**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA, | CASE No.: 1:07-cv-00710 |
| *Plaintiff,* | JUDGE: John D. Bates |
| v. | DECK TYPE: Antitrust |
| AMSTED INDUSTRIES, INC., | DATE STAMP: |
| *Defendant.* | FILED: |

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION TO MODIFY FINAL JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 60(b)(5) and Section XIII of the Final Judgment entered in this matter on July 16, 2007 ("Final Judgment"),[1] Plaintiff United States of America ("United States") has moved the Court to modify the Final Judgment by entering the proposed Modified Final Judgment submitted with its motion, filed simultaneously herewith. Defendant, Amsted Industries, Inc. ("Amsted") does not oppose this motion. As stated below, the proposed modification is minor and serves the public interest by effectuating the remedy intended in the Final Judgment. Accordingly, Plaintiff requests that the Court grant the Motion to modify the Final Judgment and enter the proposed Modified Final Judgment.

## I. BACKGROUND

On April 18, 2007, the United States filed a Complaint alleging that the acquisition by Amsted of all the assets comprising FM Industries, Inc. ("FMI"), a wholly owned subsidiary of

[1] Section XIII of the Final Judgment provides that "[t]his Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time . . . to modify any of its provisions."

Progress Rail Holding Corp. ("Progress Rail"), violated Section 7 of the Clayton Act, 15 U.S.C. § 18 and Section 2 of the Sherman Act, 15 U.S.C. § 2. The Complaint alleged that the acquisition harmed competition in the end-of-car cushioning units ("EOCC") market in the United States. Along with the Complaint, the United States filed a proposed Final Judgment, Competitive Impact Statement and Hold Separate Stipulation and Order.

The Final Judgment was designed to recreate competition in the production, manufacture and sale of EOCCs in the United States by giving a new entrant the market-specific intellectual property needed for successful competition. The Final Judgment identified Wabtec Corporation ("Wabtec") as the approved acquirer of these assets. The Court entered the Final Judgment on July 16, 2007. On July 23, 2007, Amsted entered into an agreement with Wabtec to divest the required assets. On July 31, 2007, Amsted and Wabtec signed an asset purchase agreement.

In order to compete, however, Wabtec must receive certification from the Association of American Railroads ("AAR"). Both new and reconditioned EOCC units must be approved and certified by the AAR. Accordingly, on August 7, 2007, after receiving FMI's tangible and intangible assets, Wabtec requested that the AAR transfer to Wabtec the technical and quality assurance certifications that FMI had received for its EOCCs. See Declaration of Brian Cunkelman, dated July 10, 2008, attached as Exhibit 1. On August 23, 2007, the AAR denied Wabtec's request, expressing concerns about Wabtec's personnel, experience and equipment. Wabtec worked to address these concerns and invested in its EOCC line by hiring the requisite personnel, purchasing assets, installing a production line and producing reconditioned product samples. Id. On December 10, 2007, Wabtec informed the AAR about its progress and requested guidance from the AAR as to the remaining requirements it

would need to meet to receive AAR certification. The AAR responded two months later on February 7, 2008 and provided a list of the inspections and audits needed to obtain AAR approval.

In February 2008, Wabtec started making appointments for the required technical certifications. On March 25, 2008, Wabtec passed the mechanical inspection and on April 9, 2008, it passed the M-1003 inspection. In order to receive certification, Wabtec still must pass an impact test on its EOCCs at Wabtec's Cardwell test facility. Wabtec needed to replace some of its testing equipment before scheduling that test. Wabtec anticipates being ready for the test by July 31, 2008. Wabtec estimates that if its EOCC production passes the impact test, the AAR likely will issue conditional approval for certification of Wabtec's equipment approximately two weeks after the test. Id.

