UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**Civil Action No. CV-00-0305-RWR**
MILLER INDUSTRIES, INC., MILLER INDUSTRIES TOWING EQUIPMENT, INC., and CHEVRON, INC.	)	**Filed: February 23, 2000**
Defendants.	)	

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA”), 15 U.S.C. § 16(b) - (h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On February 17, 2000, the United States filed a civil antitrust Complaint in this Court charging that Defendant Miller Industries, Inc., violated Section 7 of the Clayton Act, 15 U.S.C. § 18, when it acquired ownership of two horizontal competitors, Vulcan Equipment, Inc. ("Vulcan") and Chevron, Inc. ("Chevron"). Miller Industries acquired Vulcan in September 1996 and acquired Chevron in December 1997.

The Complaint charges that these acquisitions substantially lessened competition in the markets for the design, manufacture, and sale of the two major categories of towing and recovery vehicles generally used to service passenger cars and light trucks in the United States: light-duty towtrucks and light-duty car carriers. Prior to their acquisition, Vulcan and Chevron were proven innovators that had patented and successfully marketed key functional improvements in light-duty towtrucks and light-duty car carriers, and were two of the three most significant competitors faced by Miller Industries[1] in these markets. The acquisitions eliminated head-to-head competition that benefitted consumers, establishing Miller Industries as the dominant firm in the light-duty towtruck and light-duty car carrier markets with the ability unilaterally to raise prices or reduce quality. The acquisitions also increased Miller Industries' ownership of valuable patent rights, and reduced the number of firms with the right to offer towing and recovery vehicles incorporating the important technology covered by those patents. Finally, by reducing the number of competitors, these acquisitions increased the likelihood of anticompetitive coordinated behavior to raise prices or reduce quality.

The request for relief in the Complaint seeks: (1) a judgment that the acquisitions violate Section 7 of the Clayton Act; (2) injunctive or other appropriate relief to restore competition; (3) an award of costs to the Government; and (4) such other relief as the Court may deem just and proper.

Shortly before the Complaint was filed, the parties reached a proposed settlement that would substantially restore competition in the United States light-duty towtruck and light-duty car

[1] When used herein, the term "Miller Industries" refers to any one or more of the defendants.

carrier markets, primarily by requiring Miller Industries to grant a non-exclusive license to use certain items of important patented technology to any third party that requests such a license.

Along with the Complaint, the parties filed a Stipulation and proposed Final Judgment setting out the terms of the settlement. Pursuant to the obligations imposed in these documents, beginning within ten days of the time that they are filed with the Court, Miller Industries must offer to any third party a non-exclusive license under as many as five different patents. The proposed Final Judgment specifies the maximum unit royalties payable under these compulsory licenses, and also contains model licenses setting forth other terms. Miller Industries is required to continue to offer these licenses during the ten-year life of the proposed Final Judgment. The licenses are not cancelable by Miller Industries during the life of any licensed patent, unless the licensee commits a material breach as defined in the license (*e.g.*, non-payment of royalties), or the proposed Final Judgment is not entered by the Court. The proposed Final Judgment also requires Miller Industries to notify the Government prior to making future acquisitions of competitive assets valued above a certain dollar amount.

The plaintiff and defendants have stipulated that the Court may enter the proposed Final Judgment after compliance with the APPA, unless the plaintiff has theretofore withdrawn its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce provisions of the proposed Final Judgment and punish violations thereof.

II.

DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Illegal Transactions

Defendant Miller Industries, Inc. is a Tennessee corporation. Its wholly owned subsidiary, Miller Industries Towing Equipment, Inc., is a Delaware corporation. Both maintain their principal place of business in Ooltewah, Tennessee. Defendant Chevron, a wholly owned subsidiary of Defendant Miller Industries, Inc., is a Pennsylvania corporation with its principal place of business in Mercer, Pennsylvania.

Miller Industries designs, manufactures, and markets many well known brands of light-duty towtrucks and light-duty car carriers, including those carrying the Century, Vulcan, Chevron, Holmes, Challenger, and Champion brands.

