with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket imaging system (EDIS) at *http://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: Jay H. Reiziss, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202–205–2579.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in § 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2003).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on September 8, 2003, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain insect traps by reason of infringement of claims 1–3, 5–7, 9, 13, 28, 31–33, 35–37, 39–41, or 43–45 of U.S. Patent No. 6,286,249 B1 or claims 1–4, 7, 15–19, or 21–39 of U.S. Patent No. 6,145,243 and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—American Biophysics Corporation, 2240 South County Trail, East Greenwich, RI 02818–1536.

(b) The respondent is the following company alleged to be in violation of section 337, and is a party upon which the complaint is to be served: Blue Rhino Corporation, 104 Cambridge Plaza Drive, Winston-Salem, NC 27104.

(c) Jay H. Reiziss, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(4) For the investigation so instituted, the Honorable Sidney Harris is designated as the presiding administrative law judge.

A response to the complaint and the notice of investigation must be submitted by the named respondent in accordance with § 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such response will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting the response to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter a final determination containing such findings, and may result in the issuance of a limited exclusion order or cease and desist order or both directed against such respondent.

Issued: December 12, 2003.

By order of the Commission.

Marilyn R. Abbott,

Secretary.

[FR Doc. 03–31104 Filed 12–16–03; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Alcan Inc., Alcan Aluminum Corp., Pechiney, S.A., and Pechiney Rolled Products, LLC; Complaint, Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States* v. *Alcan, Inc., Alcan Aluminum Corp., Pechiney, S.A., and Pechiney Rolled Products, LLC*, No. 1:03 CV 02012 (GK).

On September 29, 2003, the United States filed a Complaint alleging that Alcan's proposed acquisition of Pechiney would violate section 7 of the Clayton Act, 15 U.S.C. 18, by substantially lessening competition in development, production, and sale of brazing sheet in North America. Brazing sheet is an aluminum alloy used to make heat exchangers (*e.g.*, radiators, heaters, and air conditioners) for motor vehicles. The proposed Final Judgment, filed simultaneously with the Complaint, requires the defendants to divest Pechiney's brazing sheet business to a person acceptable to the United States within 120 days after Alcan receives preliminary notice from the responsible French stock market regulatory authority that the firm's tender offer for Pechiney has been successful. Copies of the Complaint, the proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement are available for inspection at the U.S. Department of Justice, Antitrust Division, Suite 215 North, 325 7th Street, NW., Washington, DC 20004 (telephone: (202) 514–2692), and at the Clerk's Office of the U.S. Court for the District of Columbia, 333 Constitution Avenue NW., Washington, DC 20001.

Public comment is invited within 60-days of the date of this notice. Such comments and responses thereto will be published in the **Federal Register** and filed with the Court. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 1401 H Street, NW., Suite 3000, Washington, DC 20530 (telephone: (202) 307–0924).

J. Robert Kramer II,

Director of Operations, Antitrust Division.

United States District Court for the District of Columbia

United States of America, U.S. Department of Justice, Antitrust Division, 1401 H Street, NW., Suite 3000, Washington, DC 20530, *Plaintiff*, v. *Alcan Inc.*, 1188 Sherbrooke Street West, Montreal, Quebec, Canada, H3A 3G2; Alcan Aluminum Corp., 6060 Parkland Boulevard, Cleveland, OH 44124–4185; Pechiney, S.A., 7, Place Du Chancelier Adenauer, CEDEX 16—75218—Paris, France; and Pechiney Rolled Products, LLC, Rural Route 2 Ravenswood, WV 26164–9802, Defendants.

Case No.

Judge:

Deck Type: Antitrust

Date:

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to obtain equitable relief against defendants, and alleges as follows:

1. In early July 2003, Alcan Inc. ("Alcan") launched a $4.6 billion tender offer for Pechiney, S.A. ("Pechiney"), which was later endorsed by Pechiney's board of directors. The United States seeks to enjoin this proposed acquisition, which, if consummated, would result in consumers

paying higher prices for brazing sheet, an aluminum alloy used in making heat exchangers for motor vehicles.

2. Alcan, through its United States subsidiary (Alcan Aluminum Corp.), and Pechiney, through its United States subsidiary (Pechiney Rolled Products, LLC), are, respectively, the second and fourth largest producers of brazing sheet in North America. Brazing sheet consists of a class of layered aluminum alloys, each of which has a unique ability to form a uniform, durable, leak-proof bond with other aluminum surfaces. Brazing sheet is widely used in fabricating the major components of heat exchanges for motor vehicles, including engine cooling (*e.g.*, radiators and oil coolers) and climate control (*e.g.*, heaters and air conditioners) systems. A combination of Alcan and Pechiney would command over 40 percent of brazing sheets sales in North America. The combined firm and one other competitor would account for over 80 percent of all brazing sheet sold in North America.

