that the subject of the meeting falls within the exception to the open meeting requirement set forth in Title 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such meeting be closed to public participation.

Dated: October 10, 2017.

David M. Ziegler,

Chair, Joint Board for the Enrollment of Actuaries.

[FR Doc. 2017–22479 Filed 10–16–17; 8:45 am]

BILLING CODE 4830–01–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Hearings of the Judicial Conference Advisory Committee on the Federal Rules of Appellate Procedure

AGENCY: Advisory Committee on the Federal Rules of Appellate Procedure, Judicial Conference of the United States.

ACTION: Notice of cancellation of public hearing.

SUMMARY: The following public hearing on proposed amendments to the Federal Rules of Appellate Procedure has been canceled: Appellate Rules Hearing on November 9, 2017, in Washington, DC.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Womeldorf, Rules Committee Secretary, Rules Committee Staff, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

SUPPLEMENTARY INFORMATION: Announcement for this hearing was previously published in 82 FR 37610.

Dated: October 12, 2017.

Rebecca A. Womeldorf,

Rules Committee Secretary.

[FR Doc. 2017–22480 Filed 10–16–17; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Advanced Media Workflow Association, Inc.

Notice is hereby given that, on September 18, 2017, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Advanced Media Workflow Association, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Bosch Security Systems, Inc., Fairport, NY; Juniper Networks, Sunnyvale, CA; Korean Broadcast System, Seoul, REPUBLIC OF KOREA; Telstra, Melbourne, AUSTRALIA; Xytech Systems, Chatsworth, CA; and Yamaha Corporation, Hamamatsu, JAPAN, have been added as parties to this venture.

Also, Digital Media Centre B.V., Amsterdam, NETHERLANDS; IBM, Somers, NY; MNC Software, Inc., San Diego, CA; Real-Time Innovations (RTI), Sunnyvale, CA; SVT, Stockholm, SWEDEN; TransMedia Dynamics Ltd., Aylesbury, UNITED KINGDOM; Laurence Cook (individual member), Portland, OR; Gabor Fogacs (individual member), Budapest, HUNGARY; Laurance Hughes (individual member), Sydney, AUSTRALIA; Douglas McGee (individual member), Columbus, OH; Christiano Nuernberg (individual member), Cambridge, MA; and Joseph Spillman (individual member), Temecula, CA, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Advanced Media Workflow Association, Inc. intends to file additional written notifications disclosing all changes in membership.

On March 28, 2000, Advanced Media Workflow Association, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 29, 2000 (65 FR 40127).

The last notification was filed with the Department on June 26, 2017. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 20, 2017 (82 FR 33516).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2017–22440 Filed 10–16–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—PXI Systems Alliance, Inc.

Notice is hereby given that, on September 26, 2017, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), PXI Systems Alliance, Inc. (''PXI Systems'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Advanced Testing Technologies, Inc., Hauppauge, NY; and CERN, Geneva, SWITZERLAND, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PXI Systems intends to file additional written notifications disclosing all changes in membership.

On November 22, 2000, PXI Systems filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 8, 2001 (66 FR 13971).

The last notification was filed with the Department on July 3, 2017. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 25, 2017 (82 FR 34550).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2017–22439 Filed 10–16–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Showa Denko K.K., SGL Carbon SE, and SGL GE Carbon Holding LLC (USA); 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 of America* v. *Showa Denko K.K., SGL Carbon SE, and SGL GE Carbon Holding LLC (USA),* Civil Action No. 1:17–cv–1992. On September 27, 2017, the United States filed a Complaint alleging that Showa Denko K.K.'s (''SDK'') proposed acquisition of the global graphite electrodes business of SGL Carbon SE (''SGL'') would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires SDK to divest SGL's entire U.S. graphite electrodes business.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's Web site at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register.** Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, Department of Justice, 450 Fifth Street NW., Suite 8700, Washington, DC 20530 (telephone: 202–307–0924).

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the District of Columbia

United States of America, U.S. Department of Justice, Antitrust Division, 450 Fifth Street NW., Suite 8700, Washington, DC 20530, Plaintiff, v. *Showa Denko K.K., 13–9 Shiba Daimon 1-chome, Minato-ku, Tokyo 105–8518, Japan, SGL Carbon SE, Soehnleinstrasse 8, 65201 Weisbaden, Germany,* and *SGL GE Carbon Holding LLC (USA), 10130 Perimeter Parkway, Suite 500, Charlotte, NC 28216,* Defendants.

Case No: 1:17–cv–01992
Judge: James E. Boasberg

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to enjoin Showa Denko K.K.'s (''SDK'') proposed acquisition of SGL Carbon SE's (''SGL Carbon'') global graphite electrode business and to obtain other equitable relief. The United States alleges as follows:

I. NATURE OF THE ACTION

1. On October 20, 2016, SDK announced an agreement to acquire SGL Carbon's global graphite electrode business for approximately $264.5 million. SDK and SGL Carbon manufacture and sell large ultra-high power (''UHP'') graphite electrodes, a critical input needed to melt scrap steel in electric arc furnaces (''EAFs'') at steel mills. SDK and SGL Carbon are two of the three leading suppliers of large UHP graphite electrodes utilized in EAFs in the United States and have a combined market share of approximately 56 percent.