On September 2, 1996, Defendant Miller Industries, Inc., acquired, in exchange for shares of its capital stock having an approximate value of $8.2 million, all of the outstanding capital stock of Vulcan, one of its major competitors in the design, manufacture, and sale of light-duty towtrucks and light-duty car carriers, thereby obtaining control of Vulcan's assets, including several patents of great competitive value in the light-duty towtruck and light-duty car carrier markets. The transaction was not subject to the notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U. S. C. § 18a**,** ("HSR Act") because the dollar value of the transaction was below $ 15 million.

Miller Industries continues to market products under the Vulcan label, but Vulcan's production facilities have been dismantled and its operations integrated with those of Miller Industries. Title to the patents formerly owned by Vulcan has passed to Defendant Miller Industries Towing Equipment, Inc.

On December 5, 1997, Defendant Miller Industries, Inc. acquired, for $10 million cash, all of the capital stock of Chevron, another of its major competitors in the design, manufacture, and sale of light-duty towtrucks and light-duty car carriers, thereby obtaining control of Chevron's assets, including valuable patents in the light-duty towtruck and light-duty car carrier markets. This transaction also was not subject to the notification requirements of the HSR Act. Although many of Chevron's functions have now been integrated with Miller Industries, Defendant Chevron, Inc. survives as a wholly owned Miller Industries subsidiary and continues as the owner of record of the patents it held before its acquisition.

B. Product and Geographic Markets

Light-duty towtrucks and light-duty car carriers are the principal types of vehicles used by towing companies, garages, and other towing service providers in the United States to recover and transport immobilized or unattended illegally parked passenger cars and light trucks. Manufacturers design, construct, and assemble specialized equipment components, such as booms, winches, and bed-tilting mechanisms, for mounting on standard truck chassis supplied by automotive suppliers such as GM, Ford, Dodge, or Navistar. The installed price of the equipment used to construct a light-duty towtruck is generally between twelve to fifteen thousand dollars, and between eleven and fourteen thousand dollars for a light-duty car carrier.

Towing and recovery vehicle fleets generally include both light-duty towtrucks and light-duty car carriers because each possesses characteristics that make it more efficient than the other in certain situations. Light-duty towtrucks, which lift a disabled vehicle by its front or back tires to tow it, maneuver better in confined spaces such as parking garages and narrow city streets and are generally more effective in difficult recovery situations. Light-duty car carriers have flat beds that can be tilted to permit a disabled vehicle to be winched up onto the truck bed and carried. Light-duty car carriers are preferred for removing vehicles that are particularly susceptible to damage, and are generally more efficient in transporting a disabled vehicle over substantial distances. Also, a light-duty car carrier may be equipped with an "underlift" that permits it to tow a second vehicle in addition to the one on its bed, enabling it to remove two disabled vehicles simultaneously.

Removal and recovery of larger disabled vehicles, such as buses, heavy trucks, or construction equipment, requires the service of larger and more powerful vehicles, which also generally have different equipment. These heavier removal and recovery vehicles also cost more to purchase and operate.

Because of the distinct characteristics of light-duty towtrucks and light-duty car carriers, respectively, prospective buyers would not respond to a small but significant increase in the price of either one by substituting the other, or by substituting any other type of towing and recovery vehicle. Light-duty towtrucks and light-duty car carriers each comprises a separate relevant product market and, as there is no significant importation, the United States comprises the relevant geographic market in which the competitive effects of these acquisitions must be assessed.

C. Patent Barriers

Miller Industries owned valuable patented technology prior to its acquisitions of Vulcan and Chevron, and acquired additional important patents when it acquired these two companies. These patent rights relate to (1) improved wheel lift design technology, and (2) the "independent raise and lower" ("IRL") technology.

1. The Wheel-Lift Patents

A wheel lift is a device mounted on the rear end of a light-duty towtruck or light-duty car carrier that cradles and supports from beneath the front or back tires of a disabled vehicle in order to apply the lifting power required to raise it into towing position, and to tow it. Nearly a decade ago, Miller Industries acquired the patent rights to a greatly improved wheel lift design called the L-Arm Wheel Lift (U.S. Patent No. 4,836,737) when it acquired Century Wrecking Company. Century had previously granted a paid-up royalty license under this patent to competitor Jerr-Dan Corporation.