3. The proposed acquisition, if consummated, would combine Alcan, a low cost new entrant and price maverick, with Pechiney, a large industry incumbent, compromising Alcan's incentive to quickly expand its sales by reducing brazing sheet prices, and ending the intense competitive rivalry that currently exists between Alcan and Pechiney in developing, producing, and selling brazing sheet. This competition, which will intensify in the next few years as Alcan completes qualifying its brazing sheet with more customers, already has produced significant improvements in brazing sheet quality, durability, and reliability, and highly competitive prices and terms for this material. By reducing the number of major North American producers of brazing sheet from four to three, this acquisition would substantially increase the likelihood that the combined firm will unilaterally increase, or that it and the other major competitor will tacitly or explicitly cooperate to increase, prices of brazing sheet to the detriment of consumers.

4. Unless this proposed acquisition is blocked, Alcan's acquisition of Pechiney will substantially lessen competition in the development, production, and sale of brazing sheet and likely result in an increase in prices and a reduction in quality and innovation for brazing sheet in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

I. Jurisdiction and Venue

5. This Complaint is filed by the United States under Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

6. Alcan and Pechiney develop, produce, and sell brazing sheet in the flow of interstate commerce. Alcan's and Pechiney's activities in developing, producing, and selling brazing sheet substantially affect interstate commerce. This Court has jurisdiction over the subject matter of this action pursuant to Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1331, 1337(a) and 1345.

7. Alcan, Alcan Aluminum Corp., Pechiney, and Pechiney Rolled products LLP have consented to personal jurisdiction and venue in this judicial district.

II. Defendants

8. Alcan is a Canadian corporation with its headquarters in Montreal, Quebec. Alcan Aluminum, an Alcan subsidiary, is a Delaware corporation with its principal place of business in Cleveland, OH. Alcan is one of the world's largest fully integrated aluminum producers. Alcan mines ore from which primary aluminum is produced, and produces a very wide range of rolled aluminum products, including brazing sheet. In 2002, Alcan reported sales of about $12.5 billion. Alcan projects that its sales of brazing sheet in North American in excess of $30 million in 2003.

9. Pechiney is a French corporation with its main office in Paris, France. A subsidiary, Pechiney Rolled Products, is a Delaware corporation with its principal place of business in Ravenswood, WV. Pechiney is also a leading integrated aluminum producer that makes a wide range of rolled aluminum products. In 2002, Pechiney reported total sales of about $11.3 billion. Its United States operations generate over $100 million in North American sales of brazing sheet.

III. The Proposed Transaction

10. In early July 2003, Alcan publicly announced a tender offer for shares of Pechiney, a transaction now valued at over $4.6 billion. The tender offer, recently endorsed by Pechiney's board of directors, is expected to be completed on November 30, 2003, and soon after, Alcan is expected to acquire a majority of the voting shares in Pechiney.

IV. Trade and Commerce

A. The Relevant Product Market

11. Brazing sheet comprises a class of custom-engineered aluminum alloys, each of which is composed of a solid metal "core" clad on one or both sides with an alloy whose melting temperature is lower than that of the core material. When brazing sheet is baked at the appropriate temperature, the cladding alloy will melt and form a durable, uniform leak-proof bond between the core and any adjoining aluminum surface, effectively welding the two materials together.

12. Brazing sheet is ideally suited for fabricating the major components of heat exchange systems used in motor vehicles. Heat exchanges include engine cooling systems such as radiators and oil coolers and climate control systems such as heater cores and air conditioning units (*i.e.*, evaporator and condenser cores). By making the basic components of heat exchanges with brazing sheet, a parts maker can avoid the physically tedious and costly task of welding or soldering individual components, many of which have unusually intricate surfaces that form joints deep within the heat exchange unit. A parts maker instead can loosely assemble the brazed components and bake the assembly in a brazing oven. The surfaces of the components will melt, converting the entire loose assembly into a solid, leak-proof heat exchange unit.

13. Today, the major components of all heat exchangers used in motor vehicles are made of brazing sheet. Less expensive, lighter, more durable and formable than materials it replaced, brazing sheet enables vehicle makers simultaneously to reduce vehicle cost, size, and weight; improve gas mileage; and extend engine, climate control system, and drive train life. In heat exchange applications, no other material matches the combination of strength, light weight, durability, formability, and corrosion resistance of brazing sheet. Because of the unique attributes, brazing sheet is the preferred material for making heat exchangers for motor vehicles.

14. A small but significant and nontransitory increase in prices for brazing sheet would not cause parts makers to switch to other materials for heat exchanger components in volumes sufficient to make such a price increase unprofitable and unsustainable. Accordingly, the development, production, and sale of brazing sheet is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

B. The Relevant Geographic Market

15. Alcan produces brazing sheet in an aluminum hot rolling mill in Oswego, NY, and "slits" or cuts finished roll stock at a cold rolling mill in Fairmont, WV. Pechiney makes brazing sheet in an aluminum hot rolling mill in Ravenswood, WV. The only other large competitor produces brazing sheet in a hot rolling mill in the United States. A much smaller rival produces brazing sheet in hot rolling mills in Canada and in Europe. Additional volumes of brazing sheet are exported to the United States from Europe. Brazing sheet exports to North America, however, account for less than eight percent of total sales. The Canadian and foreign firms, moreover, operate at or near their full production capacity.

