UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. IMETAL, DBK MINERALS, INC., ENGLISH CHINA CLAYS, PLC, and ENGLISH CHINA CLAYS, INC., Defendants.	)	Civil No: 99 1018 GK

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO MOTION OF HERITAGE PLASTICS, INC. TO INTERVENE, OR IN THE ALTERNATIVE TO APPEAR AS AMICUS CURIAE

Heritage Plastics, Inc. (hereafter "Heritage") seeks to intervene in this Tunney Act proceeding, or in the alternative to appear as amicus curiae, to remedy a commercial dispute it has with one of its major suppliers, defendant English China Clays, Inc. (now owned by defendant Imetal), over a product that is not at issue in this case. Heritage has utterly failed to show that it is entitled to intervene or otherwise participate, and permitting it to do so would serve only to delay the proceeding and prejudice the adjudication of the rights of the original parties and of the public. The proposed Final Judgment required substantial divestitures to remedy the alleged anticompetitive effects of Imetal's acquisition of ECC, some of which have yet to be concluded, and the longer this proceeding goes on the more likely it is that those divestitures of productive assets will be delayed. Heritage's motion, filed in the first instance nearly a year after the proposed Final Judgment was filed with this Court, should be denied.

I. BACKGROUND OF THE CASE

The United States filed this civil antitrust case on April 26, 1999, alleging that the proposed acquisition of English China Clays, plc ("ECC") by Imetal was likely to substantially lessen competition in four separate markets in the United States, in violation of the Section 7 of the Clayton Act, 15 U.S.C. § 18. The four relevant product markets alleged in the Complaint are: water-washed kaolin; calcined kaolin for use in paper-making; ground calcium carbonate ("GCC") sold in slurry form for the paper industry, also referred to as paper-grade GCC; and fused silica. (Complaint at Paragraph 1.) Simultaneously with the filing of the Complaint, the United States filed a Hold Separate Stipulation and Order and a proposed Final Judgment, settling the case by consent. The proposed Final Judgment requires, among other things, that the defendants divest substantial assets in all four product markets.

The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"), sets forth procedures governing the entry of consent judgments in government antitrust cases. The Act requires that the United States file a Competitive Impact Statement that, inter alia, describes the proceeding and the proposed consent judgment, and provides for a 60-day period for public comment on the proposed judgment and for government responses to those comments.[1] The United States must, as provided by the Act, carefully consider and respond to any comments it receives, file the comments and its responses with the Court, and publish them in the Federal Register. After the Government has complied with these requirements, the Court must

[1]The United States filed its Competitive Impact Statement on May 24, 1999.

determine, after reviewing the Competitive Impact Statement, the public comments, the Government's responses to those comments, and any other information it deems necessary, whether the proposed settlement is "within the reaches of the public interest." United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981), cert. denied, 454 U.S. 1083 (1981). This public interest determination is properly, and often, made solely on the basis of the record before the Court, and without a hearing or other additional proceedings.[2]

The 60-day period for public comment in this case ended on August 11, 1999. The Government received one comment, from the Paper, Allied-Industrial, Chemical and Energy Workers International Union ("PACE"). Heritage did not file any comments with the Government during the statutorily-mandated public comment period.

The United States responded to PACE's comment on January 14, 2000, and filed the comment and its response with the Court that same day. It also arranged for the comment and the response thereto to be published in the Federal Register as required by 15 U.S.C. §16(d) on February 7, 2000.[3] PACE filed a motion to intervene in this proceeding, or in the alternative to appear as amicus curiae, to oppose entry of the proposed Final Judgment, on February 3, 2000, and an amended motion on February 24, 2000. The Court denied both motions in its order dated April 3, 2000. Only after it had done so did Heritage file the instant motion.

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[2]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.

[3]On February 17, 2000, the United States certified to this Court that it had complied with the requirements of the Tunney Act, and asked the Court to make a finding that the proposed Final Judgment was in the public interest and enter the order.

