any other type of product, otherwise reduce purchases of poly joints, or turn to suppliers outside the United States, in volumes sufficient to make such a price increase unprofitable. Thus, the development, manufacture, and sale of poly joints in the United States is a line of commerce and relevant market within the meaning of Section 7 of the Clayton Act.

2. Anticompetitive Effects

Foster's acquisition of Portec likely would substantially lessen competition in the United States for bonded joints and poly joints. For most U.S. customers of bonded joints, Portec and Foster are the two primary suppliers and are often the only suppliers. Currently, Foster and Portec sell approximately 51 and 44 percent, respectively, of U.S. bonded joints. One other company, which does not have the same commitment to research and development as Foster and Portec, accounts for the remaining five percent of sales. If the acquisition is not enjoined, the combined firm would supply approximately 95 percent of bonded joints in the United States and would have a virtual monopoly in that market. Using a measure called the Herfindahl/Hirschman Index ("HHI"), the HHI would increase by approximately 4,500 points, resulting in a post-acquisition HHI of more than 9,000 points.

The possibility of losing sales of bonded joints to each other has often constrained Foster's and Portec's bidding behavior. The competition between Foster and Portec for sales of bonded joints has resulted in lower prices and innovations that have produced higher-quality and

longer-lasting joints. Without the competition provided by Portec on bonded joints, Foster would have the incentive and gain the ability profitably to increase prices, reduce quality, reduce innovation, and provide less customer service. The remaining competitor, with only five percent of bonded joint sales, has limited customer acceptance and would not be able to increase its sales post-acquisition sufficiently to discipline the anticompetitive effects of the acquisition.

For most U.S customers, Foster and Portec are two of only three suppliers of poly joints. Currently, Foster and Portec sell approximately 21 and 33 percent, respectively, of poly joints in the United States. The third competitor accounts for the remaining sales in this market. If the acquisition is not enjoined, the combined firm would supply approximately 54 percent of poly joints in the United States. The HHI would increase by more than 1,300 points, resulting in a post-acquisition HHI of more than 5,000 points. The possibility of losing sales of poly joints to each other has often constrained Foster's and Portec's bidding behavior. Competition among the three poly joint suppliers has resulted in lower prices. As the products of the three companies are to some degree different, the acquisition of Portec likely will eliminate the closest competitor to Foster for some customers and thus allow the two remaining competitors to increase prices. Also, because the price levels and the dollar magnitude of the margins are higher for bonded joints than poly joints, any sales diverted from poly joints to bonded joints offer the prospect of additional profits to the merged firm. The acquisition of Portec by Foster would eliminate the significant competition between Foster and Portec and its future benefits to customers. Post-acquisition Foster likely would have the incentive and gain the ability to profitably increase prices and provide less customer service.

If the number of competitors in the U.S. poly joint market is reduced from three to two, Foster and its only remaining competitor will have the incentive and ability to raise prices

through coordinated interaction by directly increasing prices, allocating customers, or restricting output or capacity. Unlike in the bonded joint market where post-acquisition Foster will have close to a monopoly, coordination will be more likely or more effective in the poly joint market because, with two significant competitors, both could be reasonably certain of the identity of each other's customers, likely making cheating, such as discounting, easier to detect and discipline. The enhanced ability to detect cheating would be facilitated by, among other things, the fact that bids by public transit companies are often or usually made public.

3. Entry

Sufficient, timely entry of additional competitors into either the U.S bonded joint market or the U.S. poly joint market is unlikely, and the threat of entry thus will not prevent the likely competitive harm resulting from Foster's acquisition of Portec. For bonded joints, rapid, successful, and profitable entry requires that a new supplier develop and successfully operate a production process that consistently produces a large number of high-quality bonded joints that meet the railroads' rigorous specifications. A new supplier of bonded joints also must invest in research and development to meet the railroads' desire for innovation and increased strength and longevity. These capabilities are difficult to obtain, and it takes years for a joint manufacturer to develop the know-how and expertise required to meet customers' qualification requirements. Further, many Class 1 railroads insist that new bonded joints undergo not only laboratory testing, but also several years of in-track testing on the railroads' lines, to ensure that the joints meet the railroads' performance standards under actual usage conditions. Attempts by suppliers to meet a Class 1 railroad's requirements may not be successful, and approval by one railroad does not guarantee approval by others.

Similarly, a new supplier of poly joints in the United States must develop the expertise to manufacture a large number of joints on a consistent base, which could take years. A new poly joint supplier must obtain approvals from its customers, whose rigorous approval processes can take eighteen months or more. Approval by any customer cannot be assured, and approval by one customer does not guarantee approval by any other.