16. Domestic parts makers prefer to purchase brazing sheet from North American sources. Foreign brazing sheet typically costs much more than, but does not outperform, brazing sheet produced in North America. Reliance on overseas sources for brazing sheet can be especially risky for domestic parts makers since foreign brazing sheet is more prone to supply interruptions and delays than brazing sheet procured from local, North American sources. Typically, when overseas demand has surged, foreign producers of brazing sheet have cut shipments to North American customers, resulting in production bottlenecks that have jeopardized North American parts makers' relationships with their customers.

17. For these reasons, North American parts makers generally restrict purchases of foreign brazing sheet imports to unique circumstances, *e.g.*, as an interim measure until one or more domestic producers have been qualified to make brazing sheet for use in an auto maker's vehicle, or for low volume heat exchanger parts for which a foreign auto maker has designated a single foreign supplier as the only qualified source for that brazing sheet material.

18. A small but significant and nontransitory increase in prices for brazing sheet in North America would not cause parts makers to buy so much brazing sheet from sources outside North America that

such a price increase would be unprofitable and unsustainable. Accordingly, North America is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

C. Anticompetitive Effects

19. There are only four significant competitors in the sale of brazing sheet in North America. Pechiney is the second largest producer with over 30 percent of sales; Alcan is the fourth largest with over 10 percent of sales. After the proposed acquisition, the combined firm and the largest U.S. producer of brazing sheet would command over 80 percent of all brazing sheet sales. Total North American sales of brazing sheet exceed $360 million annually.

20. The brazing sheet market would become substantially more concentrated if Alcan acquires Pechiney. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI") (defined and explained in Appendix A), the post-acquisition HHI would increase by at least 600 points, resulting in a post-merger HHI of about 3600, well in excess of levels that ordinarily would raise significant antitrust concerns.

21. The proposed transaction would combine Alcan with Pechiney, and remove a low cost, aggressive, and disruptive competitor in the North American brazing sheet market. Before the announced acquisition, Alcan recently had undertaken to significantly increase its sales of brazing sheet in North America. In 2001, Alcan moved its brazing sheet operations from England to Oswego, NY, then developed new, highly proprietary aluminum rolling technology that would make a low cost producer of brazing sheet in North America. Alcan also recently has completed qualifying to provide brazing sheet to several major domestic parts makers.

22. The proposed transaction will make it more likely that the few remaining brazing sheet producers will engage in anticompetitive coordination to increase prices, reduce quality and innovation, and decrease production of brazing sheet. After the acquisition, the combined firm and its largest North American rival would share market leadership and a common incentive to pursue strategies that emphasize accommodation and do the risk provocation. The acquisition also would substantially increase the likelihood that the combined firm will unilaterally increase prices of brazing sheet to the detriment of customs for whom Pechiney and Alcan are the only firms now qualified to provide brazing sheet for those customers' requirements. The other competitors in brazing sheet sales in North America do not have the incentive or ability, individually or collectively, to effectively constrain a unilateral or cooperative exercise of market power after the acquisition.

23. Purchasers of brazing sheet have benefited from competition between Alcan and Pechiney through lower prices and improved products. Alcan's acquisition of Pechiney would eliminate substantial competition and lead to an increase in prices and reduction in innovation and quality of brazing sheet.

24. The proposed transaction, if consummated, would eliminate a significant competitor and facilitate unilateral or coordinated increases in prices, or a reduction in levels of quality and innovation, for brazing sheet.

D. Entry Unlikely To Deter a Post Acquisition Exercise of Market Power

25. Successful entry into the brazing sheet market would not be timely, likely or sufficient to deter any unilateral or coordinated exercise of market power as a result of the transaction.

26. Significant barriers prevent do novo or lateral entry into the development, production, and sale of brazing sheet in North America. To produce this material, not only must a firm possess an aluminum hot rolling mill (which costs a least $80 million to construct), but also the technology and expertise to create custom-engineered aluminum alloys that perform well in the demanding operating conditions prevalent in the small heat exchangers used in motor vehicles. Even firms with the physical and technological assets to produce brazing sheet must, in order to have a significant impact, "qualify" with customers, *i.e.*, demonstrate that it would be a reliable producer of consistently high quality brazing sheet material. Qualification can be acquired only after the new firm has made a substantial investment in expensive alloy technology, successfully completed a series of time-consuming tests of its materials and components, and acquired actual experience producing brazing sheet that meets the exacting specifications of risk-averse parts markers. It took Alcan over two years from when it moved its brazing sheet operations to Oswego, New York to qualify with enough customers to make a significant sales impact.

V. Violations Alleged

27. The effect of Alcan's proposed acquisition of Pechiney may be to substantially lessen competition and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act.

28. The transaction will likely have the following anticompetive effects, among others:

a. Competition generally in the development, production, and sale of brazing sheet in North America would be substantially lessened;

b. Actual and potential competition between Alcan and Pechiney in the development, production, and sale of brazing sheet in North America would be eliminated; and

c. Prices for brazing sheet sold in North America would likely increase and the levels of quality and innovation would likely decline.

