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6 UNITED STATES DISTRICT COURT
7
8 CENTRAL DISTRICT OF CALIFORNIA

)	CASE NO.: 8:09-cv-00275-AG-AN
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	MOTION AND MEMORANDUM OF
)	THE UNITED STATES IN SUPPORT
)	OF ENTRY OF FINAL JUDGMENT
v.)	
MICROSEMI CORPORATION,)	
)	
Defendant.)	Hon. Andrew J. Guilford
)	

15
16 Pursuant to Section 2(b) of the Antitrust Procedures and
17 Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), plaintiff, the
18 United States of America ("United States") moves for entry of the
19 proposed Final Judgment filed in this civil antitrust proceeding.
20 The proposed Final Judgment may be entered at this time without
21 further hearing if the Court determines that entry is in the
22 public interest. The Competitive Impact Statement ("CIS"), filed
23 in this matter on August 20, 2009, explains why entry of the
24 proposed Final Judgment would be in the public interest. The
25 United States is filing simultaneously with this Motion and
26 Memorandum a Certificate of Compliance setting forth the steps
27 taken by the parties to comply with all applicable provisions of
28

1 the APPA and certifying that the statutory waiting period has
2 expired.

3 **I. Background**

4 On July 14, 2008, defendant Microsemi Corporation
5 ("Microsemi") acquired most of the assets of Semicoa. After
6 investigating the competitive impact of that acquisition, the
7 United States filed a civil antitrust Complaint on December 18,
8 2008, seeking an order compelling Microsemi to divest the Semicoa
9 assets and other relief to restore competition. The Complaint
10 alleges that the acquisition significantly lessened competition
11 in the development, manufacture and sale of certain high
12 reliability small signal transistors and ultrafast recovery
13 rectifier diodes used in aerospace and military applications, in
14 violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and
15 Section 2 of the Sherman Act, 15 U.S.C. § 2. As a result of the
16 acquisition, prices for these products did or would have
17 increased, delivery times would have lengthened, and terms of
18 service would have become less favorable. Pursuant to an Order
19 to Preserve and Maintain Assets, which was entered on December
20 24, 2008 and modified on August 6, 2009, Microsemi may not,
21 without written consent of the United States, dispose of the
22 acquired assets prior to resolution of this proceeding.

23 Concurrent with the filing of the CIS on August 20, 2009,
24 the United States and Microsemi filed a Stipulation Regarding
25 Proposed Final Judgment and a proposed Final Judgment. These
26 filings were designed to restore competition through a

1 divestiture of the acquired assets. The proposed Final Judgment
2 requires Microsemi to divest the Semicoa assets, thus restoring
3 the competition that was lost as a result of the acquisition.¹

4 The United States and Microsemi have stipulated that the
5 proposed Final Judgment may be entered after compliance with the
6 APPA. Entry of the Final Judgment would terminate this action,
7 except that the Court would retain jurisdiction to construe,
8 modify, or enforce the provisions of the Final Judgment and to
9 punish violations thereof.

10 **II. Compliance with the APPA**

11 The APPA requires a sixty-day period for the submission of
12 public comments on a proposed Final Judgment. See 15 U.S.C.
13 § 16(b). In compliance with the APPA, the United States filed
14 the CIS on August 20, 2009; published the proposed Final Judgment
15 and CIS in the *Federal Register* on September 1, 2009 (see *United*
16 *States v. Microsemi Corp.*, 74 Fed. Reg. 45242); and published
17 summaries of the terms of the proposed Final Judgment and CIS,
18 together with directions for the submission of written comments
19 relating to the proposed Final Judgment, in *The Washington Post*
20 for seven days beginning on September 6, 2009 and ending on
21 September 12, 2009, and in *The Los Angeles Times* for seven days
22 beginning September 13, 2009 and ending September 19, 2009. The
23 sixty-day public comment period ended on November 18, 2009, and
24 the United States received no comments. The United States is

25
26 ¹ Microsemi completed the divestiture, in compliance with
27 the terms of the proposed Final Judgment and with the consent of
the United States, on August 20, 2009.