Therefore, entry by new firms or the threat of entry by new firms would not defeat the substantial lessening of competition in the development, manufacture, and sale of bonded joints and poly joints in the United States that likely would result from Foster's acquisition of Portec.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects that likely would result from Foster's acquisition of Portec. This divestiture will preserve competition in the development, manufacture, and sale of bonded joints and the development, manufacture, and sale of poly joints by creating an independent, economically viable competitor to Foster in the United States for these products.

The acquirer of the divested assets will obtain from Defendants the assets it needs to replace the competition in the sale of bonded joints and poly joints that would be lost as a result of Foster's acquisition of Portec. The proposed Final Judgment requires Defendants to divest the assets used to manufacture and sell Portec's bonded joints and poly joints, including Portec's facility in Huntington, West Virginia, and the tangible and intangible assets used to manufacture and sell these joints. The tangible assets include, among other things, manufacturing equipment, tooling, inventory, and materials. The intangible assets include, among other things, patents, licenses, intellectual property, know-how, trade secrets, trade names, drawings, specifications, computer software, marketing and sales data, manuals and technical information, and research

data. The divested assets will provide the acquirer with the assets it needs to successfully manufacture and sell bonded joints and poly joints in the United States.

This divestiture also ensures that the Huntington facility will be able to operate efficiently. Defendants are required to divest the assets used to manufacture and sell the following other Portec products currently manufactured at the Huntington facility: end posts, polyurethane-coated gauge and tie plates, fiberglass joint kits, plastic insulation, standard rail joints, compromise and transitional rail joints, and Weldmate joint bars. These assets need to be divested because the products use the same inputs or machinery as bonded joints and poly joints or are closely related or complementary to the bonded joints and poly joints. The assets used to manufacture these related or complementary products will be sold to the acquirer so the acquirer's ability to continue producing bonded joints and poly joints efficiently at that facility will not be impaired. These products together constitute Portec's full line of rail joints and complementary products and will make the acquirer a stronger competitor than if it acquired only the bonded joint and poly joint assets. This full range of products will allow the Huntington facility to be operated as a viable standalone facility.

A few other Portec products currently being manufactured at the Huntington facility, primarily friction management products and Shipping Systems Division ("SSD") products, are not being divested. These products are not related to bonded joints and poly joints and do not use the same equipment or inputs. For example, the friction management and SSD products are merely assembled at Huntington from off-the-shelf parts. As a result, the products not being divested do not directly alter the efficient operation of the bonded joint and poly joint assets.

The proposed Final Judgment designates Koppers Inc. as the company to which the divested assets must be sold. While the United States does not generally require that the

purchaser of the divested assets be identified and approved prior to and as a condition of settlement, the unique circumstances of this case necessitate such an approach. In many cases, numerous potential acquisition candidates would be acceptable to the customers and the United States. Also, acquirers in most cases would be able to continue selling the divested products without significant delays made necessary by extensive testing requirements. Here, the upfront designation of the acquirer ensures the sale will be made to an acquirer with the expertise and resources necessary to replace Portec immediately as a full-fledged competitor to Foster. Because bonded joints and poly joints are critical to the safe and efficient operation of a railroad, customers must be confident that the acquirer of the divested assets will be able to maintain the current quality and long-term reliability of these joints. If the customers lack this confidence, they likely would conduct lengthy in-track testing before purchasing joints from a new supplier in significant quantities. Such lengthy testing periods could mean that the divested Portec joint businesses would not provide meaningful competition to Foster for several years, and, as a result, the divestiture would not remedy the competitive harm that would likely result from Foster's acquisition of Portec. The possibility that customers would require long testing periods before purchasing from an acquirer led the United States to require an acceptable acquirer prior to entering into a settlement.

Defendants presented Koppers to the United States as a potential acquirer of the divested assets. Foster and Koppers entered into an agreement for the purchase of the divested assets on December 9, 2010. Koppers is a global integrated producer of carbon compounds and treated and untreated wood products and services for use in a variety of industries, including the rail industry. In 2009, Koppers had total revenues of approximately $1.12 billion. Approximately 58 percent of its 2009 sales were generated in the United States. Koppers currently supplies all

the Class 1 railroads. In addition, Koppers maintains relationships with many short-line and regional rail lines. Koppers has a strong relationship with the Class 1 railroads, an excellent reputation as a supplier to railroads, and is committed to research and development. The United States determined, after a thorough investigation, that railroad customers would be sufficiently confident in Koppers's ability consistently to manufacture quality bonded joints and poly joints and, therefore, would not be likely to insist upon a lengthy in-track testing period for these joints.