Heritage now seeks to intervene as of right for the purpose of obtaining access to what it calls determinative documents for the ground calcium carbonate market and for purposes of appealing the Final Judgment. It also seeks permissive intervention for the purpose of commenting on and opposing the Final Judgment, and for the purpose of appealing from it, and in the alternative seeks to appear as amicus curiae to participate in the instant proceedings. Heritage characterizes the intervention it seeks as limited, but in fact it is seeking full rights to appeal from the proposed Final Judgment after it is entered.

II. HERITAGE HAS SHOWN NO MERGER HARM AND NO HARM RESULTING FROM THE VIOLATION CHARGED IN THE COMPLAINT

Heritage is a manufacturer of plastic film. Heritage Motion to Intervene (hereafter "Motion") at p.2. One of the products it purchases to manufacture this film is a form of ground calcium carbonate, called Film-Link, that has been wet processed into very fine particles and then dried and chemically treated. Heritage buys this ground calcium carbonate from defendant English China Clays, now owned by defendant Imetal. The gravamen of Heritage's complaint, embodied in its motion, is that the price of this ground calcium carbonate product it purchases from ECC has increased by 56% since approximately January 1999, when the proposed acquisition was first announced (Motion at 3). Heritage also alleges that after Imetal acquired ECC, the company imposed a substantial price increase effective March 1, 2000 and a new and costly return policy on defective product. [4]

[4]We note that Heritage's motion does not detail the price increases except for the last one, and we cannot tell from the motion how much of the 56% price increase occurred before the acquisition and how much was after.

Heritage would have the Court believe that the price increase it is facing is a result of Imetal's acquisition of ECC, and of anticompetitive harm from the acquisition, that it claims the consent decree will not remedy. The facts are otherwise, however. Imetal and ECC did not compete in the manufacture or sale of the Film-Link product Heritage purchases from ECC before the acquisition, because Imetal did not make that (or an equivalent) product. Imetal's acquisition of ECC did not increase market concentration, or lessen competition, in the manufacture or sale of that product. Prices may have gone up, but not because the acquisition increased the companies' market power with respect to that product.

Nor can Heritage show that it has been harmed on account of the violation charged in the Complaint, since the product it buys is not the subject of the Complaint. The Complaint alleges that the proposed acquisition of ECC by Imetal would violate the Clayton Act with respect to sales of paper-grade GCC in the southeastern United States. Heritage does not buy paper-grade GCC -- it buys a different ground calcium carbonate product, as to which the Government did not charge that the merger would violate the antitrust laws. The two products are different. (See Declaration of Dr. Frederick W. Gramlich, at Tab A.)[5] Any effect on the product Heritage buys is

[5]Heritage appears to take the position in its motion that the product it buys really is the product described in the Complaint. It says (Motion at p.2) that the Complaint describes the calcium carbonate as "slurry form for the paper industry, as the paper industry is the main purchaser of such ground calcium carbonate," thus suggesting this is merely a form of short-hand. It also argues that the product it buys uses the same crushed ore from the same place, and is also dry processed and then wet ground like the paper-grade ground calcium carbonate (Motion at 2, 10-11) -- except that (a) the wet processing may be different for Heritage's product than for the paper-grade calcium carbonate (see Motion at 2, n3) and (b) the product is further processed, i.e., dried and surface treated. See also discussion at Motion pp. 28-31. Dr. Gramlich's Declaration makes it clear, however, that the Government considers the product alleged in the Complaint and the product Heritage is complaining about in its motion to be separate and distinct products for purposes of antitrust analysis, and explains why the Government reached that conclusion. This should be the end of the discussion. If the Court were to go behind this to make an independent determination of what the relevant product alleged in the Complaint is, it would in essence be

thus outside the scope of the Court's proper inquiry in this Tunney Act proceeding. The District Court in reviewing a proposed Consent Decree is to look to the violations alleged in the Complaint, and not to other violations that the Government could have charged but did not. United States v. Microsoft, 56 F.3d 1448 (D.C.Cir. 1995).