29. Unless prevented, the acquisition of Pechiney by Alcan would violate section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

VI. Requested Relief

30. Plaintiff requests:

a. That the proposed acquisition of Pechiney by Alcan be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18;

b. That defendants and all persons acting on their behalf be permanently enjoined and restrained from carrying out any contract, agreement, understanding or plan, the effect of which would be to combine Pechiney with the operations of Alcan;

c. That plaintiff recover the costs of this action; and

d. That plaintiff receive such other and further relief as the case requires and this Court may deem proper.

Dated: September 29, 2003.

Respectfully submitted,

For Plaintiff United States of America:

R. Hewitt Pate,
Assistant Attorney General, DC Bar # 473598.

Deborah P. Majoras,
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Trial Attorneys, U.S. Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW., Suite 3000, Washington, DC 20530, Telephone: (202) 307–6583.

Appendix A—Herfindahl-Hirschman Index Calculations

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, HHI is 2600 ($30^3 + 30^2 + 20^2 = 2600$). The HHI takes into account the relative size distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Market in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be highly concentrated. Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. *See Merger Guidelines* § 1.51.

Final Judgment

Whereas, plaintiff, United States of America, filed its Complaint on September 29, 2003, and plaintiff and defendants, Alcan Inc., Alcan Aluminum Corp., Pechiney, S.A.,

and Pechiney Rolled Products, LLC, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law:

And whereas, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the defendants to assure that competition is not substantially lessened;

And whereas, plaintiff requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint:

And whereas, defendants have represented to the United States that the divestiture required below can and will be made and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

II. Definitions

As used in this Final Judgment:

A. "Acquirer" means the entity or entities to whom defendants divest Pechiney's Brazing Sheet Business.

B. "Alcan" means defendant Alcan Inc., a Canadian corporation with its headquarters in Montreal, Canada, its successors and assigns, and its subsidiaries (including defendant Alcan Aluminum Corp.), divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

C. "Pechiney" means Pechiney, S.A., a French corporation with its headquarters in Paris, France, and its successors and assigns, its subsidiaries, divisions (including Pechiney Rolled Products, LLC), groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

D. "Brazing sheet" means a layered aluminum alloy that consists of a core clad on one or both sides with aluminum alloy whose melting temperature is lower than that of the core material. Brazing sheet is used primarily in making components of heat exchange systems (*e.g.,* radiators, oil coolers, and air conditioning units) for motor vehicles.

E. "Pechiney's Brazing Sheet Business" means all assets, interests, and rights in Pechiney Rolled Products, LLC's aluminum product rolling mill located in or near Ravenswood, West Virginia 26164 ("Ravenswood Facility"), including:

1. All tangible assets of the Ravenswood Facility and the real property on which the Ravenswood Facility is situated; any facilities used for research, development, and engineering support to the Ravenswood Facility ("the Engineering Facilities"), and any real property associated with those facilities; manufacturing and sales assets relating to the Ravenswood Facility and to the Engineering Facilities, including capital equipment, vehicles, supplies, personal property, inventory, office furniture, fixed assets and fixtures, materials, on- or off-site warehouses or storage facilities, and other tangible property or improvements; all licenses, permits and authorizations issued by and governmental organization relating to the Ravenswood Facility and to the Engineering Facilities; all contracts, agreements, leases, commitments, and understandings pertaining to the operations of the Ravenswood Facility and to the Engineering Facilities; supply agreements all customer lists, accounts, and credit records; and other records maintained by Pechiney Rolled Products in connection with the operations of the Ravenswood Facility and of the Engineering Facilities;

2. All intangible assets, including but not limited to all patents, licenses and sublicenses, intellectual property, trademarks, trade names, service marks, service names (except to the extent such trademarks, trade names, service marks, or service names contain the trademark or names "Pechiney" or any variation thereof), technical information, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information Pechiney Rolled Products, LLC provides to its employees, customers, suppliers, agent or licensees in connection with the operations of the Ravenswood Facility; provided, however, that defendants may require the Acquirer, in the United States's sole discretion, to license defendants to make, have made, use, or sell outside of North America any Pechiney product or process made by or used in connection with the Ravenswood Facility; and

3. All research data concerning historic and current research and development efforts relating to the operations of the Ravenswood Facility and of the Engineering Facilities, including designs of experiments, and the results of unsuccessful designs and experiments.

F. "Date that Alcan's tender offer for Pechiney ends" means the date Alcan receives a preliminary indication from the Conseil des Marches Financiers of Paris, France, that Alcan's tender offer has been successful.

III. Applicability

A. This Final Judgment applies to Alcan and Pechiney, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their assets or of lessor business units that include Pechiney's Brazing Sheet Business, that the purchaser agrees to be bound by the provisions of this Final Judgment, provided, however, that defendants need not obtain such an agreement from the Acquirer.