The United States typically requires that assets be divested within 60 to 90 days after the filing of the Complaint or five days after the entry of the Final Judgment by the Court. Because the acquirer of the divested assets has been selected and approved by the United States prior to the filing of the Complaint, there is no need for 60 to 90 days to engage in a search for an acquirer. Further, the United States has already reviewed the documents related to the divestiture. Accordingly, the proposed Final Judgment requires that the divested assets be sold to Koppers within ten days after the Court signs the Hold Separate.[2] The entry of the Hold Separate was chosen as the date upon which the divestiture period begins to run because Foster cannot consummate its acquisition of Portec until the Court enters the Hold Separate, and that acquisition must be consummated before the divested assets are sold.

The proposed Final Judgment prohibits Defendants from interfering with any negotiations by Koppers to employ any current or former Portec employee who is responsible in any way for the design, production, and sale of the products being divested. It also requires that

[2] The Hold Separate requires that until the assets being divested are sold according to the terms of the proposed Final Judgment, Foster and Portec must continue to operate their entire businesses as independent, ongoing, and economically viable businesses that are held entirely separate, distinct, and apart. Foster and Portec shall not coordinate their production, marketing, or terms of sale until the assets being divested are sold. It is necessary to keep Portec's entire business separate from Foster's business in the event the divested assets are not sold to Koppers for any reason. If the assets are not sold to Koppers, Foster and Portec will be unable to combine their operations, thereby preserving Portec as an independent competitor in the bonded joint and poly joint markets.

Defendants waive any non-compete agreements for current or former employees involved in the design, production, and sale of the products being divested. The proposed Final Judgment also requires that the assets being divested be operational on the date of sale. In addition, the proposed Final Judgment requires that Defendants divest Portec's entire business relating to each of the divested products and not manufacture any products using the intangible assets divested pursuant to the proposed Final Judgment. To allow Foster time to remove the assets used for those products not being divested, the proposed Final Judgment allows Defendants to occupy that portion of the Huntington facility that is used to manufacture the products not being divested for sixty days from the date Foster acquires Portec.

Finally, the proposed Final Judgment requires that Defendants provide advance notice to the United States of any acquisition of the assets of or any interest in, any company in the business of designing, developing, producing, marketing, servicing, distributing, and/or selling bonded joints and/or poly joints, or any company in the business of producing, marketing, distributing, and/or selling friction management products; or any relationship with another company that involves the distribution of friction management products in North America.[3] Until very recently, Foster and Portec competed in the sale of friction management products in the United States. Few competitors sell these products in the United States. Portec is the leader in the development, production, and sale of certain friction management products. Foster was a distributor of friction management products for an overseas manufacturer and it recently terminated its relationship with that manufacturer. However, in the future Foster could begin selling friction management products made by that manufacturer or others. As a result, the proposed Final Judgment ensures that the United States will have the ability to investigate the

[3] Friction management products are defined as wayside gauge-face lubrication systems, top-of-rail lubrication systems, and any other system or equipment used to lubricate rail.

competitive impact if Foster attempts to resume its sale of friction management products in the United States.

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 Foster's acquisition of Portec. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will preserve competition for the development, manufacture, and sale of bonded joints and poly joints in the United States. 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
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)-(B). 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 mechanisms 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).[4] In determining whether a 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); *United States v. Republic Serv., Inc.*, 2010-2

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[4] *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'").

Trade Cas. (CCH) ¶ 77,097, 2010 U.S. Dist. LEXIS 70895, No. 08-2076 (RWR), at *10 (D.D.C. July 15, 2010) (finding that "[i]n light of the deferential review to which the government's proposed remedy is accorded, [amicus curiae's] argument that an alternative remedy may be comparably superior, even if true, is not a sufficient basis for finding that the proposed final judgment is not in the public interest.").

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; *Republic Serv.*, 2010 U.S. Dist. LEXIS 70895, at *2-3 (entering final judgment "[b]ecause there is an adequate factual foundation upon which to conclude that the government's proposed divestitures will remedy the antitrust violations alleged in the complaint.").

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,[5] 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 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,

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[5] 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).

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.[6]

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: December 14, 2010

Respectfully submitted,

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[6] *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, Christine A. Hill, hereby certify that on December 14, 2010, I caused a copy of the foregoing Competitive Impact Statement to be served upon Defendants L.B. Foster Company and Portec Rail Products, Inc. by mailing the documents electronically to the duly authorized legal representatives of Defendants as follows:

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