UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. SAPA HOLDING AB, and INDALEX HOLDINGS FINANCE, INC. Defendants.	CASE NO.: JUDGE: DECK TYPE: Antitrust DATE STAMP: July 30, 2009

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

Defendant Sapa Holding AB ("Sapa") and Indalex Holdings Finance, Inc. ("Indalex") entered into an Asset Purchase Agreement dated June 16, 2009, pursuant to which Sapa would acquire Indalex in a sale under Chapter 11 of the Bankruptcy Code. The United States filed a civil antitrust Complaint on July 30, 2009, seeking to enjoin the proposed acquisition, alleging that it would substantially lessen competition for the manufacture and sale of coiled extruded aluminum tubing used in the formation of high frequency communications cables in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition

would likely result in higher prices, lower product quality, decreased services, and reduced product innovation for coiled extruded aluminum tubing used in the formation of high frequency communications cables.

With the filing of the Complaint in this case, the United States also filed a Hold Separate Stipulation and Order and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the proposed acquisition. Under the proposed Final Judgment, explained more fully below, defendants are required promptly to divest either Sapa's or Indalex's assets used for the manufacture and sale of coiled extruded aluminum tubing used in the formation of high frequency communications cables in the United States. If they have not divested one of these facilities within the period prescribed in the proposed Final Judgment, then a trustee will be appointed to sell Indalex's entire Burlington, North Carolina extruded aluminum fabrication facility. Under the terms of the Hold Separate Stipulation and Order, Sapa is required to take certain steps to ensure that the assets eligible to be divested will be operated as a competitively independent, economically viable and ongoing business concern, that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The United States and the 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 proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Parties to the Proposed Transaction

Sapa is a Swedish corporation with its principal place of business in Stockholm, Sweden. Sapa sells fabricated aluminum products throughout the world, including in the United States, where it is the largest aluminum extruder. Among the fabricated aluminum products that Sapa sells in the United States is coiled extruded aluminum tubing used in the formation of high frequency communications cables, which Sapa manufactures at its plant in Catawba, North Carolina. Sapa is owned by Orkla ASA, a Norwegian public limited company whose offices are located in Skøyen, Oslo in Norway. Orkla is a large, diversified international company with operations throughout the world.

Indalex is a Delaware corporation with its principal place of business in Lincolnshire, Illinois. Indalex sells fabricated aluminum products in Canada and the United States. Indalex is the second largest aluminum extruder in the United States. Among the fabricated aluminum products that Indalex sells in the United States is coiled extruded aluminum tubing used in the formation of high frequency communications cables, which Indalex sells from its plant in Burlington, North Carolina.

Pursuant to a bankruptcy court-supervised bidding process, Sapa and Indalex entered into an Asset Purchase Agreement on June 16, 2009, under which Sapa agreed to acquire substantially all the assets of Indalex and its affiliates in the United States and Canada. Sapa and Indalex are the only two manufacturers of coiled extruded aluminum tubing used in the formation of high frequency communications cables in the United States. Sapa's acquisition of Indalex thus would result in a monopoly. Without the head-to-head competition from Indalex,

Sapa will be able to exercise power in the market for coiled extruded aluminum tubing used in the formation of high frequency communications cables sold in the United States by raising prices, lowering product quality, decreasing services, and reducing product innovation. This transaction is the subject of the Complaint and proposed Final Judgment filed by the United States on July 30, 2009.

The United States has agreed to entry of the proposed Final Judgment and Hold Separate Stipulation and Order, which will prevent injury to competition that otherwise likely would arise from the proposed acquisition of Indalex by Sapa.

B. The Relevant Product Market

Coiled extruded aluminum tubing, or "aluminum sheathing," is 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. Manufacturers of coaxial cables use aluminum sheathing sold by Sapa and Indalex to protect the cable wiring and insulation and to prevent the loss of the transmission signal to subscribers. To fulfill this function, aluminum sheathing must be continuous, and it must not have any imperfections such as disruptions, pin-holes, or deformations along the entire length of the product. Aluminum sheathing also must be hermetic, forming an air-tight barrier around the circumference of the tubing. In addition, the aluminum sheathing must have a minimum length of about 1,900 continuous feet to accommodate the needs of finished coaxial cable manufacturers.