IV. Divestiture

A. Defendants are ordered and directed, within one hundred twenty (120) calendar days after the date that Alcan's tender offer for Pechiney ends, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest Pechiney's Brazing Sheet Business in a manner consistent with this Final Judgment to an Acquirer 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 in total sixty (60) calendar days, and shall notify the Court in each such circumstance. Defendants agree to use their best efforts to divest Pechiney's Brazing Sheet Business as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of Pechiney's Brazing Sheet Business. Defendants shall inform any person making inquiry regarding a possible purchase of Pechiney's Brazing Sheet Business that it will be divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to Pechiney's Brazing Sheet Business customarily provided in a due diligence process except such information or documents subject to the attorney-client or work-product privilege. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide prospective Acquirers of Pechiney's Brazing Sheet Business and the United States information relating to the personnel involved in the production, operation, development, and sale of Pechiney's Brazing Sheet Business to enable the Acquirer to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer to employ any of the defendants' employees whose responsibilities includes the production, operation, development, or sale of the products of Pechiney's Brazing Sheet Business.

D. Defendants shall permit prospective Acquirers of Pechiney's Brazing Sheet Business to have reasonable access to personnel and to make inspections of the physical facilities of Pechiney's Brazing Sheet Business; access to any and all environment, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendants shall warrant to the Acquirer of Pechiney's Brazing Sheet Business that each asset that was operational as of the date

of filing of the Complaint in this matter will be operational on the date of divestiture.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of Pechiney's Brazing Sheet Business.

G. Defendants shall not take any action, direct or indirect, that would prevent or discourage in any way any dealer from distributing the products of Pechiney's Brazing Sheet Business for a period of two years after such divestiture. Nothing in this provision, however, shall prevent defendants from promoting and selling in the ordinary course of business products that compete with those of Pechiney's Brazing Sheet Business.

H. Defendants shall warrant to the Acquirer of Pechiney's Brazing Sheet Business that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of Pechiney's Brazing Sheet Business, and that following the sale of Pechiney's Brazing Sheet Business, defendants will not undertake, directly or indirectly, any challenge to the environmental, zoning, or other permits relating to the operation of Pechiney's Brazing Sheet Business.

I. Nothing in this Final Judgment shall be construed to require the Acquirer as a condition of any license granted by or to defendants pursuant to section II (E) and IV to extend to defendants the right to use the Acquirer's improvements to any of Pechiney's Brazing Sheet Business.

J. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire Pechiney's Brazing Sheet Business, and shall be accomplish in such a way as to satisfy the United States, in its sole discretion, that Pechiney's Brazing Sheet Business can and will be used by the Acquirer as part of a viable, ongoing business, engaged in developing, manufacturing, and selling brazing sheet in North America. Divestiture of Pechiney's Brazing Sheet Business may be made to an Acquirer, provided that it is demonstrated to the sole satisfaction of the United States that Pechiney's Brazing Sheet Business will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

1. Shall be made to an Acquirer that, in the United States's sole judgment, has the managerial, operational and financial capability to compete effectively in the development, manufacture, and sale of brazing sheet in North America; and

2. Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and defendants give defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to complete effectively.

V. Appointment of Trustee to Effect Divestiture

A. If defendants have not divested Pechiney's Brazing Sheet Business within the time period specified in Section IV(A), defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of Pechiney's Brazing Sheet Business.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell Pechiney's Brazing Sheet Business. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of sections IV, V and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to section V(D) of this Final Judgment, the trustee may hire at the cost and expense of defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonable necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as plaintiff approves, and shall account for all monies derived from the sale of Pechiney's Brazing Sheet Business and all costs and expenses to incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of Pechiney's Brazing Sheet Business and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to customary confidentiality protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, and interest in Pechiney's Brazing Sheet Business and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest Pechiney's Brazing Sheet Business.

G. If the trustee has not accomplished such divestiture within six months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture; (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the plaintiff who shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in Pechiney's Brazing Sheet Business, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer, any other third party, or the trustee if applicable additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed

Acquirer, any third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under section V(D) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under section IV or V shall not be consummated. Upon objection by defendants under section V(D), a divestiture proposed under section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture order by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in Pechiney's Brazing Sheet Business, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for Pechiney's Brazing Sheet Business, and to provide required information to any prospective Acquirer, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants, including limitations on the information, shall be made within fourteen (14) days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section IX of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve Pechiney's Brazing Sheet Business and to divest Pechiney's Brazing Sheet Business until one year after such divestiture has been completed.

X. Compliance Inspection

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

1. Access during defendants' office hours to inspect and copy, or at plaintiff's option, to require defendants to provide copies of, all books, ledgers, accounts, records and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. No Reacquisition

Defendants may not reacquire any part of Pechiney's Brazing Sheet Business during the term of this Final Judgment.

XII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIII. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XIV. Public Interest Determination

Entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

_____

United States District Judge

Competitive Impact Statement

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

In early July 2003, Alcan Inc., ("Alcan") Publicly announced that it would soon begin a tender offer for shares of Pechiney, S.A. ("Pechiney"), a transaction formally endorsed by Pechiney's board of directors on August 30, 2003. On September 29, 2003, the United States filed a civil antitrust suit alleging that Alcan's proposed acquisition of Pechiney would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint alleges that a combination of Alcan and Pechiney would substantially lessen competition in the development, production, and sale of brazing sheet in North America. Pechiney and Alcan are, respectively, the second and fourth largest competitors in the sale of brazing sheet in North America. The acquisition would result in a single firm—Alcan—with a market share of over 40 percent, and the industry's two largest firms having a combined share of over 80 percent, of North American sales of brazing sheet. The attendant reduction in competition in this highly concentrated market would lead to an increase in brazing sheet prices and a reduction in product quality and innovation to the detriment of North American consumers. Accordingly, 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 that would prevent Alcan from acquiring control of, or otherwise combining its assets with, Pechiney.

