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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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H. MAYER-WHITTINGTON
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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALUMINUM COMPANY OF
AMERICA, et al.,

Defendants.

Civil No: 98-CV-1497 (PLF)

Judge: Paul L. Friedman

Filed: June 18, 1998

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 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

On June 15, 1998, the United States filed a civil antitrust Complaint alleging that the proposed acquisition by Aluminum Company of America ("Alcoa") of the aluminum cast plate ("cast plate") manufacturing business of Alumax Inc. ("Alumax") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Alcoa and Alumax are the two largest producers of aluminum cast plate in the world, and are each other's most significant competitor. They compete vigorously to lower the costs of producing and selling the best quality cast plate at the lowest prices, and to provide the best technological, marketing, and customer support services. There is only one other producer, Alpase, and it is much smaller and not nearly as significant. Alcoa and Alumax have proposed a transaction that will leave the already highly

concentrated aluminum cast plate business with one overwhelmingly dominant firm - Alcoa - owning almost 90% of the cast plate manufacturing business in the world. Worldwide sales of cast plate in 1997 were \$73,884,000.

The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) a permanent injunction preventing Alcoa from acquiring Alumax.

When the Complaint was filed, the United States also filed a proposed settlement that would permit Alcoa to complete its acquisition of Alumax, but require a divestiture that will preserve competition in the relevant market. This settlement consists of a Stipulation and Order, Hold Separate Stipulation and Order, and a proposed Final Judgment.

The proposed Final Judgment orders Alcoa to divest, within one hundred and eighty (180) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, the Alcoa Cast Plate Division (as defined in the Final Judgment) to an acquirer acceptable to the Antitrust Division of the Department of Justice ("DOJ"). "Alcoa Cast Plate Division" means all assets included within the cast plate operation of Alcoa's Aerospace and Commercial Rolled Products Division, including all tangible and intangible assets, and all research data concerning historic and current research and development efforts relating to the cast plate operation.

Until such divestiture is completed, the terms of the Hold Separate Stipulation and Order entered into by the parties apply to ensure that the Alcoa Cast Plate Division shall be maintained as an independent competitor from Alcoa.

The plaintiff 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 the 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 Defendants and the Proposed Transaction

Alcoa is a Pennsylvania corporation, with its principal offices located in Pittsburgh, Pennsylvania. Alcoa is the world's largest integrated aluminum company, engaging in all phases of the aluminum business — from the mining and processing of bauxite to the production of primary aluminum and fabrication of products. In 1997, Alcoa had revenues of over \$13 billion. Alcoa produces cast plate at a facility located in Vernon, California. Alcoa's 1997 sales of cast plate in the United States were \$17,871,528.

Alumax is a Delaware corporation, headquartered in Atlanta, Georgia. In 1997, Alumax reported total sales of about \$3 billion. Its Mill Products Division produces cast plate, among other products, in Lancaster, Pennsylvania. Alumax's sales of cast plate in the United States were \$38,991,628.

On March 8, 1998, Alcoa and Alumax entered into an agreement under which Alcoa would acquire Alumax. This transaction, which would increase concentration in the already highly concentrated cast plate market, precipitated the government's suit.

B. Cast Plate Market

Cast plate is a flat aluminum product, ranging from eight to twelve feet long, three to five feet wide and anywhere from one-quarter inch to thirty inches thick. Cast plate is produced by pouring molten aluminum onto a conveyor belt in a shape slightly thicker than what is ultimately

desired. After cooling, the shape is milled to achieve its final thickness and shape. Cast plate has metallurgic characteristics that make it uniquely suited for certain applications. The casting process, which involves little or no pressing of the plate, produces aluminum that is free from stresses that can cause warping. The resulting cast metal shape is stable enough for applications that require precise dimensions and flatness, such as jigs, fixtures, and numerous tooling, mold, machinery and equipment applications. Cast plate is used to make machinery and equipment that manufactures end products with extremely narrow tolerances. Cast plate must be stress-free, stable, and flat, because stress-induced warping, instability, and unevenness would cause movement in the machinery and equipment made of cast plate, which in turn would cause the end products manufactured on that machinery and equipment to be out of tolerance.