Aluminum sheathing also must be thin-walled, typically with a wall thickness in the range of 0.019 to 0.057 inches, with a tolerance as low as +/- 0.002 inches across the entire aluminum sheathing product line. The ratio of the sheathing outer diameter to the wall thickness

commonly falls into the 30:1 range. These thin walls make it difficult to maintain material consistency during the extrusion process and increase the risk of manufacturing defects and damage incurred during shipping.

Aluminum sheathing used for coaxial cables must be made from high-purity aluminum alloy with particular mechanical and electrical properties. Typically, it will be made from either aluminum alloy 1060, with a minimum aluminum content of 99.6 percent, or 1100, with a minimum aluminum content of 99.0 percent. These alloys are flexible and pliable making them particularly suitable for cable applications but also susceptible to denting or damage during processing. Any imperfection could increase the electrical impedance of the finished cable and reduce its performance. Moreover, the tubing must be designed and manufactured so that transmission of radio frequency signals up to a frequency of 3 Ghz at a signal loss level no worse than -30 decibels is achieved.

Aluminum sheathing is coiled and sold to coaxial cable manufacturers that stretch the aluminum tubing and insert electrical wiring and insulation. There is no other product that coaxial cable manufacturers can use as a reasonably cost effective substitute for aluminum sheathing. A small but significant increase in the price of aluminum sheathing would not cause purchasers to substitute any other type of tubing to protect coaxial cables used to transmit high frequency broadband signals. Accordingly, the manufacture and sale of aluminum sheathing is a separate and distinct line of commerce and a relevant product market for the purpose of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

C. The Relevant Geographic Market

All aluminum sheathing sold in the United States is manufactured in the United States and Indalex and Sapa sell aluminum sheathing for uses throughout the country. No aluminum

sheathing is imported into the United States from abroad. The United States is a relevant geographic market for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

D. The Competitive Effects of the Transaction

If Sapa is allowed to acquire the aluminum sheathing business of Indalex, the number of manufacturers of aluminum sheathing will decrease from two to one. Thus, the transaction will result in a monopoly. Currently, Sapa and Indalex directly constrain each other's prices, limiting overall price increases for aluminum sheathing. Purchasers of aluminum sheathing in the United States have benefited from the competition between Sapa and Indalex through lower prices, higher quality, more innovation, and better service. Without the competitive constraint of head-to-head competition from Indalex, Sapa will have the ability to exercise market power by raising prices, lowering product quality, decreasing services, and lessening product innovation. The acquisition of Indalex by Sapa would remove a significant competitor in the market for aluminum sheathing in the United States. The resulting loss of competition would deny customers the benefits of competition, in violation of Section 7 of the Clayton Act.

Entry into the manufacture and sale of aluminum sheathing would not be timely, likely, or sufficient to counter the anticompetitive effects of the transaction. A new entrant into the manufacture and sale of aluminum sheathing must obtain significant technical know-how in order to manufacture it. Extrusions of structural aluminum products are made from different aluminum alloys and are not typically formed into lengths of 1900 feet or more. Also, other types of aluminum extrusions typically are not coiled and require different post-extrusion processing. A new entrant would require significant time to develop the necessary expertise to perfect these processes in a high-volume production environment. Moreover, customers of

aluminum sheathing must carefully qualify any new supplier, which can cost the customer over $1 million and one year of time. Aluminum sheathing customers–i.e., cable manufacturers–incur significant liability in the form of repair and replacement costs and diminished reputation if their products do not perform as predicted.

A new entrant also must invest in significant equipment and tooling to successfully manufacture the product. Appropriate dies, coiling systems, and presses of the size commonly used to produce aluminum sheathing require substantial investment, much of which represents sunk costs.