At the same time the Complaint was filed, the United States filed a proposed settlement that would allow Alcan to acquire Pechiney but require defendants to divest Pechiney's entire North American brazing sheet business in such a way as to preserve competition in North America. The settlement consists of a Hold Separate Stipulation and Order and a

proposed Final Judgment. According to the terms of the settlement, defendants must divest Pechiney's brazing sheet business [1] to a person acceptable to the United States, in its sole discretion, within 120 calendar days after Alcan receives preliminary notification from the responsible French stock market regulatory agency, Conseil des Marches Financiers, that the firm's tender offer for shares of Pechiney has been successful, or within five (5) days after notice of entry of the Final Judgment, whichever is later. The United States, in its sole discretion, may extend the time period for this divestiture one or more times, not to exceed a total of 60 days past the initial divestiture deadline. If defendants do not complete the ordered divestiture within the prescribed time period, then the United States may nominate, and the Court will appoint, a trustee who will have sole authority to divest Pechiney's brazing sheet assets.

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the Tunney Act. Entry of the proposed 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 Violations of the Antitrust Laws

A. The Defendants and the Proposed Transaction

Alcan is a Canadian corporation based in Montreal, Quebec. One of the world's largest fully integrated aluminum producers, Alcan producers primary aluminum ingot and a wide range of rolled aluminum products, including brazing sheet. Its annual revenues exceed $12.5 billion, including over $30 million in North American sales of brazing sheet. This business operation is managed by a domestic subsidiary of Alcan, Alcan Aluminum Corporation.

Pechiney is a French corporation based in Paris, France. Pechiney is also a major fully integrated aluminum producer, with annual revenues exceeding $11.3 billion. Its U.S. subsidiary, Pechiney Rolled Products, LLC, produces a wide variety of rolled aluminum products (including brazing sheet) in an aluminum rolling mill in Ravenswood, West Virginia. Pechiney's total North American sales of brazing sheet exceed $100 million annually.

Alcan has launched a teder offer for shares of Pechiney, a transaction now valued at over $4.6 billion. The tender offer, publicly announced in early July and approved in August by Pechiney's board of directors, is expected to be completed in early December 2003. If the tender offer is successful, Alcan's acquisition of Pechiney would combine, respectively, the fourth and second largest competitiors in the sale of brazing sheet in North America, and substantially lessen competition in this already highly concentrated market.

The acquisition would combine Alcan, a low-cost new entrant and pricing maverick, with Pechiney, a large industry incumbent. The deal would eliminate Alcan's incentive to expand its sales quickly by reducing its brazing sheet prices and increase its sales at the expense of larger rivals such as Pechiney, and end the current intense competitive rivalry in developing, producing, and selling brazing sheet in North America. This competition, which promises to intensify in the next few years as Alcan finishes qualifying its brazing sheet for more applications with other North American customers, has already produced significant improvements in brazing sheet quality, durability, and reliability, and highly competitive prices and contractual terms for this material. The transaction would reduce the number of significant competitors in the sale of brazing sheet in North America from four to three, and substantially increase the prospect of future tacit or explicit post-merger coordination between these firms to increase prices of brazing sheet to the detriment of consumers. Other North American competitors in the sale of brazing sheet have neither the production capacity nor competitive incentive, individually or collectively, to discipline a small but significant post-merger unilateral or cooperative price increase in brazing sheet.

B. The Effects of the Transaction on Competition in the Sale of Brazing Sheet

1. Relevant market: the sale of brazing sheet in North America. The Complaint alleges that development, production, and sale of brazing sheet is a relevant product market within the meaning of Section 7 of the Clayton Act. Brazing sheet describes a class of custom-engineered aluminum alloys made of a solid metal core clad on one or both sides with an alloy whose melting temperature is lower than that of the core material. When heated to the appropriate termperature, the cladding alloy melts and forms a durable, uniform leak-proof bond between the core and any adjoining aluminum surface, effectively welding the two materials together. Brazing sheet is ideally suited, and virtually all of it is used, for fabircating the major components of heat exchange systems for motor vehicles. These heat exchangers include engine cooling systems, such as radiators and oil coolers, and climate control systems, such as heater cores and air conditioning units (*i.e.*, evaporator and condenser cores).

By constructing the basic components of motor vehicle heat exchangers with brazing sheet, a parts maker can avoid the tedious and costly task of welding or soldering individual components, many of which have usually intricate surfaces that form joints deep within the heat exchange unit. A parts maker can instead loosely assemble brazed components and bake the entire assembly in a brazing oven. The surfaces of the components will met, converting the assembly into a solid, leak-proof heat exchange unit.

