UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. SAPA HOLDING AB, and INDALEX HOLDINGS FINANCE, INC. Defendants.	Civil No. 1:09-cv-01424 JUDGE: Hon. Richard J. Leon DECK TYPE: Antitrust

MOTION AND MEMORANDUM OF
THE UNITED STATES IN SUPPORT OF ENTRY OF FINAL JUDGMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), plaintiff, the United States of America ("United States") moves for entry of the proposed Final Judgment filed in this civil antitrust proceeding. The proposed Final Judgment may be entered at this time without further hearing if the Court determines that entry is in the public interest. The Competitive Impact Statement ("CIS"), filed in this matter on July 30, 2009, explains why entry of the proposed Final Judgment would be in the public interest. The United States is filing simultaneously with this Motion and Memorandum a Certificate of Compliance setting forth the steps taken by the parties to comply with all applicable provisions of the APPA and certifying that the statutory waiting period has expired.

I. Background

On July 30, 2009, the United States filed a civil antitrust Complaint alleging that the proposed acquisition of Indalex Holdings Finance, Inc. ("Indalex") by Sapa Holdings AB

("Sapa") would substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Sapa and Indalex both manufacture and sell coiled extruded aluminum tubing ("aluminum sheathing") used in the fabrication of coaxial cables, which are used in large quantities by cable television companies in the United States and abroad to transmit high frequency broadband signals to their subscribers. The Complaint alleges Sapa's proposed acquisition of Indalex would give Sapa a virtual monopoly of the aluminum sheathing market in the United States. Accordingly, the Complaint sought to permanently enjoin the proposed acquisition by requesting a judgment that the acquisition violates Section 7 of the Clayton Act.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate Order") and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition, and a CIS. The Court signed and entered the Hold Separate Order on July 30, 2009. The proposed Final Judgment requires Sapa, within 90 days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as a viable business Sapa's Catawba, North Carolina aluminum sheathing facility ("Catawba facility") or the portion of Indalex's assets located north of Industry Drive ("Burlington aluminum sheathing facility") at its Burlington, North Carolina aluminum extrusion facility ("Burlington facility"). The proposed Final Judgment provided for divestiture of the Burlington facility in the event of defendants' failure to divest either the Catawba facility or the Burlington aluminum sheathing facility ("Divestiture Assets") to an Acquirer acceptable to the United States, in its sole discretion, within

the time periods specified in the proposed Final Judgments.[1] Under the terms of the proposed Final Judgment, if Sapa had not sold the Divestiture Assets within the prescribed time, this Court would appoint a trustee to sell the Burlington facility. The Hold Separate Order and the proposed Final Judgment required Sapa to preserve, maintain and continue to operate the Divestiture Assets in the ordinary course of business, including reasonable efforts to maintain and increase sales and revenues. The CIS explains the basis for the Complaint and the reasons why entry of the proposed Final Judgment would be in the public interest.

The Hold Separate Order provides that the proposed Final Judgment may be entered by the Court after the completion of the procedures required by the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Compliance with the APPA

The APPA requires a sixty-day period for the submission of public comments on a proposed Final Judgment. *See* 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed the CIS on July 30, 2009; published the proposed Final Judgment and CIS in the *Federal Register* on August 20, 2009 (*see United States v. Sapa Holdings AB, et al,* 74 Fed. Reg. 42112); 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 September 2, 2009 and ending on

[1] The defendants completed the divestiture of the Catawba facility, in compliance with the terms of the proposed Final Judgment, on November 20, 2009.

September 8, 2009. The sixty-day public comment period terminated on November 7, 2009, and the United States received no public comments. Simultaneously with this Motion and Memorandum, the United States is filing a Certificate of Compliance that states all the requirements of the APPA have been satisfied. It is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the proposed Final Judgment.

III. Standard of Judicial Review

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, the court, in accordance with the statute as amended in 2004,[2] 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.

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[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended 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).

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).

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). 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 making its public interest

[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.

determination, a district 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 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. AT&T Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716); *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). To meet this standard, 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.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in

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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"), *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'").

relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459-60. As this Court 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, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). This instruction explicitly writes into the statute the standard intended by the Congress that enacted the Tunney Act in 1974 , as Senator Tunney then 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 scope of the court's "review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F.

Supp. 2d at 11.[4]

The United States alleged in its Complaint that the acquisition of Indalex by Sapa would substantially lessen competition in the manufacture and sale of aluminum sheathing used in the formation of high frequency communications cables in the United States. The remedy in the proposed Final Judgment resolves the alleged competitive effects entirely by requiring Sapa to divest its Catawba facility or Indalex's Burlington aluminum sheathing facility, which comprise the defendants' entire assets devoted to their aluminum sheathing businesses in the United States. Sapa has divested its Catawba facility to a viable purchaser approved by the United States. Moreover, the public, including affected competitors and customers, has had the opportunity to comment on the proposed Final Judgment as required by law, and no comments have been submitted. There has been no showing that the proposed settlement constitutes an abuse of the United States's discretion or that it is not within the zone of settlements consistent with the public interest.

IV. Conclusion

For the reasons set forth in this Motion and Memorandum and in the CIS, the Court should find that the proposed Final Judgment is in the public interest and should enter the Final

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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"); 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."); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) 61,508, at 71,980 (W.D. Mo. 1977) ("[T]he 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.").

Judgment without further hearings. The United States respectfully requests that the Final Judgment annexed hereto be entered as soon as possible.

Dated: January 7, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John F. Greaney, hereby certify that on January 7, 2010, I caused a copy of the foregoing Motion and Memorandum of the United States in Support of Entry of Final Judgment to be served upon defendants Sapa Holding AB and Indalex Holdings Finance, Inc. by mailing the document electronically to the duly authorized legal representatives of defendants as follows:

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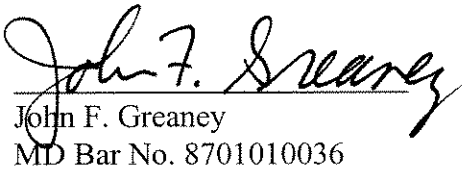

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