2. The proposed acquisition would eliminate vigorous head-to-head competition between SDK and SGL Carbon for the business of U.S. EAF customers. For a significant number of U.S. EAF steel mills, SDK and SGL Carbon are two of the top suppliers of large UHP graphite electrodes, and the competition between SDK and SGL Carbon has resulted in lower prices, higher quality electrodes, and better service. Notably, SDK and SGL Carbon are two of only three firms that operate manufacturing facilities in North America in an industry where a local manufacturing presence is important to customers to ensure reliability of supply at an affordable cost. The proposed acquisition likely would give SDK the ability to raise prices or decrease the quality of delivery and service provided to these customers.

3. As a result, the proposed acquisition likely would substantially lessen competition in the manufacture and sale of large UHP graphite electrodes sold to EAF steel mills in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and should be enjoined.

II. JURISDICTION AND VENUE

4. The United States brings this action pursuant to 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.

5. Defendants manufacture and sell large UHP graphite electrodes throughout the United States. They are engaged in a regular, continuous, and substantial flow of interstate commerce, and their activities in the manufacture and sale of large UHP graphite electrodes have a substantial effect upon interstate commerce. The Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

6. Defendants have consented to venue and personal jurisdiction in this district. This court has personal jurisdiction over each defendant and venue is proper in this district under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(c).

III. DEFENDANTS AND THE PROPOSED ACQUISITION

7. Defendant SDK is a corporation organized under the laws of Japan and headquartered in Tokyo, Japan. SDK is one of Japan's leading chemical companies and graphite electrodes are a primary line of business. SDK, which operates in approximately 14 countries, had revenues of approximately $5.8 billion in 2016. SDK's worldwide revenues from sales of graphite electrodes in 2016 were $248 million, and its U.S. revenues from sales of graphite electrodes in 2016 were approximately $85 million.

8. Defendant SGL Carbon is a publicly-owned company organized under the laws of Germany and headquartered in Wiesbaden, Germany. SGL Carbon is a leading manufacturer of carbon-based products, ranging from carbon and graphite products to carbon fibers and composites, and its operations extend to 34 countries. In 2016, SGL Carbon had global revenues of approximately $885 million. SGL Carbon's worldwide revenues from sales of graphite electrodes in 2016 were approximately $326.6 million, and its U.S. revenues from sales of graphite electrodes in 2016 were approximately $58.6 million.

9. Defendant SGL GE Carbon Holding LLC (USA) (''SGL US''), an indirect, wholly-owned subsidiary of SGL Carbon, is a Delaware limited liability company headquartered in Charlotte, North Carolina. SGL US is the sole shareholder of SGL GE Carbon LLC, which owns the assets of SGL US's operations in the United States, including SGL's Hickman and Ozark graphite electrode plants.

10. Pursuant to an October 20, 2016 Sale and Purchase Agreement, SDK agreed to acquire all of the corporate entities comprising SGL Carbon's graphite electrodes global operations, including SGL US, for approximately $264.5 million.

IV. TRADE AND COMMERCE

A. *Industry Background*

11. Graphite electrodes are used as conductors of electricity to generate sufficient heat to melt scrap metal in EAFs or to refine steel in ladle

metallurgical furnaces. In a typical EAF operation, a series of electrodes (usually three) are attached to a crane-like device with connecting pins to form columns that are suspended over a large bucket of scrap steel. Large amounts of electricity are sent through the electrodes and the resulting heat melts the scrap into liquid.

12. Graphite electrodes are consumed as they are used and continually need to be replaced with fresh electrodes. Electrodes are designed in a range of sizes to fit the characteristics of each furnace and are suited to the electrical properties of a specific EAF. In particular, the opening through which electrodes are inserted into the furnace is only wide enough to admit electrodes of a certain diameter.

13. Graphite electrodes are subdivided into three grades: low power, high power, and UHP, where grade refers to the level of current-carrying capacity of the graphite electrode. EAFs typically utilize large UHP graphite electrodes that are between 18 and 32 inches in diameter and are characterized by an ability to withstand high currents and significant thermal stasis. Given that they are the most sophisticated products used for the most demanding steelmaking applications, large UHP graphite electrodes are produced by a smaller number of manufacturers than low power and high power graphite electrodes.

14. EAF steel mills, which are part of a vital U.S. industry involved in the manufacture and sale of steel and steel products used for many applications, represent an average of 45 percent of all domestic steel production. Large UHP graphite electrodes constitute a material operational input cost to these EAF steel mills that affects their ability to compete vigorously with steel made in blast furnaces both domestically and internationally. Over the past three years, U.S. EAF steel mills collectively averaged $262 million in large UHP graphite electrode purchases, and that number is expected to increase in the coming years due to a recent increase in steel demand and a decrease in the volume of steel imported into the United States.

15. Large UHP graphite electrodes are purchased through an annual bid process where manufacturers are invited to bid for an entire year or partial year's supply. Manufacturers are qualified through a trialing process where graphite electrodes are evaluated based on both commercial risks and the total cost per ton of melted steel. EAF customers evaluate electrode suppliers based on the reliability and efficiency of their electrodes, the timeliness of electrode delivery, the supplier's commercial business practices, and ongoing technical service capabilities. Many customers prefer qualified suppliers with domestic manufacturing capability (which helps ensure reliable on-time delivery) and a robust local service operation (which enables prompt deployment of established technical expertise and support). EAF customers typically avoid suppliers that develop a reputation for graphite electrode breakages even when they offer electrodes at steep discounts because the costs of temporarily shutting down a furnace to remove broken electrode pieces can be significantly greater than the potential short-term savings from cheaper electrodes.