1 filing a Certificate of Compliance simultaneously with this
2 Motion and Memorandum that states that all the requirements of
3 the APPA have been satisfied. It is now appropriate for the
4 Court to make the public interest determination required by 15
5 U.S.C. § 16(e) and to enter the proposed Final Judgment.

6 **III. Standard of Judicial Review**

7 The Clayton Act, as amended by the APPA, requires that
8 proposed consent judgments in antitrust cases brought by the
9 United States be subject to a sixty-day comment period, after
10 which the Court shall determine whether entry of the proposed
11 Final Judgment "is in the public interest." 15 U.S.C.
12 § 16(e)(1). In making that determination, the court, in
13 accordance with the statute, as amended in 2004,² is required to
14 consider:

15 (A) the competitive impact of such judgment, including
16 termination of alleged violations, provisions for
17 enforcement and modification, duration of relief
18 sought, anticipated effects of alternative remedies
19 actually considered, whether its terms are ambiguous,
20 and any other competitive considerations bearing upon
21 the adequacy of such judgment that the court deems
22 necessary to a determination of whether the consent
23 judgment is in the public interest; and

24 (B) the impact of entry of such judgment upon
25 competition in the relevant market or markets, upon the
26 public generally and individuals alleging specific
27 injury from the violations set forth in the complaint

28 ² The 2004 amendments substituted "shall" for "may" in directing relevant factors for the court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare 15 U.S.C. § 16(e) (2004) with 15 U.S.C. § 16(e)(1) (2006); see also *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

1 including consideration of the public benefit, if any,
2 to be derived from a determination of the issues at
trial.

3 15 U.S.C. § 16(e)(1)(A)-(B). In considering these statutory
4 factors, the court's inquiry is necessarily a limited one as the
5 government is entitled to "broad discretion to settle with the
6 defendant within the reaches of the public interest." *United*
7 *States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995);
8 *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp.
9 2d 1 (D.D.C. 2007) (assessing public interest standard under the
10 Tunney Act).

11 Under the APPA a court considers, among other things, the
12 relationship between the remedy secured and the specific
13 allegations set forth in the government's complaint, whether the
14 decree is sufficiently clear, whether enforcement mechanisms are
15 sufficient, and whether the decree may positively harm third
16 parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the
17 adequacy of the relief secured by the decree, a court may not
18 "engage in an unrestricted evaluation of what relief would best
19 serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462
20 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d
21 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-
22 62. Courts have held that:

23 [t]he balancing of competing social and political
24 interests affected by a proposed antitrust consent
25 decree must be left, in the first instance, to the
26 discretion of the Attorney General. The court's role
27 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

1 is the one that will best serve society, but whether
2 the settlement is "within the reaches of the public
3 interest." More elaborate requirements might undermine
the effectiveness of antitrust enforcement by consent
decree.

4 *Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).³

5 In making its public interest determination, a district court

6 "must accord deference to the government's predictions about the
7 efficacy of its remedies, and may not require that the remedies
8 perfectly match the alleged violations." *SBC Commc'ns*, 489 F.

9 Supp. 2d at 17; see also *Microsoft*, 56 F.3d at 1461 (noting need

10 for courts to be "deferential to the government's predictions as
11 to the effect of the proposed remedies"); *United States v.*

12 *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003)

13 (noting that the court should grant due respect to the prediction
14 of the United States as to the effect of proposed remedies, its
15 perception of the market structure, and its views of the nature
16 of the case).