Other products are not realistic substitutes for cast plate to which customers could switch in the event of a small, but significant and non-transitory price increase. Rolled tooling plate is not a substitute because the rolled metal shape can warp. Furthermore, it is not possible to produce rolled plate as thick as cast plate can be made. Depending on the thickness of the shape, rolled plate can also be significantly more expensive than cast plate.

Alcoa and Alumax are the two strongest and most significant producers of cast plate in the world, representing almost 90% of 1997 sales. Albase, the third competitor, is not as significant as either Alcoa or Alumax. Aggressive competition by Alcoa and Alumax has given customers lower prices and improved quality for cast plate products.

Successful entry into the manufacture and sale of cast plate is difficult, time-consuming and costly. To build an efficient cast plate facility would cost in excess of \$25 million, and would require as long as four years from the time of site selection to production of commercial quantities

of cast plate. A new entrant into the cast plate business must submit its product to customers for qualification before the entrant will be accepted as a supplier. A new entrant must establish a reputation for good quality product and for reliability in fulfilling customer orders. There are no other domestic or foreign firms whose entry or expansion would be likely, timely, or sufficient to thwart an anticompetitive price increase.

C. Harm to Competition as a Consequence of the Acquisition

The proposed acquisition would likely lessen competition in the manufacture and sale of cast plate. If Alcoa acquired the cast plate business of Alumax, it would control almost 90% of the cast plate business in the world and likely would increase prices, reduce quality, and decrease production of cast plate. Entry by a new company would not be timely, likely, or sufficient to prevent harm to competition.

The Complaint alleges that the transaction would likely have the following effects, among others: actual and potential competition between Alcoa and Alumax in the cast plate market will be eliminated; competition generally in the sale and manufacture of cast plate worldwide would be lessened substantially; and prices for cast plate would increase.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The provisions of the proposed Final Judgment are designed to eliminate the anticompetitive effects of the acquisition of Alumax by Alcoa.

The proposed Final Judgment provides that Alcoa must divest, within one hundred and eighty (180) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, the Alcoa Cast Plate Division to an acquirer acceptable to the DOJ. If defendants fail to divest the Alcoa Cast Plate

Division, a trustee (selected by DOJ) will be appointed.

The Final Judgment provides that Alcoa will pay all costs and expenses of the trustee. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the parties will have the opportunity to make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

Divestiture of the Alcoa Cast Plate Division preserves competition because it will restore the cast plate market to a structure that existed prior to the acquisition and will preserve the existence of an independent competitor. Divestiture will keep at least three producers of cast plate in the market, which will preserve and encourage ongoing competition in the production and sale of cast plate.

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 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. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Judgment at any time prior to entry. 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:

Roger W. Fones
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
325 Seventh Street, N.W., Suite 500
Washington, D.C. 20004

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 Alcoa and Alumax.

The United States is satisfied that the divestiture of the described assets specified in the proposed Final Judgment will encourage viable competition in the production and sale of cast plate. The United States is satisfied that the proposed relief will prevent the acquisition from having anticompetitive effects in this market. The divestiture of the Cast Plate Division will restore the cast plate market to a structure that existed prior to the acquisition and will preserve the existence of an independent competitor.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

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." In making that determination, the court may consider --

(1) 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, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment 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) (emphasis added). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, 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 United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the 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."¹ Rather,

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.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, 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), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also, Microsoft, 56 F.3d 1448 (D.C. Cir.1995). Precedent requires that

¹ 119 Cong. Rec. 24598 (1973). See also United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[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.²

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard 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.' (citations omitted)."³

² United States v. Bechtel, 648 F.2d at 666 (internal citations omitted) (emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983).

³ United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette, 406 F. Supp. at 716; United States v. Alcan Aluminum Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

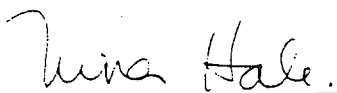
VIII. DETERMINATIVE DOCUMENTS

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.

FOR PLAINTIFF UNITED STATES OF AMERICA:

Dated: June 18, 1998

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Competitive Impact Statement to be served on counsel for defendants in this matter in the manner and on the date set forth below:

By first class mail, postage prepaid:

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A.K. Rosa

18 June 1998

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Date

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