16. Large UHP graphite electrodes are priced by the pound, and quantities are described using metric tons. A typical U.S. EAF furnace operating at an average utilization rate may spend up to $4 million per year on electrodes for that furnace. Electrodes usually are ordered in advance and are expected to be shipped in a timely manner by truck to each steel mill, where they are stored until used, although some customers have consignment arrangements with manufacturers that keep inventories of graphite electrodes in the manufacturers' own warehouses.

B. *The Relevant Product Market*

17. There are no functional substitutes for large UHP graphite electrodes for U.S. EAF steel mills. Without large UHP graphite electrodes, an EAF steel mill cannot be operated and must be idled. Moreover, each EAF steel mill requires large UHP graphite electrodes of a specific diameter; a customer cannot substitute a different size graphite electrode than that for which its EAF is outfitted because the electrode would not fit and could not handle the level of current. Thus, it is likely that every individual size of large UHP graphite electrodes is a separate relevant product market. Because market participation by manufacturers is similar, and potential anticompetitive effects likely are similar across the entire range of sizes, all large UHP graphite electrodes can be grouped together in a single market for purposes of analysis.

18. A small but significant increase in the price of large UHP graphite electrodes sold to EAF steel mills would not cause customers of such electrodes to substitute a different kind of electrode or any other product, or to reduce purchases of such electrodes in volumes sufficient to make such a price increase unprofitable. Accordingly, the manufacture and sale of large UHP graphite electrodes sold to EAF steel mills is a line of commerce and relevant product market within the meaning of Section 7 of the Clayton Act.

C. *The Relevant Geographic Market*

19. Individual U.S. EAF customers solicit bids from large UHP graphite electrode producers and these producers develop individualized bids based on each U.S. EAF customer Request for Proposal (''RFP''). This bidding process enables large UHP graphite electrode producers to engage in ''price discrimination,'' *i.e.,* to charge different prices to different EAF customers. A small but significant increase in the prices of large UHP graphite electrodes can therefore be targeted to customers in the United States, and would not cause a sufficient number of these customers to buy electrodes from customers outside the United States so as to make such a price increase unprofitable. Since the availability of domestic technical services is important to U.S. customers, these customers would not buy electrodes from customers outside the United States. Accordingly, the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

D. *Anticompetitive Effects*

20. SDK and SGL Carbon have market shares of approximately 35 and 21 percent, respectively, in the relevant market. The third major seller of large UHP graphite electrodes to U.S. EAF customers has a market share of 22 percent. The remaining competitors combined account for only 22 percent of the market and are comprised of firms based in Japan, India, Russia, and China.

21. As articulated in the Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission (the ''Horizontal Merger Guidelines''), the Herfindahl-Hirschman Index (''HHI''), discussed in Appendix A, is a widely-used measure of market concentration. Market concentration is often a useful indicator of the level of competitive vigor in a market and the likely competitive effects of a merger. The more concentrated a market, the more likely it is that a transaction would result in a meaningful reduction in competition and harm consumers. Markets in which the HHI exceeds 2,500 points are considered highly concentrated, and transactions that result in highly concentrated markets and increase the HHI by more than 200 points are presumed to be likely to enhance market power.

22. In the market for the manufacture and sale of large UHP graphite electrodes used in U.S. EAF steel mills, the pre-merger HHI is 2230 and the post-merger HHI is 3693, representing an increase in the HHI of 1,463. Under the Horizontal Merger Guidelines, the proposed acquisition will result in a highly concentrated market and is thus presumed likely to enhance market power.

23. In addition to increasing concentration, SDK's acquisition of SGL Carbon's global graphite electrode business would eliminate head-to-head competition between SDK and SGL Carbon to supply large UHP graphite electrodes to U.S. EAF steel mills. SDK and SGL Carbon both have a strong reputation for high-quality graphite electrodes, a robust local manufacturing presence, an established delivery infrastructure, and superior technical service capabilities and support, including proprietary software specifically designed to assist steel mills in the installation and efficient maintenance of electrodes within their EAFs. SDK and SGL Carbon compete directly on price, quality, delivery, and technical service, and the competition between them has directly benefitted U.S. EAF customers.

24. Only one other significant competitor besides SDK and SGL Carbon sells large UHP graphite electrodes in the U.S. and has a similar reputation for quality, shipment and delivery logistics, and local technical service. The transaction is likely to lead to higher prices because, for most customers, it will reduce the number of significant bidders from three to two.

25. Although other firms have participated in the U.S. market with limited sales, none of these firms individually or collectively are positioned to constrain a unilateral exercise of market power by SDK after the acquisition. The most significant of these firms, based in Japan, has a long history of sales of large UHP graphite electrodes in the United States, a good reputation for quality, and an enduring small presence in the market. However, it and the remaining small firms that have made sales to U.S. EAF steel mills are disadvantaged by their lack of domestic manufacturing capability, limited delivery and technical service infrastructure, and high costs. Some additionally are disadvantaged because of lower product quality. The response of other participants in the relevant market therefore would not be sufficient to constrain a unilateral exercise of market power by SDK after the acquisition.

26. For all of these reasons, the proposed transaction likely would substantially lessen competition in the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills and lead to higher prices and decreased quality of delivery and service.

E. *Difficulty of Entry*

27. Entry of additional competitors into the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills is unlikely to be timely, likely, or sufficient to prevent the harm to competition caused by the elimination of SGL Carbon as an independent supplier. Over the past two decades, several firms have attempted to make a meaningful entry into the U.S. market, notably from India and China, but have not been able to make substantial sales or become preferred suppliers.