Heritage seeks to bring itself within the four corners of the Complaint by arguing that it is "subject to essentially the same market conditions as the paper-making industry with regard to a potential monopoly over the supply of GCC" (Motion at 11), and that the effect of the acquisition is to create a monopoly in the relevant market of calcium carbonate reserves. The answer to this is twofold. First, the Complaint does not allege reserves as a relevant product market as to which the proposed acquisition would violate Section 7 of the Clayton Act. Second, the proposed Final Judgment recognizes that reserves are necessary for an independent Alabama Carbonates, and requires divestiture of substantial reserves along with the required divestiture of Imetal's interest in the joint venture.[6]

Heritage also incorrectly argues (Motion at p.29) that its injury is properly within the sphere of the Court's public interest determination because the product it buys is simply a downstream product of the paper-grade GCC that is the subject of the Complaint. In support it points to dicta in United States v. BNS, 858 F.2d 456, 463 (9th Cir. 1988), where the Court said that in considering the impact of a consent judgment on the public interest in a case where the

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engaging in precisely the kind of full-blown fact-finding that settlement is designed to avoid, and that is improper in a Tunney Act proceeding.

[6]Heritage claims that divesting Alabama Carbonates is insufficient to provide a check on an anticompetitive price increase (Motion at 4), as witnessed by the fact that its prices have increased. Since Alabama Carbonates never sold the product Heritage is buying, it didn't constrain the prices before the acquisition, and there is no reason to think it would afterward.

complaint alleged a substantial lessening of competition in the marketing of grain in a specified area, it would be permissible to consider the impact of the decree on the price of bread in a related area. Of course, in that situation, if the producer of grain were able to anticompetitively raise prices to its customers who bought grain to make bread, those customers could pass the increase along to their customers who buy bread. Thus, when the Court looks to the violation alleged in the Complaint, it may legitimately look at the effect of that violation on indirect as well as direct customers. That is not Heritage's situation, though. Heritage does not buy paper-grade GCC and incorporate it into its Film-Link product. It does not buy paper-grade GCC and incorporate it into its end products either. And, as the Gramlich Declaration makes clear, there is no logical, predictable relationship between the price of paper-grade GCC and the price of the product Heritage buys, as there is between grain and bread. The product that Heritage is buying is not a downstream product of the paper-grade GCC in the Complaint.

III. HERITAGE HAS NO RIGHT TO INTERVENE UNDER THE TUNNEY ACT, AND NO INTEREST THAT WOULD ENTITLE IT TO INTERVENE AS OF RIGHT UNDER Rule 24(A)(2)

Heritage moves to intervene as of right in this proceeding, "for the limited purpose of gaining a means of access to the Antitrust Division's determinative documents as regards the GCC market and gaining the right to appeal." It has made no showing that would entitle it to such intervention, however.

This Court has held that there is no right to intervene in Tunney Act Proceedings. United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 218 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983) ; accord, United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 648 (D. Del.

1983). The Tunney Act permits, but does not require, the Court to authorize participation, including intervention. 15 U.S.C. § 16(f). Whether or not a movant is entitled to intervene as of right is determined by the standards set forth in Rule 24(a)(2) of the Federal Rules of Civil Procedure.

Rule 24(a)(2) provides that:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In this case, Heritage fails on all three prongs. First, the Rule requires that the motion for intervention be timely. In this case, Heritage's motion comes nearly a year after the consent decree was filed, and only after the Court has concluded lengthy proceedings on PACE's motion to intervene, finally denied that motion, and the parties have certified compliance with the Tunney Act and requested entry of the proposed Final Judgment. Heritage could have moved for intervention at any time in the last 11 months for the "limited purpose" it now asserts. To the extent Heritage now complains about monopoly power in the market for calcium carbonate reserves (see Motion at p. 7-9), it expressed concern about that issue even before the Complaint was filed, see Motion at p.13, and could have addressed it during the comment period. To the extent that Heritage became concerned enough to comment only after its prices went up, its motion says the price increases began as early as January of 1999. While Heritage has not told us exactly when and by how much its prices went up, if the increases started in January 1999, surely the company had an inkling of what was likely to happen before the comment period ended in

August. It chose to wait. This is not a timely application.

More importantly, however, Heritage has not demonstrated a substantial interest in the transaction which is the subject of the action. Heritage has not shown that the price increase is merger-related, or that the injury it claims is on account of the violation charged in this case.

