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 THE PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION TO INTERVENE, OR IN THE ALTERNATIVE TO APPEAR AS AMICUS CURIAE

The Allied Industrial, Chemical and Energy Workers International Union ("PACE") seeks inappropriately to inject itself into the resolution of this Clayton Act Section 7 case. The United States brought this case to remedy a potential substantial lessening of competition in the markets for water-washed kaolin, calcined kaolin, paper-grade ground calcium carbonate ("GCC"), and fused silica as a result of defendant Imetal's proposed acquisition of defendant English China Clays, plc ("ECC"). The proposed Final Judgment, which is pending before this Court, permitted the acquisition, but preserved competition in the four markets that are the subject of the Complaint, in part by requiring Imetal to divest substantial assets relating to all four products. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act ("APPA", or "Tunney Act"), 15 U.S.C.§ 16(b)-(h), and

the Court may now enter the proposed Final Judgment once it determines that entry of the Judgment is in the public interest. 15 U.S.C. § 16(e).[1]

Pace has totally failed to meet the strict standards for permissive intervention in government antitrust consent decree cases. PACE has not demonstrated that it has any cognizable interest in the proceeding that would justify intervention. It has not demonstrated that its participation in the proceedings would aid the Court in any way in making the public interest determination, as is required for intervention in this Circuit. Nor has it demonstrated that the Government has acted in bad faith or with malfeasance, as it must to intervene where the interest it asserts is the public interest. The fact that PACE differs with the Government over the remedies that are appropriate in this case does not entitle it to intervene or appear as amicus. Nor should it, particularly since PACE has availed itself of the ample opportunity provided by the Tunney Act to voice its objections to both the Government and the Court. PACE's intervention would only delay the proceeding and prejudice the adjudication of the rights of the original parties.

Permitting PACE to intervene or appear as amicus serves no purpose other than to allow the Union to present its objections to the proposed Final Judgment to the Court for a third time. Its motion should be denied.

I. BACKGROUND OF THE CASE

The United States filed this civil antitrust case on April 26, 1999, alleging that the proposed

[1]The United States today filed a Consent Motion for Entry of Final Judgment, which includes a Certificate of Compliance with the APPA.

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 Clayton Act. Simultaneously, it 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. With respect to paper-grade ground calcium carbonate (GCC) (the only product with which PACE is concerned), the proposed Final Judgment requires that Imetal divest its interest in the limited partnership through which it participates in that market, and also divest substantial reserves.

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.[2] 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 determine, after reviewing the Competitive Impact Statement, the public comments, the Government's responses to those comments, and any other

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

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.[3]

On August 10, 1999, PACE filed a comment with the Government, opposing the proposed Final Judgment as it related to paper-grade GCC.[4] The essence of its argument, albeit implicit, was that the proposed Final Judgment would not preserve the competition that existed before the acquisition because it required divestiture of Imetal's ownership interest in Alabama Carbonates and a fixed quantity of reserves only, and did not require divestiture of dry processing facilities.[5] PACE wanted a "requirement that Alabama Carbonates will actually enter the market" (Comment, page 4), and a requirement that there be "market conditions that maximize future competition" (Comment, page 5). It took the position that "[t]he Final Judgment should not permit any possibility of a decrease in competition ." (Comment, page 5). It also expressed concern that the transition provisions of the Final Judgment might not fully protect Alabama Carbonates against a variety of pernicious practices Imetal

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[3]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.

[4]PACE has raised no objections to the provisions of the proposed Final Judgment relating to the other three product markets -- kaolin, calcined kaolin, and fused silica.

[5]Georgia Marble (Imetal) had a single dry processing facility in Sylacauga, Alabama, that supplied its dry-processed GCC business (a product distinct from paper-grade GCC) and also supplied feedstock to the Alabama Carbonates plant under a supply agreement.

could engage in (Comment, page 6), and might not provide enough time for Alabama Carbonates to construct its own dry processing facilities.[6]

The United States considered PACE's comment, and responded to it on January 14, 2000. The response explained why the Proposed Final Judgment would preserve the two competitors that existed before the acquisition, why the divestiture of reserves would eliminate what could have been a substantial barrier to Alabama Carbonates becoming vertically integrated if it chose to do so, and responded to PACE's expressed concerns about the transition agreement. The United States filed both PACE's comment and the United States' response with the Court on January 14, 2000.[7]

PACE reiterated its opposition to the proposed Final Judgment in its Memorandum in support of the pending motion, filed February 3, 2000. The arguments in the Memorandum are phrased differently than was the comment, but the substance is the same. PACE objects to the proposed Final Judgment because it "provides for less-than-complete divestiture of the assets of either of the merging entities" (Memorandum in Support of Motion to Intervene, at p.4), and specifically (see Id., Fn 2) because the proposed Final Judgment "provides for Alabama Carbonates to receive only designated reserves and no dry processing facility."