Pursuant to Paragraph IV.D of the Final Judgment, if Wabtec fails to deliver a manufactured or reconditioned EOCC by July 16, 2008, one year from the date of entry of the Final Judgment, Progress Rail will be unilaterally released from its covenant not to compete with Amsted in the market for EOCCs. When the Final Judgment was drafted, the Division sought to remedy a merger to monopoly by providing Wabtec with the assets needed to enter the United States EOCC market. There was some concern, however, that if Wabtec was unsuccessful in entering the EOCC market, the covenant not to compete between Amsted and Progress Rail would act as an unreasonable restraint on competition. Accordingly, the time limit in Paragraph IV.D was inserted to ensure that, in the event that Wabtec's entry did not occur, Progress Rail would be free to enter the market in its place. The United States sought the conditional release of the covenant not to compete after one year based upon the assumption that the AAR would

promptly transfer FMI's AAR certification to Wabtec's units and that a one-year period would be a sufficient time to judge whether Wabtec would successfully enter the market. The United States had reasonably expected Wabtec to be able to sell its first EOCC prior to July 16, 2008, but due to conditions beyond Wabtec's control, successful entry cannot occur until after July 16, 2008.

## II. THE PROPOSED MODIFICATION SERVES THE PUBLIC INTEREST AND SHOULD BE APPROVED

### A. Applicable Legal Standard

This Court has jurisdiction to modify the Final Judgment pursuant to Section XIII of the Judgment, the Federal Rules of Civil Procedure, Fed. R. Civ. P. 60(b)(5), and "principles inherent in the jurisdiction of the chancery." United States v. Swift & Co., 286 U.S. 106, 114 (1932); *see also* In re Grand Jury Proceedings, 827 F. 2d 868, 873 (2d Cir. 1987). Where, as here, the United States, as plaintiff, unilaterally proposes a modification to a consent judgment and the modification does not further restrict the defendant's rights or actions, the Court should apply the same standard as when the United States and the defendant both consent to a modification. When the government unilaterally seeks to modify a decree, the court evaluates the modifications in light of both how the additional burdens imposed by the proposed modifications affect the defendant's due process rights and the public interest. *Cf.* Duran v. Elrod, 760 F.2d 756, 759 (7th Cir. 1985). However, where both the government and the defendant consent to modifications, the court focuses solely on the public interest aspects of the calculus. *See, e.g.*, United States v. W. Elec. Co., 993 F. 2d 1572, 1576 (D.C. Cir. 1993); United States v. W. Elec. Co., 900 F. 2d 283, 305 (D.C. Cir. 1990); United States v. Loew's, Inc., 783 F. Supp. 211, 213 (S.D.N.Y. 1992); United States v. Columbia Artists Mgmt., Inc., 662 F. Supp.

865, 869-70 (S.D.N.Y. 1987) (citing United States v. Swift & Co., 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,702-03 (N.D. Ill. 1975)). Here, the defendant agrees to the modification and the proposed modification does not further impinge the defendant's rights. Accordingly, the court need only evaluate the proposed modifications in light of the public interest. Thus, the issue before the Court is whether modification is in the public interest. This is the same standard that a district court applies in reviewing an initial consent judgment in a government antitrust case. The judiciary's role in determining whether the initial entry of a consent decree is in the public interest, absent a showing of abuse of discretion or a failure to discharge its duty on the part of the government, is to "inquire . . . into the purpose, meaning, and efficacy of the decree." United States v. Microsoft, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

The purpose of the antitrust laws is to protect competition. *See, e.g.*, United States v. Penn-Olin Chem. Co., 378 U.S. 158, 170 (1964) (antitrust laws reflect "a national policy enunciated by the Congress to preserve and promote a free competitive economy"). The relevant question before the court therefore is whether modification of the Judgment would serve the public interest in "free and unfettered competition as the rule of trade." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); *see also* United States v. W. Elec. Co., 900 F.2d at 308; United States v. American Cyanamid, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 405 U.S. 1101 (1984); United States v. Columbia Artists Mgmt., 662 F. Supp. 865, 870 (S.D.N.Y. 1987). Here, the Court should modify the decree as requested because it will effectuate the remedy originally intended in the Final Judgment by providing Wabtec the extra time it needs to enter the United States EOCC market.

**B. The Proposed Modification**

The Final Judgment sought to preserve competition in the production, manufacture and sale of EOCCs in the United States through the establishment of an independent and economically viable competitor by requiring Amsted to provide to a new entrant the market-specific intellectual property needed for successful competition. In the event that Wabtec was unable or unwilling to sell its first EOCC within one year of the date of entry of the Final Judgment, Paragraph IV.D provides that Progress Rail will be unilaterally released from its covenant not to compete with Amsted in the EOCC market. The one-year time limit in Paragraph IV.D of the Final Judgment was an attempt to balance the need to provide Wabtec with the incentive to invest in the EOCC market and the need to ensure that if Wabtec chose not to make the capital investments required for entry, Progress Rail would be free to enter the market in its place.