Before being acquired by Miller Industries, Vulcan had invented significant improvements to the basic patented L-Arm Wheel Lift, and obtained the "Vulcan Improvement Patents" (U.S. Patent Nos. 4,637, 623 and 4,798,509). The key features of these improvements allow the L-Arm device to pivot both horizontally and vertically, providing for easier deployment of the wheel lift. Miller Industries and Vulcan entered into a cross license agreement under which Vulcan obtained a license under Miller Industries' L-Arm patent and Miller Industry obtained a license to use the most significant features of the Vulcan Improvement patents.

There is no established, commercially available alternative to the L-Arm or the Vulcan Improvement Patents. Prior to Miller Industries' acquisition of Vulcan, three competitors (Miller Industries, Jerr-Dan, and Vulcan) had the right to compete with products incorporating the L-Arm wheel lift, and two (Miller Industries and Vulcan) had the right also to compete with products incorporating the most significant features of the Vulcan Improvement Patents. Vulcan reserved for itself the exclusive rights to other features of the improvements, such as the use of a vertical locking pin device and the elongated curved plate.

Chevron, lacking rights to the above-described patents, in an effort to design around them, developed and obtained Patent No. 5,628,609 on the "Backsaver" wheel lift. Miller Industries nevertheless sued Chevron and charged that this Backsaver design infringed its L-Arm patent, but Miller Industries acquired Chevron before this issue was adjudicated.

2. The IRL Patent

A light-duty car carrier can be equipped with an "underlift," that is a wheel lift (which can be, but need not be, an L-Arm wheel lift) mounted on its back end that can be used to tow another disabled vehicle once one disabled vehicle has been loaded atop its bed. Prior to its acquisition by Miller Industries, Chevron had developed and patented a greatly improved design for mounting a wheel lift as an underlift on a light-duty car carrier so that it could be raised into towing position, and lowered from it, independently of the tilting truck bed. The right to use this IRL feature (covered by U.S. Patent No. 5,061,147), which significantly facilitates removal and transportation of two vehicles simultaneously by a light-duty car carrier, is a substantial benefit to competitors in the United States light-duty car carrier market. Designing around the patent is difficult, time consuming, and expensive.

D. Harm to Competition as a Consequence of the Merger

Even before it acquired Vulcan and Chevron, Miller Industries was the nation's largest supplier of light-duty towtrucks and the second largest supplier of light-duty car carriers, with 45% and 23% shares of total revenues in those markets, respectively. With these acquisitions, Miller increased its market shares dramatically, so that after the acquisitions it accounted for approximately 73% of total revenues for U.S. sales of light-duty towtrucks and about 47% of total revenues for U.S. sales of light-duty car carriers, and significantly increased concentration in both markets. As measured by the commonly used *Herfindahl-Hirschman Index (HHI)*,[2] concentration of the light-duty towtruck market, which stood at an *HHI* of about 2650 before these acquisitions, rose by about 3000 points to an *HHI* of about 5650 after the acquisitions. Concentration of the light-duty car carrier market, which stood at an *HHI* of about 2380 before these acquisitions, rose by about 1200 points to an *HHI* of about 3580 after the acquisitions. Miller Industries' acquisitions of Vulcan and Chevron also eliminated two significant and effective competitors, both of which had successfully developed and marketed valuable innovations in product design that had provided Miller Industries' products with important competition, and both of which would likely have continued to innovate had they remained independent. The acquisitions also reduced the number of firms able to offer products incorporating the L-Arm wheel lift and the most competitively significant features of the Vulcan Improvement Patents, and substantially increased Miller Industries' ownership of patent rights important for effective competition in the light-duty towtruck and light-duty car carrier markets. Miller Industries now faces competition in these markets from only one large competitor and a number of small firms.

As a result of the acquisitions, Miller Industries became the dominant firm in the light-duty towtruck and light-duty car carrier markets with the ability unilaterally to raise prices or reduce quality. In addition, by reducing the number of competitors, these acquisitions increased the likelihood of anticompetitive coordinated behavior to raise prices or reduce quality.