28. Firms attempting to enter into the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills face significant entry barriers in terms of cost and time. First, a new entrant into this business must be able to construct a manufacturing facility, which entails substantial time and expense. Second, such an entrant must have the technical capabilities necessary to design and manufacture high quality graphite electrodes that meet customer requirements for performance and reliability. Third, both new entrants and graphite electrode manufacturers who do not currently participate in the U.S. market must typically demonstrate competence to EAF customers in the U.S. through a lengthy qualification and trial period during which the supplier must establish a strong performance record and avoid product breakages that can cause EAF outages. Fourth, an entrant must have a strong local infrastructure in place to assure customers of reliable delivery and the prompt deployment of qualified expertise, including technical services associated with installation and maintenance of the electrodes.

29. As a result of these barriers, entry into the market for the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills would not be timely, likely, or sufficient to defeat the substantial lessening of competition that likely would result from SDK's acquisition of SGL Carbon's global graphite electrode business.

V. VIOLATION ALLEGED

30. The acquisition of SGL Carbon's global graphite electrode business by SDK likely would substantially lessen competition for the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

31. Unless enjoined, the transaction likely would have the following anticompetitive effects, among others:

a. competition between SDK and SGL Carbon in the market for the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills would be eliminated; and

b. prices for large UHP graphite electrodes sold to U.S. EAF steel mills likely would be less favorable, and quality of delivery and service likely would decline.

VI. REQUESTED RELIEF

32. The United States requests that this Court:

a. adjudge and decree SDK's proposed acquisition of SGL Carbon's global graphite electrode business to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. 18;

b. preliminarily and permanently enjoin and restrain defendants and all persons acting on their behalf from consummating the proposed acquisition or from entering into or carrying out any contract, agreement, plan, or understanding, the effect of which would be to combine SGL Carbon's global graphite electrode business with the operations of SDK;

c. award the United States its costs of this action; and

d. award the United States such other and further relief as the Court deems just and proper.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

Andrew M. Finch,
Acting Assistant Attorney General.

Bernard A. Nigro, Jr.,
Deputy Assistant Attorney General.

Patricia A. Brink,
Director of Civil Enforcement.

Maribeth Petrizzi,
Chief, Litigation II Section.
D.C. Bar # 435204

David E. Altschuler,
Assistant Chief, Litigation II Section.
D.C. Bar # 983023

Bashiri Wilson,*
James K. Foster

Attorneys, U.S. Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street NW., Suite 8700, Washington, DC

20530, Tel.: (202) 514–8362, Fax: (202) 514–9033, Email: bashiri.wilson@usdoj.gov.

*Attorney of Record

Dated: September 27, 2017

Appendix A

DEFINITION OF HHI

The term ''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI 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 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches a maximum of 10,000 points when it is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,500 and 2,500 points are considered to be moderately concentrated and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. *See Horizontal Merger Guidelines* § 5.3 (issued by the U.S. Department of Justice and the Federal Trade Commission on August 19, 2010). Transactions that increase the HHI by more than 200 points in highly concentrated markets will be presumed likely to enhance market power. *Id.*

United States District Court for the District Of Columbia

United States of America, Plaintiff, v. *Showa Denko K.K., SGL Carbon SE, and SGL GE Carbon Holding LLC (USA),* Defendants.

Case No: 1:17–cv–01992

Judge: James E. Boasberg

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America (''United States''), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''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

On October 20, 2016, defendants Showa Denko K.K. (''SDK''), SGL Carbon SE (''SGL Carbon''), and SGL GE Carbon Holding LLC (USA) (''SGL US'') entered into an agreement pursuant to which SDK agreed to acquire SGL Carbon's global graphite electrode business for approximately $264.5 million.

The United States filed a civil antitrust Complaint on September 27, 2017 seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially for the manufacture and sale of large ultra-high power (''UHP'') graphite electrodes sold to electric arc furnace (EAF) steel mills in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. This loss of competition likely would give SDK the ability and incentive to increase prices or decrease the quality of delivery and service provided to U.S. EAF customers.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order (''Hold Separate'') and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, defendants are required to divest SGL Carbon's entire U.S. graphite electrodes business (the ''Divestiture Assets'') to Tokai Carbon Co., Ltd. (''Tokai'') or to an alternate Acquirer approved by the United States. Under the terms of the Hold Separate, defendants will take certain steps to ensure that the Divestiture Assets are operated as a competitive, independent, economically viable, and ongoing business concern, that the Divestiture Assets will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final 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 VIOLATION

A. The Defendants and the Transaction

SDK, a Japanese corporation headquartered in Tokyo, Japan, is one of Japan's leading chemical companies, and had global sales of approximately $5.8 billion in 2016. SDK is one of the world's largest providers of graphite electrodes, with global sales of $248 million in 2016, including approximately $85 million in U.S. revenues from graphite electrodes sales.

SGL Carbon is a German-based corporation headquartered in Wiesbaden, Germany. SGL Carbon is a leading manufacturer of carbon-based products, ranging from carbon and graphite products to carbon fibers and composites, with operations in 34 countries. SGL Carbon is a leading global producer of graphite electrodes, with worldwide graphite electrode revenues of approximately $326.6 million in 2016, including approximately $58.6 million from sales of graphite electrodes in the United States.