Nor is it clear how the disposition of this action -- in this case, entry of the proposed Final Judgment -- would impair or impede Heritage's ability to protect its interest if that interest were cognizable. Heritage claims that it needs access to any determinative documents the Government has relating to ground calcium carbonate, in case it decides to file a lawsuit challenging the Imetal/ECC acquisition. The fact is, though, that Heritage already has access to the single determinative document in the possession of the Government. The United States appended that determinative document to its Competitive Impact Statement, as required by the Tunney Act. It published the Competitive Impact Statement, and the appended determinative document, in the Federal Register, also as required by the Tunney Act. And finally, it certified in its Certificate of Compliance, filed February 17, 2000, that it has complied with the Tunney Act, which means it has produced all determinative documents.

Heritage claims that there must be more documents relating to ground calcium carbonate, because Defendants produced over 400 boxes of documents (Motion at p.18), and also because the United States interviewed Heritage Plastics in the course of its investigation (Motion at p. 13). While it can point to nothing specific, Heritage urges the Court to review a summary of these 400 boxes and other documents the Government obtained in the course of its investigation, to see if there may be determinative documents there. In the alternative, it urges the Court to review a list of the parties from whom the Government obtained documents and an index of the documents so

obtained.

The Tunney Act does not require the Government to disclose whatever documentary evidence it has collected in the course of its investigation, however. As the Court of Appeals for the District of Columbia pointed out in Massachusetts School of Law at Andover, Inc. v. United States, 118 F.3d 776 (D.C. Cir. 1997), both the purpose and the legislative history of the Tunney Act compel a narrow reading of the term "determinative document." The government argued in that case that the term refers only to documents, such as reports to the government, that individually had a significant impact on the government's formulation of relief -- i.e., on its decision to propose or accept a particular settlement. Id. At 784. The Court agreed, and held that "the Tunney Act does not require that the government give access to evidentiary documents gathered in the course of an investigation culminating in settlement." Id at 785.[7]

Since Heritage would not be entitled to the broad-ranging document discovery it is seeking even if it had demonstrated an interest that would support intervention, denial of its

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[7]Heritage relies on Massachusetts School of Law for the proposition that it is entitled to intervene as of right in this case, because in that case the Court of Appeals did permit such intervention for the limited purpose of seeking determinative documents. That case is distinguishable from this one, of course, because the Court first found that the movant had a substantial interest in the transaction; it was claiming injury from the precise conduct that the government's case claimed was illegal. Beyond that distinction, however, the United States submits that Massachusetts School of Law is properly read more narrowly. In that case, the Court of Appeals granted intervention as of right precisely so that it could decide the question of whether the movant was entitled to access to the government's investigative files. See id. at 781-82. Now that the Court has held unambiguously that there is no such entitlement, it seems unlikely that it would grant the same intervention as of right to the next movant seeking wholesale discovery of the government's investigative files.

Heritage also relies on United States v. Alex Brown & Sons, 169 F.R.D. 532 (S.D.N.Y. 1996), in which the Court granted movant permissive intervention, inter alia for the purpose of seeking a specific settlement document. That case is similarly distinguishable because, as the Court noted, no one disputed that movant shared questions of law and fact in common with the action before the Court. Id. at 538. Again, the Court denied movant the document it sought.

motion and disposition of this action would not impair or impede its ability to protect any legitimate interest in seeking those documents. With respect to its request to intervene for purposes of appealing the Final Judgment, Heritage has advanced no argument as to why the entry of the final judgment would impair or impede it ability to protect any legitimate interest it might have. The mere fact that it opposes entry of the proposed Final Judgment, or thinks it inadequate, does not constitute the required showing. Id. at 781. Thus, Heritage has failed to satisfy the third prong of the Rule 24(a)(2) test as well, and its motion for intervention as of right should be denied.

IV. HERITAGE HAS ALSO FAILED TO SATISFY THE STANDARDS FOR PERMISSIVE INTERVENTION IN AI GOVERNMENT ANTITRUST SUIT

Heritage has also moved for permissive intervention, for the purpose of opposing the proposed Final Judgment. The Tunney Act provides that the Court may authorize participation in proceedings before it by interested persons, including intervention as a party pursuant to the Federal Rules of Civil Procedure. 15 U.S.C.§ 16(f). Intervention is thus committed to the discretion of the Court, subject to the requirements of Rule 24(b) (2) of the Federal Rules of Civil Procedure.