Successful entry is difficult and unlikely, in large part because the L-Arm as well as other

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[2] A definition and explanation of *HHI* is provided in Appendix A to the Complaint.

patented wheel lift designs owned by Miller Industries are critical for effective competition in both of these markets. It would take a new entrant considerable time, expenditure, and effort to develop product designs that did not infringe Miller Industries' patents -- if it could be done at all -- as well as establish the necessary distribution network and gain customer acceptance of its products.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is designed to eliminate the anticompetitive effects of Miller Industries' acquisitions of Vulcan and Chevron, primarily by requiring compulsory licensing of the above-described patents to any present competitor or entrant at reasonable royalties.

A. Patent Licenses

The proposed Final Judgment directs Miller Industries to offer, until the expiration of the ten-year term of the decree, to any third party requesting it a non-exclusive license for any one or more of: (1) the L-Arm patent, (2) certain specified claims of the Vulcan Improvement Patents, that allow the L-Arm to pivot horizontally and vertically, (3) the Backsaver patent, and (4) the IRL patent.

All licenses will be uncancelable by Miller Industries until the last of the licensed patents has expired, unless the licensee materially breaches (as defined in the license, *e.g.*, for non-payment of royalties) its terms.

The proposed Final Judgment requires Miller Industries to retain the services of an Independent Auditor to collect royalty payments and provide Miller Industries with the payments along with reports that do not disclose competitively sensitive sales information about a licensee.

Licenses will be for the full subject matter scope of the L-Arm, Backsaver, and IRL patents, and for specified claims of the Vulcan Improvement Patents (the "Licensed Claims"). These Licensed Claims cover the horizontal and vertical pivoting features and are the claims that Vulcan had licensed to Miller Industries before Vulcan was acquired. The claims of the Vulcan Improvement Patents that are not licensed (the "Unlicensed Claims") are also specified and described in the Final Judgment. These cover the same features that, prior to its acquisition by Miller Industries, Vulcan had reserved for its own exclusive use.

To clarify the features covered by the Licensed Claims, and to facilitate the production by licensees of wheel lifts embodying these features, the proposed Final Judgment makes clear that the wheel lift design now used in Miller Industries' Century model towtruck is covered by the Licensed Claims and is not precluded from licensees' use by the Unlicensed Claims. The engineering drawings for the Century model wheel lift design are appended to the proposed Final Judgment as Exhibits D and E.

The Proposed Final Judgment also includes another option to facilitate licensing of the Licensed Claims and promote product innovation. Licensees that wish to incorporate the features of the Licensed Claims into their own wheel lift designs -- rather than use the Century model design -- may seek assurance that their designs fall within the Licensed Claims and do not infringe the Unlicensed Claims. Miller Industries shall retain a Designated Expert, to be selected at the sole discretion of the Government, who will, at the request of an existing or prospective licensee, determine whether a licensee's proposed design falls within Licensed Claims. Miller Industries will be bound by a determination by the Designated Expert that a design falls within the Licensed Claims and will not subsequently challenge that design as an infringement of any Unlicensed Claim of the Vulcan

Improvement Patents. The proposed Final Judgment provides that Miller Industries will pay, up to a specified maximum amount, the cost for the Designated Expert to review the licensed patents and gain sufficient familiarity to be able to assess specific design proposals offered by licensees. Any licensee that opts for such a determination will bear the additional cost of the Designated Expert's determination regarding its particular design. The proposed Final Judgment imposes requirements designed to assure that information about the proposed design remains confidential with the Designated Expert until products embodying the design are actually sold.

Each licensee and prospective licensee under the Vulcan Improvement patents may use the services of the Designated Expert, but no one is required to use them. Miller Industries is required to grant each request for a license, and a licensee of the Licensed Claims may choose simply to design and market its product. Of course, a licensee choosing this option would not be protected against the risk of a possible claim of infringement and the costs inherent therein.

