DEPARTMENT OF JUSTICE

Antitrust Division

United States v. The Manitowoc Company, Inc., et al.; 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, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States* v. *The Manitowoc Company, Inc., et al.*, Civil Action No. 1:08–cv–01704. On October 6, 2008, the United States filed a Complaint alleging that the proposed acquisition by The Manitowoc Company, Inc. (''Manitowoc'') of Enodis plc would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, by substantially lessening competition in the United States in the manufacture, development, distribution, and sale of commercial cube ice machines. The proposed Final Judgment, filed the same day as the Complaint, requires Manitowoc to divest Enodis's entire business engaged in the development, production, distribution, and sale of ice machines, ice machine parts, and related equipment in the United States.

Copies of the Complaint, proposed Final Judgment, Stipulation, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW, Suite 1010, Washington, DC 20530 (telephone: 202 514–2481), on the Department of Justice's Web site at *http://www.usdoj.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, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, Department of Justice, Washington, DC 20530, (telephone: 202–307–0924).

J. Robert Kramer, II

Director of Operations.

United States District Court for the District of Columbia

United States of America, Department of Justice, Antitrust Division, 1401 H Street, NW., Suite 3000, Washington, D.C. 20530, Plaintiff, v. The Manitowoc Company, Inc., 2400 South 44th Street, Manitowoc, Wisconsin 54221; ENODIS PLC, 175 High Holborn, London, England WCIV 7AA; and Enodis Corporation, 2227 Welbilt Boulevard, New Port Richey, Florida, 34655, Defendants

Case No.: Deck Type: Antitrust Case: 1:08-cv-01704, Assigned to: Kennedy, Henry H., Assign. Date: 10/6/2008, Description: Antitrust

Complaint

The United States of America (''United States''), acting under the direction of the Attorney General of the United States, brings this civil antitrust action against defendants The Manitowoc Company, Inc. (''Manitowoc''), Enodis plc, and Enodis Corporation (Enodis plc and Enodis Corporation will hereinafter be collectively referred to as ''Enodis'') to enjoin Manitowoc's proposed acquisition of Enodis plc and to obtain other relief. The United States complains and alleges as follows:

I. Nature of the Action

1. On June 30, 2008, Manitowoc offered to acquire Enodis plc for 328 pence in cash per share, in a transaction valued at 27 billion (including assumed debt). The acquisition is structured as a Scheme of Arrangement under the laws of the United Kingdom. The directors of Enodis plc unanimously recommended that its shareholders vote in favor of accepting Manitowoc's offer, and a majority of the shareholders did so.

2. Manitowoc manufactures and sells commercial ice machines in the United States under the Manitowoc brand, and its ice machines are the most widely sold in the United States. Enodis manufactures and sells commercial ice machines under two brands in the United States, Scotsman and Ice-O-Matic (collectively, the ''Enodis brands''); Scotsman and Ice-O-Matic machines are the second and fourth most widely sold, respectively.

3. In the United States, Manitowoc's proposed acquisition of Enodis would reduce the number of manufacturers that sell commercial ice machines producing cubed ice from three to two and would create a company with approximately 70 percent of the U.S. sales of commercial cube ice machines. Unless the proposed acquisition is enjoined, competition for commercial cube ice machines will be substantially reduced. The proposed acquisition likely would result in higher prices, lower quality, and less innovation in the commercial cube ice machine market.

4. The United States brings this action to prevent the proposed acquisition of Enodis by Manitowoc because that acquisition would substantially lessen competition in the development, production, distribution, and sale of commercial cube ice machines in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

II. Parties to the Proposed Transaction

5. Defendant Manitowoc is a Wisconsin corporation with its principal place of business in Manitowoc, Wisconsin. It is a global industrial equipment company that manufacturers commercial ice machines and related equipment, refrigeration equipment, cranes, and ships and other water vessels.