The major components of all heat exchangers used in motor vehicles are made of brazing sheet, a mterial that enables vehicle makers simultaneously to reduce vehicle cost, size, and weight; improve gas mileage; and extend engine, cllimate control system, and drive train life. In heat exchange applications, no other material can match the combination of low cost, strength, light weight, durability, formability, and corrosion resistance provided by brazing sheet.

A small but significant and nontransitory increase in prices for brazing sheet would be profitable and sustainable because it would not cause parts makers to begin using significant amounts of other materials to make heat exchangers for motor vehicles. The development, production, and sale of brazing sheet is a line of commerce and a relevant product market within the meaning of section 7 of the Clayton Act.[2]

The Complaint alleges that the sale of brazing sheet in North America is a relevant geographic market within the meaning of Section 7 of the Clayton Act. Over ninety percent of brazing sheet sold in North America is produced by firms located in either the United States or Canada. Some customers import brazing sheet into North America from overseas sources. Foreign brazing sheet, however, is significantly more expensive and more prone to unpredictable and costly delivery delays than brazing sheet produced in North America. North American customers are reluctant to rely on it for general production requirements. A small but significant aand nontransitory increase in prices of brazinag sheet sold in North America would be profitable and sustainable because it would not be undermined by increased customer imports of brazing sheet from overseas sources. North America is a relevant geographic market in which to assess the competitive effects of Alcan's proposed acquisition of Pechiney on sales of brazing sheet.

2. Anticompetitive effects of the acquisition. The Complaint alleges that in this highly concentrated market for brazing sheet, a combination of Alcan and Pehiney likely would: (i) Substantially lessen competition in the development, production, and sale of brazing sheet in North America; (ii) eliminate actual and potential competition between Alcan's and Pechiney's brazing sheet businesses; and (iii) increase prices and reduce current levels of quality and innovation for brazing sheet in North America.

Specifically, the Complaint alleges that Pechiney and Alcan are, respectively, the second and fourth largest producers of brazing sheet in North America. The

[1] Pechiney's brazing sheet business, as defined in Section II(E) of the proposed Final Judgment, includes all tangible and intangible assets of Pechiney's Ravenswood, West Virginia aluminum rolling mill and the engineering facilities, wherever located, that provide research and development support for any product produced at the Ravenswood plant.

[2] Brazing sheet is designed for and sold to motor vehilcle parts makers (and others) on an application-specific basis. Thus, it may be possible to delineate relevant markets smaller than the "all brazing sheet" market alleged in the Complaint. A producer of brazing sheet for use in one type of heat exchange component, however, generally has the ability to make and market brazing sheet suitable for use in producing other types of components for heat exchange units. According to the Merger Guidelines, if such production substitutability is "nearly universal" among the firms that make and sell brazing sheet, then it is appropriate, as a matter of convenience, to describe the relevant product market as "all brazing sheet." *See* Horizontal Merger Guidelines, n. 14 (1997 rev.).

combined firm and one other producer command over 80 percent of brazing sheet sales in North America. Two smaller firms also sell brazing sheet in North America. However, these small firms do not have sufficient excess production capacity or capability to attract significant sales away from the larger market incumbents, and thereby effectively constrain a post-merger exercise of market power by those firms.

Alcan's acquisition of Pechiney is likely to diminish competition substantially. First, the remaining competitors would be more likely to successfully engage in tacit or explicit coordinated pricing to the detriment of consumers, because they would not need to worry about the loss of sales to Alcan, currently a small, "hungry," low-cost new entrant. Second, Alcan could unilaterally increase its prices for brazing sheet for which it and Pechiney are the only qualified suppliers.

New entry into the development, production, and sale of brazing sheet in North America is difficult. To produce brazing sheet, a firm must have an aluminum hot rolling mill (which costs at least $80 million and takes three years to construct). Even after acquiring an aluminum hot rolling mill, a new firm can begin selling brazing sheet to customers only after it has made an additional substantial investment in developing and mastering allow-making technology, successfully "qualified" its products with prospective customers by completing a series of time-consuming tests of brazing sheet materials and sample heat exchange components, and finally, acquired some actual experience producing brazing sheet that meets the exacting specifications of risk-averse parts makers.[3] These so-called "sunk" entry costs[4] are very large relative to the size of the North American market for brazing sheet, and there is a very high risk that a new entrant may not receive any profits from its entry. In these circumstances, it is unlikely that, after a combination of Alcan and Pechiney, new entry into the brazing sheet market in North America would occur so rapidly and be of such magnitude that it would effectively constrain a cooperative or unilateral post-merger exercise of market power by incumbent producers of brazing sheet.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment will preserve competition in the sale of brazing sheet in North America. The Judgment requires that defendants sell Pechiney's brazing sheet business to an acquirer acceptable to the United States within 120 calendar days after Alcan has received a preliminary indication from Conseil des Marches Financiers, a French stock market regulatory agency, that Alcan's tender offer for shares of Pechiney has been successful, or within five (5) days after notice of entry of the Final Judgment, whichever is later. The United States may extend this time period for divestiture one or more times, for a total time not to exceed 60 days. Defendants must use their best efforts to divest Pechiney's brazing sheet business as expeditiously as possible, and until the ordered divestiture takes place, defendants must cooperate with any prospective purchasers.