SGL US, an indirect, wholly-owned subsidiary of SGL Carbon, is a Delaware limited liability company headquartered in Charlotte, North Carolina. SGL US is the sole shareholder of SGL GE Carbon LLC, which owns the assets of SGL US's operations in the United States, including SGL Carbon's Hickman and Ozark graphite electrode plants.

Pursuant to an agreement dated October 20, 2016, SDK intends to acquire SGL Carbon's global graphite electrode operations, including SGL US, for approximately $264.5 million. The proposed acquisition, as initially agreed to by defendants, would lessen competition substantially in the manufacture and sale of large UHP graphite electrodes to U.S. EAF customers. This acquisition is the subject of the Complaint and proposed Final Judgment filed today by the United States.

B. Graphite Electrode Industry Overview

Graphite electrodes are used to conduct electricity to generate sufficient heat to melt scrap metal in EAFs or to refine steel in ladle metallurgical furnaces. In a typical EAF operation, a series of electrodes are attached to a steel arm with connecting pins to form columns that are suspended over a large bucket of scrap steel. Large amounts of electricity are sent through the electrodes and the resulting heat melts the scrap into liquid. Graphite electrodes are consumed as they are used and continually need to be replaced with fresh electrodes. Electrodes are designed in a range of sizes to fit the characteristics of each furnace and are suited to the electrical properties of a specific EAF.

Graphite electrodes are subdivided into three grades based on their level of current-carrying capacity: low power, high power, and UHP. EAFs typically utilize UHP graphite electrodes that are between 18 and 32 inches in diameter and are characterized by an ability to withstand high currents. Large UHP graphite electrodes are the most sophisticated products used for the most demanding steelmaking applications and, as a result, are produced by a smaller number of manufacturers than

low power or high power graphite electrodes.

EAF steel mills, which are a part of a vital U.S. industry involved in the manufacture and sale of steel and steel products used for many applications, represent an average of 45 percent of all domestic steel production. Over the past three years, U.S. EAF steel mills collectively averaged $262 million in large UHP graphite electrode purchases, and that number is expected to increase in the coming years due to a recent increase in steel demand and a decrease in the volume of steel imported into the United States.

Large UHP graphite electrodes are purchased through an annual bid process where manufacturers are invited to bid for an entire year or partial year's supply. EAF customers evaluate electrode suppliers based on the reliability and efficiency of their electrodes, the timeliness of electrode delivery, the supplier's commercial business practices, and ongoing technical service capabilities. Many U.S. customers prefer suppliers that have a domestic manufacturing capability and a robust local service operation. Given the high costs of temporarily shutting down a furnace to remove broken electrode pieces, EAF customers typically avoid suppliers that develop a reputation for graphite electrode breakages even if the supplier offers electrodes at steep discounts. Electrodes usually are ordered in advance and are expected to be shipped in a timely manner by truck to each steel mill, where they are stored until used, although some customers have consignment arrangements with manufacturers that keep inventories of graphite electrodes in the manufacturers' own warehouses.

C. Relevant Markets Affected by the Proposed Acquisition

As alleged in the Complaint, there are no functional substitutes for large UHP graphite electrodes for U.S. EAF steel mills. Without large UHP graphite electrodes, EAF steel mills cannot be operated and must be idled. Moreover, customers cannot substitute a different size graphite electrode for use in an EAF because the electrode size and current-carrying capacity is tailored to the specific facility. For these reasons, the Complaint alleges that it is likely that every individual size of large UHP graphite electrodes is a separate relevant product market. Because market participation by manufacturers is similar, and potential anticompetitive effects likely are similar across the entire range of sizes, all large UHP graphite electrodes can be grouped together in a single market for purposes of analysis. The Complaint alleges that a hypothetical profit-maximizing monopolist of large UHP graphite electrodes likely would impose a small but significant non-transitory increase in price (''SSNIP'') that would not be defeated by substitution to a different kind of electrode or any other product, or result in a reduction in purchases of such electrodes in volumes sufficient to make such a price increase unprofitable. Accordingly, the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills is a line of commerce and relevant market within the meaning of Section 7 of the Clayton Act.

As alleged in the Complaint, the United States is the relevant geographic market for the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills. In the United States, individual EAF customers solicit bids from producers of large UHP graphite electrodes, and these producers develop individualized bids based on each customer's Request for Proposal. The bidding process enables large UHP graphite electrode producers to engage in ''price discrimination,'' *i.e.,* to charge different prices to different EAF customers. A small but significant increase in the prices of large UHP graphite electrodes can therefore be targeted to customers in the United States without causing a sufficient number of these customers to use arbitrage to defeat the price increase, such as by buying electrodes from customers outside the country so as to make such a price increase unprofitable. Since the availability of domestic technical services is important to U.S. customers, these customers would not buy electrodes from customers outside the United States. Accordingly, the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

D. Anticompetitive Effects

According to the Complaint, the proposed acquisition would substantially increase concentration in the relevant market. SDK and SGL Carbon have market shares of approximately 35 and 21 percent, respectively, in the relevant market; a third major seller of large UHP graphite electrodes to U.S. EAF customers has a market share of 22 percent. The remaining competitors, which include firms from Japan, India, Russia, and China, have a combined 22 percent share. Under the Herfindahl-Hirschman Index (''HHI''), a widely-used measure of market concentration utilized in the Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission (the ''Horizontal Merger Guidelines''), the pre-merger HHI is 2230 and the post-merger HHI is 3693, representing an increase in the HHI of 1,463. As discussed in the Horizontal Merger Guidelines and alleged in the Complaint, these HHIs indicate that the proposed acquisition will result in a highly concentrated market and is presumed likely to enhance market power.