Rule 24(b)(2) provides that a movant may be granted permissive intervention if its claim or defense and the main action have a question of law or fact in common. Rule 24(b) is predicated on the theory that, when claims or defenses have a question of law or fact in common, notions of judicial economy and a sound administrative scheme of procedure encourage one action or hearing rather than a multiplicity of actions or hearings. 3D Moore's Federal Practice

§§ 24.10[1], 24.11 (3d Ed.).

In this proceeding, however, the only issue before the Court is whether the proposed Final Judgment is in the public interest. The D.C. Circuit has made it clear that this inquiry is a narrow one. As the Court stated in United States v. Microsoft Corp., 56 F.3d 1448 (D.C.Cir. 1995), "[a] district judge pondering a proposed consent decree . . . would and should pay special attention to the decree's clarity. . . . Similarly, we would expect a district court to pay close attention to the compliance mechanisms in a consent decree." 56 F.3d at 1461, 1462. The Court's function, however, is not to determine whether the proposed final judgment "is the one that will best serve society, but only to confirm that it is 'within the reaches of the public interest." Id. at 1460 (citations omitted). When reviewing a proposed consent decree, that represents a settlement, the Court must give great deference to the government's predictions as to the effect of the proposed remedies; it may not reject a proposed settlement merely because it believes other remedies might be preferable, Id., or because "a third party claims it could be better treated." Id. at 1461 n.9. Indeed, it should not reject a proposed remedy "unless it has exceptional confidence that adverse antitrust consequences will result -- perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency." Id. At 1460, citations omitted.

Because the United States represents the public interest in government antitrust cases, (See e.g., United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. Associated Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir.), cert. denied 429 U.S. 940 (1976)), the D.C. Circuit requires, as a condition of gaining intervenor status, that the would-be intervenor first establish that its participation would aid the court in

making its public interest determination. Massachusetts School of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C.Cir. 1997).

> A private party generally will not be permitted to intervene in government antitrust litigation absent some strong showing that the government is not vigorously and faithfully representing the public interest. Id., quoting. United States v. LTV Corp, 746 F.2d 51, 54 n.7 (D.D.C. 1984), and United States v. Hartford-Empire Co., 573 F.2d 1,2 (6th Cir. 1978).

Heritage's central claim is that it should be permitted to intervene because its prices have gone up as a result of Imetal's acquisition of ECC. (Motion at p.25). For all the reasons set forth above, however, Heritage has not shown, and cannot show, that the price increases are the result of the acquisition, or are "related to the violations alleged in the Complaint" within the meaning of the Tunney Act. (See Section 16(e) (the Court may consider the impact of entry of such judgment upon individuals alleging specific injury from the violations set forth in the Complaint).

Heritage also claims that its participation will aid the Court because it is the largest purchaser of GCC for use in the plastics industry and is the sole dissenting voice opposing the proposed Final Judgment, and thus the sole party submitting information to the Court contesting the adequacy of the proposed Final Judgment. (Motion at p. 5) As to the first point, since the Complaint does not allege a violation with respect to ground calcium carbonate for use in the plastics industry, it is difficult to understand how Heritage's participation would aid the Court in determining whether the proposed Final Judgment is in the public interest. As to the second point, although Heritage is the only dissenter currently moving to intervene, PACE's comment and court filings opposing the proposed Final Judgment are in the record and properly before the Court, and available to it as it makes its public interest determination. If the Court determines that it needs more information it can of course seek it. But the fact that Heritage is the last

opponent to the proposed Final Judgment to be before the Court hardly constitutes a showing that its participation would aid the Court in making its public interest determination.

IV. HERITAGE'S MOTION SHOULD BE DENIED BECAUSE GRANTING INTERVENTION WOULD UNDULY DELAY THE TUNNEY ACT PROCEEDING

Under Rule 24(b), even if a movant meets the threshold for permissive intervention (which Heritage has not), the Court must consider in exercising its discretion "whether the intervention would unduly delay or prejudice the rights of the original parties." In this case, intervention would do precisely that.