17 Courts have greater flexibility in approving proposed
18 consent decrees than in crafting their own decrees following a
19 finding of liability in a litigated matter. "[A] proposed decree

21 ³ *Cf. BNS*, 858 F.2d at 464 (holding that the court's
22 "ultimate authority under the [APPA] is limited to approving or
23 disapproving the consent decree"); *United States v. Gillette Co.*,
24 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way,
25 the court is constrained to "look at the overall picture not
26 hypercritically, nor with a microscope, but with an artist's
27 reducing glass"), *aff'd sub nom. Maryland v. United States*, 460
U.S. 1001 (1983). See generally *Microsoft*, 56 F.3d at 1461
(discussing whether "the remedies [obtained in the decree are] so
inconsonant with the allegations charged as to fall outside of
the 'reaches of the public interest'").

1 must be approved even if it falls short of the remedy the court
2 would impose on its own, as long as it falls within the range of
3 acceptability or is 'within the reaches of public interest.'" *United States v. AT&T Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982)
4 (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716); see
5 also *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622
6 (W.D. Ky. 1985) (approving the consent decree even though the
7 court would have imposed a greater remedy). To meet this
8 standard, the United States "need only provide a factual basis
9 for concluding that the settlements are reasonably adequate
10 remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d
11 at 17.
12

13 Moreover, the Court's role under the APPA is limited to
14 reviewing the remedy in relationship to the violations that the
15 United States has alleged in its Complaint, and does not
16 authorize the Court to "construct [its] own hypothetical case and
17 then evaluate the decree against that case." *Microsoft*, 56 F.3d
18 at 1459. Because the "court's authority to review the decree
19 depends entirely on the government's exercising its prosecutorial
20 discretion by bringing a case in the first place," it follows
21 that "the court is only authorized to review the decree itself,"
22 and not to "effectively redraft the complaint" to inquire into
23 other matters that the United States did not pursue. *Id.* at
24 1459-60. Courts "cannot look beyond the complaint in making the
25 public interest determination unless the complaint is drafted so
26 narrowly as to make a mockery of judicial power." *SBC*
27

1 *Communications*, 489 F. Supp. 2d at 15.

2 In its 2004 amendments, Congress made clear its intent to
3 preserve the practical benefits of utilizing consent decrees in
4 antitrust enforcement, adding the unambiguous instruction
5 “[n]othing in this section shall be construed to require the
6 court to conduct an evidentiary hearing or to require the court
7 to permit anyone to intervene.” 15 U.S.C. § 16(e)(2). This
8 instruction explicitly writes into the statute the standard
9 intended by the Congress that enacted the Tunney Act in 1974 , as
10 Senator Tunney then explained: “[t]he court is nowhere compelled
11 to go to trial or to engage in extended proceedings which might
12 have the effect of vitiating the benefits of prompt and less
13 costly settlement through the consent decree process.” 119 Cong.
14 Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the
15 procedure for the public interest determination is left to the
16 discretion of the court, with the recognition that the scope of
17 the court’s “review remains sharply proscribed by precedent and
18 the nature of Tunney Act proceedings.” *SBC Commc’ns*, 489 F.
19 Supp. 2d at 11.⁴

20 _____

21 ⁴ See *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17
22 (D.D.C. 2000) (noting that the “Tunney Act expressly allows the
23 court to make its public interest determination on the basis of
24 the competitive impact statement and response to comments
25 alone”); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade
26 Cas. (CCH) 61,508, at 71,980 (W.D. Mo. 1977) (“Absent a showing
27 of corrupt failure of the government to discharge its duty, the
28 Court, in making its public interest finding, should . . .
carefully consider the explanations of the government 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

1 **IV. Conclusion**

2 For the reasons set forth in this Motion and Memorandum and
3 in the CIS, the Court should find that the proposed Final
4 Judgment is in the public interest and should enter the Final
5 Judgment without further hearings. The United States respectfully
6 requests that the Final Judgment annexed hereto be entered as
7 soon as possible.

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9 Dated: January 8, 2010

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11 By: _____/s/_____
12 Lowell R. Stern
13 Attorney for Plaintiff
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27 simply on the basis of briefs and oral arguments, that is the
28 approach that should be utilized.”).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of January, 2010, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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