In addition to increasing concentration, the Complaint alleges that SDK's acquisition of SGL Carbon's global graphite electrode business would eliminate head-to-head competition between SDK and SGL Carbon in the relevant market. Both SDK and SGL Carbon have a strong reputation for high-quality graphite electrodes, a robust local manufacturing presence, an established delivery infrastructure, and superior technical service capabilities and support, including proprietary software specifically designed to assist steel mills in the installation and efficient maintenance of electrodes within their EAFs. As alleged in the Complaint, SDK and SGL Carbon compete directly on price, quality, delivery, and technical service, and the competition between them has directly benefitted U.S. EAF customers.

The Complaint further alleges that the acquisition is likely to lead to higher prices because there is only one other significant competitor with a comparable reputation for product quality, shipment and delivery logistics, and local technical service, and therefore, for most customers, the transaction will reduce the number of significant bidders from three to two. According to the Complaint, the remaining market participants, each of which has participated in the U.S. market with only limited sales, are not in a position to constrain a unilateral exercise of market power by SDK after the acquisition. The most significant of these firms, based in Japan, has a long history of sales of large UHP graphite electrodes in the United States, a good reputation for quality, and an enduring small presence in the market. However, this firm and the other remaining firms that have made limited sales to U.S. EAF steel mills are each disadvantaged by a lack of domestic manufacturing capability, limited delivery and technical service infrastructure, and high costs. As a result, none of these firms will be able to replace the competition lost as a result of SDK's acquisition of SGL Carbon's global graphite electrode business.

E. Barriers to Entry

As alleged in the Complaint, entry of additional competitors into the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills is unlikely to be timely, likely, or sufficient to prevent the harm to competition caused by the elimination of SGL Carbon as an independent supplier. New entrants face significant entry barriers in terms of cost and time, including the substantial time and expense required to construct a manufacturing facility, the need to build technical capabilities sufficient to meet customer expectations, the requirement that a new supplier demonstrate competence to U.S. customers through a lengthy qualification and trialing period, and the need to create a strong local infrastructure to ensure reliable and prompt delivery and technical service.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing an independent and economically viable competitor in the manufacture and sale of large UHP graphite electrodes in the relevant market.

Pursuant to the proposed Final Judgment, defendants must divest SGL Carbon's entire U.S. graphite electrodes business, which is defined in Paragraph II(F) to include SGL Carbon's manufacturing facilities located in Ozark, Arkansas and Hickman, Kentucky and all tangible and intangible assets used in connection with SGL Carbon's U.S. graphite electrodes business. Among the assets to be divested is SGL Carbon's CEDIS® EAF performance monitoring system, proprietary software specifically designed to assist steel mills in the installation and efficient maintenance of electrodes within their EAFs.

Paragraph IV(A) of the proposed Final Judgment provides that defendants must divest the Divestiture Assets to Tokai Carbon Co., Ltd., or to an alternative acquirer acceptable to the United States within 45 days of the Court's signing of the Hold Separate. The Divestiture Assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the operations can and will be operated by Tokai or an alternate purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with Tokai or any other prospective purchaser.

The proposed Final Judgment contains several provisions designed to facilitate the Acquirer's immediate use of the Divestiture Assets. Paragraph IV(J) provides the Acquirer with the option to enter into a transition services agreement with SGL Carbon to obtain back office and information technology services and support for the Divestiture Assets for a period of up to one year. The United States, in its sole discretion, may approve one or more extensions of this agreement for a total of up to an additional 12 months. Paragraph IV(K) provides the Acquirer with the option to enter into a supply contract with SDK for connecting pins sufficient to meet all or part of the Acquirer's needs for a period of up to three years. Connecting pins are a component used to connect graphite electrodes in an EAF, and the inclusion of a supply option in the proposed Final Judgment will enable Tokai or an alternate acquirer to devote additional capacity to the manufacture of large UHP graphite electrodes if it so chooses. The proposed Final Judgment provides that the United States, in its sole discretion, may approve one or more extensions of this supply contract for a total of up to an additional 12 months.

The proposed Final Judgment also contains provisions intended to facilitate the Acquirer's efforts to hire the employees involved in SGL Carbon's U.S. graphite electrode business. Paragraph IV(D) of the proposed Final Judgment requires defendants to provide the Acquirer with organization charts and information relating to these employees and make them available for interviews, and provides that defendants will not interfere with any negotiations by the Acquirer to hire them. In addition, Paragraph IV(E) provides that for employees who elect employment with the Acquirer, defendants, subject to exceptions, shall waive all noncompete and nondisclosure agreements, vest all unvested pension and other equity rights, and provide all benefits to which the employees would generally be provided if transferred to a buyer of an ongoing business. The paragraph further provides, that for a period of 12 months from the filing of the Complaint, defendants may not solicit to hire, or hire any such person who was hired by the Acquirer, unless such individual is terminated or laid off by the Acquirer or the Acquirer agrees in writing that defendants may solicit or hire that individual.