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[6]On the same day it filed its comment, PACE filed a "Protective Motion for Leave to Participate" in this proceeding, enclosing its comment as an exhibit to the pleading. The United States took the position that the protective motion was simply a notice to the Court that PACE might later file a motion. Accordingly, it did not oppose the motion, but did inform the Court that it would oppose if PACE later filed a motion to intervene. See Memorandum of the United States in Response to the Protective Motion of PACE for Leave to Participate, filed September 13, 1999.

[7]The comment and the response were published in the Federal Register as required by 15 U.S.C. §16(d) on February 7, 2000.

II. PACE HAS FAILED TO SATISFY THE STANDARDS FOR INTERVENTION IN A GOVERNMENT ANTITRUST SUIT

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 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.[8] 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

[8]PACE is not seeking to intervene as of right, and for that reason this Memorandum does not discuss Rule 24(a), which governs intervention as of right. Rule 24(b)(1), which permits intervention when a statute of the United States confers a conditional right to intervene, also does not apply, since 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 sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

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)(hereafter "MSL v. United States").

> 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).

PACE claims in its motion that it has two distinct antitrust interests in this proceeding. First, as

the primary union representing workers in the paper industry, it claims a direct and substantial interest in the preservation of competitive market conditions in all aspects of paper-making. Second, since both the Union and its members are consumers of paper, it claims a recognized consumer interest in preserving a free and open market for all the ingredients in the paper-making process. These claims, though, are essentially claims that PACE speaks for the public interest on the proposed Final Judgment. But it is the United States that represents the public interest in government antitrust cases. PACE has made no showing of bad faith or malfeasance on the part of the Government that would justify this Court in granting it intervenor status to represent the public interest under the standards articulated in United States v. American Bar Association, supra. Nor could it. The essence of PACE's argument is that it does not like the proposed Final Judgment -- but the D.C. Circuit has made it clear that this is not sufficient to justify intervention in a Tunney Act proceeding.

PACE also claims that it is seeking to enforce its procedural rights under the Tunney Act, and cites MSL v. United States, supra, and United States v. Alex. Brown & Sons, Inc., 169 F.R.D. 532 (S.D.N.Y. 1996), for the proposition that it has a right to do so through intervention. Neither case stands for the proposition that a party is automatically entitled to permissive intervention in a Tunney Act proceeding merely by claiming that it is seeking to enforce procedural rights, however. Those cases involved parties who had filed private antitrust suits involving the same subject matter as the Government's action, and were seeking discovery of materials from the Government for use in those proceedings and that were likely otherwise unavailable to them.[9] Here, PACE has no such claim --

[9]We note that in both cases the court ultimately denied intervenors the information they sought.

merely a hope that, if it says it is seeking to "enforce procedural rights," perhaps it can persuade the Court that it does not have to meet the standards for intervention that the District of Columbia Circuit has established in Tunney Act proceedings.

III. PACE'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 PACE 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 it is clear, both from PACE's motion and from its real interest in this proceeding, that intervention would do precisely that.[10]

If PACE were permitted to intervene in this proceeding, it could seek to conduct discovery and develop evidence to support its objections to the proposed Final Judgment. And its motion makes it clear that it would likely do precisely that. PACE attacks the Competitive Impact Statement, claiming it is defective, because it does not contain various detailed facts -- including facts about the market, about economies of scale, about the cost of building facilities -- even though those are matters that are not required to be in the Competitive Impact Statement, are not routinely included in competitive impact

[10]Granted this matter was pending before the Court for over nine months before the United States moved for entry of the proposed Final Judgment. During this elapsed time, however, the parties have made considerable progress toward accomplishing the divestitures required by the proposed Final Judgment (See Consent Motion For Entry of Final Judgment at n.1), and taken up a minimum of the Court's time. The kind of delay that would likely result from granting PACE's motion, by contrast, is precisely the kind that would likely take up a considerable amount of the Court's time, without advancing its public interest determination.

statements, and are not, in the view of the United States, necessary for the Court to make its public interest determination. It seems clear, though, that if PACE were granted intervenor status, it would try to rehash the Government's entire investigation and reconstruct the evidentiary basis for the entire settlement, under the rubric of "enforcing its procedural rights."