If Alcan and Pechiney do not accomplish the ordered divestiture within the prescribed time period, the United States will nominate, and the Court will appoint, a trustee to assume sole power and authority to complete the divestiture. Defendants must cooperate fully with the trustee's efforts to divest Pechiney's brazing sheet business to an acquirer acceptable to the United States and periodically report to the United States on their divestiture efforts.

If the trustee is appointed, the 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 completed. 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 the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment.

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 attorney's 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 parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Tunney Act, provided that the United States has not withdrawn its consent. The Tunney Act conditions entry of the decree upon the Court's determination that the proposed Final Judgment is in the public interest.

The Tunney Act provides a period of at least 60 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 60 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 Final 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: Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H Street, NW., Suite 3000, Washington, DC 20530.

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 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 Alan and Pechiney. The United States could have continued the litigation to seek preliminary and permanent injunctions against Alcan's acquisition of Pechiney. The United States is satisfied, however, that the divestiture of the assets as proposed in the Final Judgment will establish, preserve, and ensure competition in the relevant market. To this end, the United States is convinced that the proposed relief, once implemented by the Court, will prevent Alcan's acquisition of Pechiney from having adverse competition effects.

VII. Standard of Review Under the Tunney Act for the Proposed Final Judgment

The Tunney Act 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). As the United States Court of Appeals for the District of Columbia Circuit held, the Tunney Act permits a court to consider, among other things, the relationship between the remedy secured and

[3] It took Alcan over two years from when it moved its brazing sheet operations to Oswego, New York, to qualify with enough customers to make a significant sales impact.

[4] The term "sunk costs" as used in this context includes the costs of acquiring tangible and intangible assets that cannot be recovered through the redeployment of these assets outside the relevant market, *i.e.*, costs that were uniquely incurred to enter the production and sale of brazing sheet in North America and cannot be recovered upon exit from that industry.

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, 1458–62 (D.C. Cir. 1995).

In conducting this inquiry, "[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).[5] Rather:

[a]bsent 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–I Trade Cas. (CCH) ¶61,508, at 71,980 (W.D. Mo. May 17, 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) (citing *United States* v. *Bachtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62. Case law requires that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[6]

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.' " *United States* v. *Am. Telephone & Telegraph Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *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).

Moreover, the Court's role under the Tunney Act 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 might have but did not pursue. *Id.* at 1459–60.

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the Tunney Act that were considered by the United States in formulating the proposed Final Judgment.

Dated: November 13, 2003.

Respectfully submitted,

Anthony E. Harris,
Illinois Bar No. 1133713, U.S. Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW., Suite 3000, Washington, DC 20530, Telephone: (202) 307–6583.

Certificate of Service

I, Anthony E. Harris, hereby certify that on November 14, 2003, I caused the foregoing Competitive Impact Statement to be served on defendants by sending a facsimile and by mailing a copy first-class, postage prepaid, to duly authorized legal representatives of those parties, as follows:

Counsel for Defendants Alcan Inc. and Alcan Aluminum Corp.

D. Stuart Meiklejohn, Esquire, Michael B. Miller, Esquire, Sullivan & Cromwell, 125 Broad Street, New York, NY 10004–2498

Counsel for Defendants Pechiney, S.A., and Pechiney Rolled Products, LLC

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DEPARTMENT OF JUSTICE

Antitrust Division

United States and the State of Florida v. *Waste Management, Inc.*, and *Allied Waste Industries, Inc.*; Complaint, Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a Complaint, proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement were filed with the U.S. District Court for the District of Columbia in *United States and State of Florida* v. *Waste Management, Inc., and Allied Waste Industries, Inc., Civ. Action No. 1:03CV02076.* On October 14, 2003, the United States and the State of Florida filed a Complaint, which sought to enjoin Waste Management, Inc. ("Waste Management") from acquiring certain small container commercial hauling assets in Broward County, Florida from Allied Waste Industries, Inc. ("Allied"). The Complaint alleged that Waste Management's acquisition of these small container commercial hauling assets from Allied would substantially lessen competition resulting in higher prices for small container commercial hauling services in Broward County, Florida in violation of the Clayton Act, as amended, 15 U.S.C. 18. The proposed Final Judgment, also filed on October 14, 2003, requires defendants to divest contracts and accounts on selected Allied small container commercial hauling routes, to preserve competition in the provision of small container commercial hauling services. A Competitive Impact Statement filed by the United States describes the Complaint, the proposed Final Judgment, and the remedies available to

[5] *See United States* v. *Gillette Co.*, 406 F. Supp. 713, 715–16 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the Tunney Act. Although the Tunney Act 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. Rep. No. 93–1463, 93rd Cong., 2d Sess. 8–9 (1974), reprinted in 1974 U.S.C.C.N. 6535, 6538.

[6] Cf. BNS, 858 F.2d at 463 (holding that the court's "ultimate authority under the [Tunney Act] 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'").