In the event that defendants do not accomplish the divestiture within the period provided in the proposed Final Judgment, Paragraph V(A) provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that 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 accomplished. After its appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth its efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or 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 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 a period of at least sixty (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 sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register,** or the last date of publication in a newspaper of the

summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the Antitrust Division's internet website and, under certain circumstances, published in the **Federal Register.**

Written comments should be submitted to: Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 450 Fifth Street NW., 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 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 against defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against SDK's acquisition of SGL Carbon's global graphite electrode business. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by 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.'' 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, 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)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *US Airways Group, Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the ''court's inquiry is limited'' in Tunney Act settlements); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.'').[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, 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 Microsoft,* 56 F.3d at 1458–62. 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. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held 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).[2] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also US Airways,* 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[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

[1] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004) *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[2] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (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' '').

reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also US Airways,* 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements) (citing *Microsoft,* 56 F.3d at 1461); *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). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA 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; *see also US Airways,* 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). 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 did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also US Airways,* 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[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 Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the Court, with the recognition that the Court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[3] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *US Airways,* 38 F. Supp. 3d at 76.

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.

Dated: September 27, 2017

Respectfully submitted,

Bashiri Wilson*

United States Department of Justice, *Antitrust Division, Litigation II Section, 450 Fifth Street NW., Suite 8700, Washington, DC 20530, Tel.: (202) 598–8794, Fax: (202) 514–9033*, Email: *bashiri.wilson@usdoj.gov.*

*Attorney of Record

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Showa Denko K.K., SGL Carbon SE,* and *SGL GE Carbon Holding LLC (USA),* Defendants,

Case No: 1:17–cv–01992

Judge: James E. Boasberg

PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on September 27, 2017, the United States and defendants, Showa Denko K.K., SGL Carbon SE, and SGL GE Carbon Holding LLC (USA), 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, the United States 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 divestitures 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 Tokai or another entity to which defendants divest the Divestiture Assets.

B. ''SDK'' means defendant Showa Denko K.K., a Japanese corporation headquartered in Tokyo, Japan, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

[3] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* No. 73–CV–681–W–1, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D.Mo. 1977) (''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 comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

C. ''SGL'' means defendant SGL Carbon SE, a German corporation headquartered in Wiesbaden, Germany, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees, including defendant SGL GE Carbon Holding LLC (USA), a Delaware limited liability company that is an indirect, wholly-owned subsidiary of SGL Carbon SE, and is headquartered in Charlotte, North Carolina.

D. ''Tokai'' means Tokai Carbon Co., Ltd., a Japanese corporation headquartered in Tokyo, Japan, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

E. ''Divestiture Assets'' means SGL's U.S. Graphite Electrodes Business.

F. ''SGL's U.S. Graphite Electrodes Business'' means SGL GE Carbon Holding LLC (USA), all of its subsidiaries, and all additional operations of SGL related to the production, distribution, engineering, development, sale, and servicing of graphite electrodes manufactured in the United States, including, but not limited to:

1. The manufacturing facility located at 3931 Carbon Plant Rd., Ozark, Arkansas 72949 (the ''Ozark Facility'');

2. The manufacturing facility located at 2320 Myron Cory Dr., Hickman, Kentucky 42050 (the ''Hickman Facility'');

3. All tangible assets used in connection with SGL's U.S. Graphite Electrodes Business, including research and development activities; all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies, and other tangible property and all assets used exclusively in connection with SGL's U.S. Graphite Electrodes Business; all licenses, permits, and authorizations issued by any governmental organization relating to SGL's U.S. Graphite Electrodes Business; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, including supply agreements relating to SGL's U.S. Graphite Electrodes Business; all customer lists, contracts, accounts, and credit records relating to SGL's U.S. Graphite Electrodes Business; all repair and performance records and all other records relating to SGL's U.S. Graphite Electrodes Business; and

4. All intangible assets used in connection with SGL's U.S. Graphite Electrodes Business, including, but not limited to, all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names (excluding any trademark, trade name, service mark, or service name containing the name ''SGL''), technical information, computer software (including, but not limited to, SGL's CEDIS® EAF performance monitoring system) and related documentation, 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, all manuals and technical information SGL provides to its own employees, customers, suppliers, agents, or licensees, and all research data concerning historic and current research and development efforts relating to SGL's U.S. Graphite Electrodes Business, including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments.

G. ''Relevant Employees'' means all SGL personnel involved in the production, distribution, engineering, development, sale, or servicing of graphite electrodes for SGL's U.S. Graphite Electrodes Business.

III. APPLICABILITY

A. This Final Judgment applies to SDK and SGL, 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. If, prior to complying with Section IV and Section V of this Final Judgment, defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the acquirers of the assets divested pursuant to this Final Judgment.

IV. DIVESTITURE

A. Defendants are ordered and directed, within 45 calendar days after the Court's signing of the Hold Separate Stipulation and Order in this matter, to divest the Divestiture Assets in a manner consistent with this Final Judgment to Tokai or an alternative 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 sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In the event defendants are attempting to divest the Divestiture Assets to an Acquirer other than Tokai, defendants promptly shall make known, by usual and customary means (to the extent defendants have not already done so), the availability of the Divestiture Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment.

C. In accomplishing the divestiture ordered by this Final Judgment, defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privileges or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

D. Defendants shall provide the Acquirer and the United States with organization charts and information relating to Relevant Employees, including name, job title, past experience relating to SGL's U.S. Graphite Electrodes Business, responsibilities, training and educational history, relevant certifications, and to the extent permissible by law, job performance evaluations, and current salary and benefits information, to enable the Acquirer to make offers of employment. Upon request, defendants shall make Relevant Employees available for interviews with the Acquirer during normal business hours at a mutually agreeable location and will not interfere with any negotiations by the Acquirer to employ any Relevant Employees. Interference with respect to this paragraph includes, but is not limited to, offering to increase the salary or benefits of Relevant Employees other than as part of a company-wide increase in salary or benefits granted in the ordinary course of business.