Wabtec has spent considerable assets and time over the past year in an attempt to enter the EOCC market. It has set up the required production facilities and has the capability to manufacture the finished product. Wabtec needs only to pass an impact test before it can receive final AAR certification and sell its products to the railroad industry. Wabtec and an AAR representative believe that Wabtec likely will pass this last test within the next month. Because Wabtec's imminent entry into the EOCC market could be disadvantaged by the unilateral release of Progress Rail from its covenant not to compete, the United States seeks to modify Paragraph IV.D of the Final Judgment by changing the term "one year" in the second sentence to "eighteen months." The net effect of this modification is that Wabtec will receive an additional six months

to mount its entry into the EOCC market. In the event that Wabtec is unsuccessful, Progress Rail will be released from its restrictive covenant.

## III. ADDITIONAL PUBLIC NOTICE OF THE PROPOSED FINAL JUDGMENT MODIFICATIONS IS UNNECESSARY AND DOES NOT SERVE THE PUBLIC INTEREST

The Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16 (b)-(h), does not expressly apply to the modification of entered final judgments.[2] Nonetheless, the United States and the courts have concluded that notice to the public and an opportunity for comment are appropriate where significant decree modifications are proposed.[3] Here, however, the modification is minor and serves only to effectuate what was intended in the Final Judgment. Additionally, all of the parties affected by this modification have been notified. Amsted has agreed to the modification and Progress Rail was notified on July 14, 2008 of Plaintiff's Unopposed Motion to Modify the Final Judgment.

Moreover, this minor change does not harm any of the affected parties. Amsted and Progress Rail entered into the covenant not to compete in an arm's-length transaction. The Final Judgment sought to repeal that covenant only in the event that entry did not occur. Entry, however, appears to be imminent. By contrast, releasing the covenant on July 16, 2008 would in effect punish Wabtec despite its significant efforts to enter. Accordingly, the United States sees no benefit of public notice in this matter and a real public benefit in modifying the Final Judgment

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[2] The procedures mandated by the APPA govern federal district courts' consideration of "[a]ny proposal for a consent judgment submitted by the United States," 15 U.S.C. § 16(b), and are designed to facilitate a public interest determination "[b]efore entering any consent judgment proposed by the United States," 15 U.S.C. § 16(e).

[3] *See United States v. AT&T*, 552 F. Supp. 131, 144-45 (D.D.C. 1982), *aff'd. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

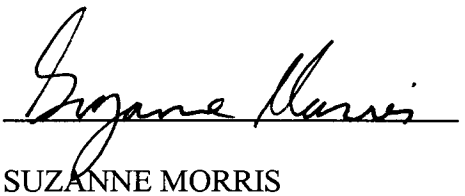
to prevent the release of the covenant not to compete. Thus, no notice or public comment period is either necessary or beneficial for a determination that the proposed modification is in the public interest.[4]

## IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant the Motion and enter the proposed Modified Final Judgment.

Dated: July 14, 2008

Respectfully submitted,



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[4] Few courts have addressed the issue of the applicability of the APPA to judgment modifications. Courts in this district have made non-material modifications of final judgments without requiring notice to the public and opportunity for comments. *United States v. Tidewater, Inc., et al.*, Civil Action No. 92-106 (D.D.C. October 7, 1992) (Hogan, J.); *United States v. Baker Hughes*, Civil Action No. 90-0825 (D.D.C. June 20, 1990) (Oberdorfer, J.).

Two courts have further held that the APPA is not applicable to judgment termination proceedings, suggesting that those courts would not view the APPA as applicable to minor judgment modifications. *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 n.7; *United States v. General Motors Corp.*, 1983-2 Trade Cas. ¶ 65,614 at 69,093 (N.D. Ill. 1983). *But see United States v. Motor Vehicle Mfrs. Ass'n*, 1981-2 Trade Cas. ¶ 64,370 (C.D. Cal. 1981).

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of July 2008, I caused a copy of the foregoing Memorandum in Support of Motion to Modify Final Judgment to be mailed, by U.S. mail, postage prepaid, to the attorney listed below:

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