While Heritage has said in its motion that it would not seek discovery if permitted to intervene, it would file a brief opposing the proposed Final Judgment. This proceeding would be delayed at a minimum by the time required to file that brief, responses thereto by the parties, a reply by Heritage, and by the time required for the Court to consider all those pleadings. This may be a relatively short period, compared with the time that has already elapsed since the filing of the proposed Final Judgment. Nevertheless, it represents an undue delay in light of Heritage's claims -- which are so clearly outside the scope of the Court's inquiry. It also represents an undue delay in light of Heritage's delay in coming forward. Heritage has known about this transaction for well over a year. It was on notice of the provisions of the Complaint and the proposed Final Judgment since at least last July, and could have availed itself of the statutorily-provided public comment period to voice its concerns. Instead, it waited until the eleventh hour, and until it found itself in an undesirable commercial quandary, to champion the supposed public interest.

Moreover, at this point any delay in entering the proposed Final Judgment is limiting the

Government's ability to effect the divestitures required by the decree. Two of the four required divestitures -- those relating to water-washed kaolin and to calcined kaolin for paper-making -- were accomplished last fall. A third divestiture, relating to paper-grade GCC, has been presented to the Government and is currently under review. The fourth divestiture, relating to fused silica, is in limbo, however. A negotiated deal to sell the facility broke down not once but twice, and the Government is unaware of any progress since. Once the proposed Final Judgment is entered, the Government can seek appointment of a trustee in short order to speed this divestiture along. Until the decree is entered, however, it can only wait. The public interest would be better served by a prompt public interest determination and entry of the proposed Final Judgment than by further delay so Heritage can pursue its commercial disputes in the guise of the public interest.

V. THE COURT SHOULD DENY HERITAGE'S REQUEST FOR AMICUS STATUS

Heritage has moved in the alternative for leave to participate in the Tunney Act proceedings as amicus curiae, and cited cases to support the proposition that the Court has authority to grant it such status. Although the Court has authority to grant amicus status, it should not do so in this case. Heritage had an opportunity to make its opposition to the proposed Final Judgment known to the Government and to the Court through the public comment procedures of the Tunney Act, and it chose not to do so. It was aware of the transaction, and of the confines of the industry generally at the time. The only thing that has changed since the comment period is the fact that Heritage is now facing a price increase for a product it purchases from Imetal/ECC. While the United States does not think that price increase is relevant to the Court's inquiry into

the proposed Final Judgment, for all the reasons set forth in this Memorandum, the Court is now fully aware of Heritage's commercial position by virtue of its Motion for Intervention. Since amicus status in Tunney Act proceedings entails no particular rights, and certainly no rights of participation that the Court could not confer without granting amicus status, no purpose would be served by granting the request.

VI. CONCLUSION

The Complaint in this case alleges that the challenged acquisition is likely to substantially lessen competition in four separate product markets. The proposed Final Judgment requires substantial divestitures in each of those markets. The United States strongly believes that the divestitures and other relief provided for in the proposed Final Judgment will alleviate the competitive concerns alleged in the Complaint.

The injury that Heritage Plastics complains of in its motion relates to a product it buys that is not the subject of the Complaint, and as to which the United States did not allege that the proposed acquisition of ECC by Imetal was likely to substantially lessen competition. Any injury that Heritage has suffered is thus not related to the violations charge in the Complaint, not related to the subject matter of this transaction, and not related to the Court's determination of whether the proposed Final Judgment is in the public interest. .

Heritage has utterly failed to demonstrate that it is entitled to intervene in the Tunney Act proceeding in this case, under the standards articulated by the D.C. Circuit, under the Federal Rules of Civil Procedure, or on any other basis. Heritage had ample opportunity under the Tunney Act to express its opposition to the proposed Final Judgment and chose not to do so.

Granting it the right to intervene or to appear as amicus curiae now, at this late date, would serve only to delay, not advance, the Court's public interest determination. Accordingly, Heritage's Motion to Intervene or in the Alternative for Leave to Appear as Amicus Curiae should be denied.

Dated: May 5, 2000

Respectfully submitted,

/s/

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