The proposed Final Judgment is intended to restore competition and promote further innovation in the markets for light-duty towtrucks and light-duty car carriers. This will benefit customers by providing them with lower prices, better quality, and a greater variety of products. The L-Arm, the Licensed Claims of the Vulcan Improvements, the IRL patent, and the Backsaver Patent are important for effective competition in the markets for light-duty towtrucks and car carriers. Licensing these designs will also lower entry barriers and allow many firms to offer products with these important features.

The proposed Final Judgment requires broad licensing to promote the wide dispersion and use of this intellectual property. This licensing, offered to all firms now in the industry and to firms that may enter in the future, will likely enable smaller firms to become more effective competitors, will likely lessen Miller Industries' market dominance, and will substantially ease entry barriers in the future. Broad licensing and use of the intellectual property, now concentrated in Miller Industries' hands, will promote further innovation and improvements in light-duty towtruck and light-duty car carrier technology. Given the configuration of the markets here, and the fact that these acquisitions were completed some years ago, the broad licensing scheme required by the proposed Final Judgment is the most effective form of relief in this case and offers the prospect of substantially increasing competition in the affected markets.

Since the decree requires Miller to license all comers during the term of the decree for the life of the patents, it was necessary to prevent Miller from exercising market power over the price or terms of such licenses or from delaying, through lengthy negotiations, implementation of the compulsory licensing requirement. Therefore, the decree requires that licenses be at reasonable royalty rates not to exceed certain maximum amounts and contains model licenses that set forth the basic terms. However, the decree allows Miller Industries and a licensee to reach a mutual agreement to lower royalty rates or to vary other license terms.

B. Notification of Future Acquisitions

The proposed Final Judgment also requires Miller Industries to notify the Department of Justice prior to acquiring any assets of or interest in a manufacturer of towing and recovery equipment, or any patent relating to the manufacture of towing and recovery equipment, when the value of the acquisition is over $5 million. This provision supplements the statutory notification provisions of the HSR Act, under which parties generally need not file a notification if the dollar value of their transaction is below

$15 million. This decree provision was included because the acquisitions of Vulcan and Chevron lessened competition even though the dollar value of these transactions fell below the HSR Act's notification threshold. It will give the Department of Justice the opportunity to assess, before the acquisitions are consummated, the likely competitive effects of any future Miller Industries' asset acquisitions greater than $5 million in value in the towing and recovery vehicle markets.

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 antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16 (a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest. The APPA provides for a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so in writing within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All written 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 its entry. The written 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:

Mary Jean Moltenbrey
Chief, Civil Task Force
Antitrust Division
United States Department of Justice
325 Seventh Street, N.W., Suite 300
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over the action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits. The United States is satisfied, however, that the broad licensing required by the decree is the most effective form of relief in this case, where the challenged acquisitions were completed some years ago and given the configuration of these markets. The proposed relief will provide and promote competition in the design, manufacture and sale of towtrucks, and will significantly ease barriers to entry.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other consideration 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 issuers at trial.

15 U.S.C. § 16 (e).

As the Court of Appeals for the District of Columbia Circuit held, the APPA permits the Court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.[3] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comment in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508 at 71,980 9W.d. Mo. 1977). Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public. " *United States v BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), *quoting United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981). Precedent 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 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.[4]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it

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[3] 119 Cong. Rec. 24598 (1973); *see also United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest"determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments files pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S. C. § 16 (f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and the further proceeding would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, *reprinted in* (1974) U.S.C.C.A.N. 6535, 6538.

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

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."[5]

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 the Act does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that cases." *Microsoft,* 56 F.3d at 1459. Since "[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bring 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.*

VIII.

DETERMINATIVE DOCUMENTS

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

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

FOR PLAINTIFF UNITED STATES OF AMERICA:

Respectfully submitted,

/s/

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Dated: February 23, 2000, Washington, D.C.

CERTIFICATE OF SERVICE

This certifies that on this day I caused a true copy of the foregoing Competitive Impact Statement to be served by first class mail, postage prepaid, upon counsel for defendants, as indicated below:

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Washington, DC 20037-1420
Counsel for Defendants Miller Industries, Inc., Miller Industries Towing Equipment, Inc., and Chevron, Inc.

____
Kurt Shaffert

Dated: February 23, 2000