E. For any Relevant Employees who elect employment with the Acquirer, defendants shall waive all noncompete and nondisclosure agreements, vest all unvested pension and other equity rights, and provide all benefits to which

the Relevant Employees would generally be provided if transferred to a buyer of an ongoing business. For a period of twelve (12) months from the filing of the Complaint in this matter, defendants may not solicit to hire, or hire, any such person who was hired by the Acquirer, unless (1) such individual is terminated or laid off by the Acquirer or (2) the Acquirer agrees in writing that defendants may solicit or hire that individual. Nothing in Paragraphs IV(D) and (E) shall prohibit defendants from maintaining any reasonable restrictions on the disclosure by any employee who accepts an offer of employment with the Acquirer of the defendant's proprietary non-public information that is (1) not otherwise required to be disclosed by this Final Judgment, (2) related solely to defendants' businesses and clients, and (3) unrelated to the Divestiture Assets.

F. Defendants shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of SGL's U.S. Graphite Electrodes Business; access to any and all environmental, 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.

G. Defendants shall warrant to the Acquirer that each asset will be operational on the date of sale.

H. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

I. Defendants shall warrant to the Acquirer that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

J. At the option of the Acquirer, SGL shall enter a transition services agreement to provide back office and information technology services and support for SGL's U.S. Graphite Electrodes Business for a period of up to one (1) year. The United States, in its sole discretion, may approve one or more extensions of this agreement for a total of up to an additional twelve (12) months. If the Acquirer seeks an extension of the term of this transition services agreement, it shall so notify the United States in writing at least three (3) months prior to the date the transition services contract expires. If the United States approves such an extension, it shall so notify the Acquirer in writing at least two (2) months prior to the date the transition services contract expires. The terms and conditions of any contractual arrangement intended to satisfy this provision must be reasonably related to the market value of the expertise of the personnel providing any needed assistance. The SGL employee(s) tasked with providing these transition services may not share any competitively sensitive information of the Acquirer with any other SGL or SDK employee.

K. At the option of the Acquirer, SDK shall enter into a supply contract for connecting pins sufficient to meet all or part of the Acquirer's needs for a period of up to three (3) years. The terms and conditions of any contractual arrangement meant to satisfy this provision must be reasonably related to market conditions for connecting pins. The United States, in its sole discretion, may approve one or more extensions of this supply contract for a total of up to an additional twelve (12) months. If the Acquirer seeks an extension of the term of this supply contract, it shall so notify the United States in writing at least three (3) months prior to the date the supply contract expires. If the United States approves such an extension, it shall so notify the Acquirer in writing at least two (2) months prior to the date the supply contract expires.

L. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by Divestiture Trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business of the production, distribution, engineering, development, sale, or servicing of large diameter ultra-high power graphite electrodes in the United States. 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' sole judgment, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the production, distribution, engineering, development, sale, or servicing of large diameter ultra-high power graphite electrodes in the United States; 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 compete effectively.

V. APPOINTMENT OF DIVESTITURE TRUSTEE

A. If defendants have not divested the Divestiture Assets within the time period specified in Paragraph IV(A), defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the Divestiture Assets. The Divestiture 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 Divestiture 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 Paragraph V(D) of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture. Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications.

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

D. The Divestiture Trustee shall serve at the cost and expense of defendants pursuant to a written agreement, on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee shall account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the Divestiture

Trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the Divestiture 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. If the Divestiture Trustee and defendants are unable to reach agreement on the Divestiture Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within 14 calendar days of appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee shall, within three (3) business days of hiring any other professionals or agents, provide written notice of such hiring and the rate of compensation to defendants and the United States.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other agents retained by the Divestiture 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 Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture 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, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the United States which 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 Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Divestiture Trustee.

VI. NOTICE OF PROPOSED DIVESTITURE

A. In the event defendants are divesting the Divestiture Assets to an Acquirer other than Tokai, within two (2) business days following execution of a definitive divestiture agreement, defendants or the Divestiture 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 Section V of this Final Judgment. If the Divestiture 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 the Divestiture Assets, 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 Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the Divestiture 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 Divestiture Trustee, whichever is later, the United States shall provide written notice to defendants and the Divestiture 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 Paragraph V(C) 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 Section V shall not be consummated. Upon objection by defendants under Paragraph V(C), 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 Section 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 ordered by this Court.

IX. AFFIDAVITS

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or Section V, defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or Section V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30)

calendar 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 the Divestiture Assets, 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 the Divestiture Assets, and to provide required information to prospective Acquirers, 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 limitation on information, shall be made within fourteen (14) calendar 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 VIII 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 and divest the Divestiture Assets until one year after such divestiture has been completed.

X. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally-recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an 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 the option of the United States, to require defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, 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 an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports or response to written interrogatories, 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)(1)(G) 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)(1)(G) 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 the Divestiture Assets 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 (10) years from the date of its entry.

XIV. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date:

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

United States District Judge

[FR Doc. 2017–22443 Filed 10–16–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Border Security Technology Consortium

Notice is hereby given that, on September 22, 2017, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Border Security Technology Consortium (''BSTC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Michigan Technology University, Houghton, MI; and TRI–COR Industries, Inc., Alexandria, VA, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and BSTC intends to file additional written notifications disclosing all changes in membership.

On May 30, 2012, BSTC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 18, 2012 (77 FR 36292).