PACE also states in its motion that it intends to ask the Court to review the United States' compliance with the Tunney Act to determine whether all the required determinative documents were produced -- not because it can point to any specific documents or classes of documents that it believes were omitted, but rather because "the Antitrust Division has made a series of determinations about market structure, incentives and future conditions . . . received large numbers of documents, conducted negotiations and reached basic conclusions." (Memorandum in Support of Motion to Intervene, at p. 6). The Antitrust Division customarily reviews large numbers of documents, from the parties and third parties, and conducts a wide-ranging inquiry to reach basic conclusions about market structure, incentives and future conditions. The fact that it did so in this case is hardly justification for an in-depth inquiry by the Court into the United States' compliance with the Tunney Act. Indeed, if this is a basis for granting PACE intervenor status, then we should expect to see people intervening in every consent decree proceeding the United States initiates, and courts conducting mini-trials as a matter of routine in those proceedings. This is clearly not what Congress had in mind when it enacted the Tunney Act.

PACE does, of course, have a very real interest in dragging this Tunney Act proceeding out as long as possible, and in blocking the proposed settlement if it can. Before Imetal's acquisition of ECC, PACE represented 140 workers at the Georgia Marble (Imetal) dry processing facility. Declaration of Joseph Drexler, appended to PACE's Protective Motion for Leave to Participate, ¶ 1. Imetal

informed PACE that, after the acquisition, the new company would no longer recognize PACE as a bargaining representative for those employees. Id. The employees at the ECC ground calcium carbonate plant were not represented by a union, and apparently once the Imetal and ECC Sylacauga facilities were combined, Imetal claimed, PACE would no longer represent a majority of the employees of the facility.[11] PACE has filed an unfair labor practice claim with the NLRB and is pursuing the matter before that agency. Id. at ¶ 2. In the meantime, though, PACE would seem to have a clear interest in trying to prevent or at least delay a combination of the Imetal and ECC plants. This is not an interest that merits granting it interventor status in this Tunney Act proceeding, however.

IV. THE COURT SHOULD DENY PACE'S REQUEST FOR AMICUS STATUS

PACE 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 would serve no purpose in this case, other than to initiate another round of briefing for all concerned. PACE has made its opposition to the proposed Final Judgment known through the public comment procedures of the Tunney Act and its comment is before the Court. It has restated its opposition in the memorandum it filed in support of the pending motion. 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.

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[11]This is the explanation that counsel for PACE provided in a meeting with counsel for the United States before it filed its comment in this matter.

V. 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. During the 60-day comment period, the Government received only a single comment (from PACE) objecting to the Proposed Final Judgment, and that comment objected only to the proposed Final Judgment insofar as it related to paper-grade GCC.

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. With respect to paper-grade GCC, as the United States explained in its response to PACE's comment, the divestiture of Imetal's interest in the Alabama Carbonates joint venture and substantial reserves ensures that there will be no reduction in competition as a result of the acquisition. The two competitors that existed before the acquisition will continue to exist. The requirement that Imetal divest reserves eliminates what could have been a substantial barrier to Alabama Carbonates' continuing to compete without being dependent on Imetal for feedstock for its operations. And finally, the transition agreement assures that Alabama Carbonates will be able to continue as a competitor in the short term while it takes the steps necessary to eliminate its historical dependence on Imetal.

PACE 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. PACE has had ample opportunity under the Tunney Act to express its opposition to the proposed Final Judgment and that opposition is properly before the Court. Granting PACE the right to intervene or to appear as amicus curiae would serve only to delay, not

advance, the Court's public interest determination. Accordingly, PACE's Motion to Intervene or in the Alternative for Leave to Appear as Amicus Curiae should be denied.

Dated: February 17, 2000

Respectfully submitted,

/s/

Patricia G. Chick
D.C. Bar # 266403
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W. Suite 3000
Washington, D.C. 20530
Telephone: (202) 307-0946
Facsimile: (202) 514-9033
Attorney for Plaintiff the United States

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Memorandum of the United States In Opposition to Motion of the Paper, Allied-Industrial, Chemical and Energy Workers International Union To Intervene, or in the Alternative to Appear as Amicus Curiae, to be served by first class mail, postage prepaid, this 17th day of February, 2000 on:

George M. Chester, Jr., Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-7566
Counsel for All Defendants

Jonathan W. Cuneo, Esquire
THE CUNEO LAW GROUP, P.C.
317 Massachusetts Avenue, N.E.
Suite 300
Washington, D.C. 20002
Counsel for Movant

_____/s/_____
Patricia G. Chick
D.C. Bar # 266403
Trial Attorney
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530
(202) 307-0946