A new entrant, to be successful, must produce aluminum sheathing in quantities that permit it to realize economies of scale. Current and projected demand for the product are not likely to be sufficient to attract new investment, particularly because customers are parties to long-term contracts, the expiration dates for which differ significantly. Thus, entry at sufficient scale to justify the cost of the required investment is unlikely.

Accordingly, entry into the manufacture and sale of aluminum sheathing would not be timely, likely, or sufficient to counter anticompetitive price increases that Sapa would likely impose after its acquisition of Indalex.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in aluminum sheathing by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires the defendants to divest either Sapa's Catawba, North Carolina aluminum sheathing facility ("Catawba facility") or the Indalex aluminum sheathing assets located at its Burlington, North

Carolina extruded aluminum fabrication facility ("Burlington aluminum sheathing facility"). As the Burlington aluminum sheathing facility has not previously operated as a profitable stand-alone business, the proposed Final Judgment also requires that defendants divest a second press, which currently produces other extruded aluminum products, to ensure that a stand-alone aluminum sheathing facility at Burlington would be attractive to a viable purchaser. This will allow a purchaser to spread the fixed costs of operating the facility over a larger output, thereby reducing unit costs of production. Each facility profitably produces aluminum sheathing currently and likely would continue to do so if acquired by a purchaser who can and will operate the facility as part of a viable, ongoing business in the production and sale of aluminum sheathing.

Under the proposed Final Judgment, defendants will have ninety (90) calendar days from the filing of the Complaint or five (5) calendar days from notice of the entry of the Final Judgment by the Court, whichever is later, to divest either the Catawba facility or the Burlington aluminum sheathing facility to a purchaser acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants agree to use their best efforts to accomplish the divestiture as expeditiously as possible and shall cooperate with prospective purchasers.

Due to the exigencies of the bankruptcy process, the United States has expedited its investigation of the proposed transaction. The United States, however, has obtained sufficient information to conclude with reasonable certainty that divestiture of either the Catawba facility

or the Burlington aluminum sheathing facility to a viable purchaser will solve the competitive concerns implicated by the proposed acquisition. Further, it is probable that defendants can accomplish the divestiture of one of these facilities to a viable purchaser.

In the event, however, that defendants have not divested the Catawba facility or the Burlington aluminum sheathing facility within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to sell the entire Indalex extruded aluminum fabrication facility, located at 1507 Industry Drive, Burlington, North Carolina ("Burlington facility"). If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the court, which shall enter such orders as appropriate, in order to carry out the purpose fo the trust, including extending the trust or the term of the trustee's appointment.

Although defendants have the option of divesting either the Catawba facility or the Burlington aluminum sheathing facility, should defendants' efforts to divest either property fail, to ensure a successful divestiture, the proposed Final Judgment provides that the entire Burlington facility be made available for sale by the trustee. The United States is confident that the entire Burlington facility could be sold to a viable purchaser that would continue to compete in the manufacture and sale of aluminum sheathing in the United States.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the manufacture and sale of coiled extruded aluminum tubing used in the formation of high frequency communications cables 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 the defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the 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 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 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 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
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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 the defendants. The United States could have commenced litigation and sought a judicial order enjoining the acquisition of Indalex by Sapa. The United States is satisfied that the divestiture and other relief described in the proposed Final Judgment will remedy the competitive concern alleged in its Complaint without causing unnecessary harm to the creditors and employees of Indalex. The relief contained in the proposed Final Judgment

would achieve substantially all of the relief that the United States would have obtained through litigation, but allow the overall transaction to close promptly to the benefit of Indalex's creditors and employees, while avoiding 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, the Court shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or 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).[1]

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. 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.

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[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors fo 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 SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In making its public interest 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 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 the proposed remedies, its perception of the market structure, and its views of the nature of the case).

Court approval of a final judgment requires a standard that is more flexible and less strict than the standard required for a finding of liability. "[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). To meet this standard, the United States "need only provide a factual basis for

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[2] *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (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'").

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 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 recently confirmed in *SBC Commc'ns*, 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." *SBC Commc'ns*, 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 that "[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.[3]

[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunny 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.").

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: July 30, 2009

Respectfully submitted,

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