6. In 2007, Manitowoc reported total sales of approximately $4 billion. Manitowoc's sales of commercial ice machines and related equipment in the United States were approximately $152 million in 2007. Sales of commercial ice machines making cube ice accounted for over 70 percent of this total.

7. Enodis is a corporation registered in the United Kingdom and Wales with its principal place of business in London, England. Enodis Corporation, a wholly owned subsidiary of Enodis plc, is a Delaware corporation with its headquarters in New Port Richey, Florida. Through its global food service equipment group, Enodis designs, manufactures, and sells cooking, food storage and preparation equipment, and ice machines and related equipment.

8. Enodis plc's revenues for its 2007 fiscal year were $1.6 billion. North American sales accounted for approximately 70 percent of Enodis plc's total revenue. In its fiscal year 2007, Enodis plc's sales of commercial ice machines and related equipment in the United States were approximately $153 million. Sales of commercial ice machines making cube ice accounted for about 60 percent of this total.

III. Jurisdiction and Venue

9. The United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

10. Defendants develop, produce, distribute, and sell commercial ice machines and other products in the flow of interstate commerce. Defendants' activities in the development, production, distribution, and sale of these products substantially affect interstate commerce. This Court has

subject matter jurisdiction over this action pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1331, 1337(a), and 1345.

11. Defendants sell commercial ice machines and other products, and have consented to venue and personal jurisdiction, in this judicial district. Venue is proper under 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

IV. Trade and Commerce

A. The Relevant Product Market

12. Restaurants, convenience stores, hotels, and other businesses need significant volumes of ice. These businesses usually meet their needs by using commercial ice-making machines located at their places of business. These machines make ice by a continuous cycle of condensation and expansion of a refrigerant through a network of tubing. As the refrigerant converts from a compressed liquid state to become a gas, heat is drawn from a component called an evaporator. Water running over the evaporator surface freezes to form ice that is then harvested by processes specific to the type of ice produced by the machine.

13. The type of ice machine purchased by a customer depends on the type and volume of ice needed. Commercial ice machines are designed to produce either hard ice or soft ice. Hard ice melts slowly and has a higher density and less surface area than soft ice. Hard ice is most often shaped as cubes or dice, half-cubes or half-dice, octagons, or crescent cubes, and is commonly referred to as cube ice. Most customers that serve ice in beverages prefer cube ice because it melts slowly and thus minimizes deterioration in the flavor of the beverage. Soft ice refers to small nuggets or flakes of ice that have a lower density and more surface area than cube ice and, therefore, melt more quickly than cube ice. Soft ice is used in hospitals, which demand a safe, chewable ice for their patients, by grocery stores or other establishments to display seafood produce, and other perishable food, and for industrial cooling applications. The prices of commercial ice machines producing soft ice are often 15 to 20 percent higher than prices of ice machines that produce comparable quantities of cube ice per day.

14. In response to a small but significant post-acquisition increase in the price of commercial machines producing cube ice, customers would not switch to machines that make soft ice in sufficient numbers so as to make such a price increase unprofitable.

15. Customers vary greatly with respect to their daily needs of cubed ice, and they require machines having an appropriate range of capacity to meet those needs. A significant and distinct segment of cube ice machine customers, including sit-down and fast-food restaurants, bars, and convenience stores, purchase commercial machines capable of producing between approximately 300 pounds to 2,000 pounds of cube ice per day (hereinafter, ''commercial cube ice machines'').

16. Although customers can purchase units that produce between approximately 50 and 300 pounds of ice per day, these machines are not able to meet the needs of the large majority of commercial cube ice machine customers. Few customers are likely to meet their needs by purchasing two or more smaller machines because it would be cost-prohibitive to do so. Similarly, large units that produce over 2,000 pounds of ice per day are not substitutes for commercial cube ice machines and are used by customers that need extremely large volumes of ice, such as convention centers, sports arenas, or bagged-ice producers. Because of the attributes of commercial cube ice machines, a small but significant post-acquisition increase in the prices of commercial cube ice machines would not cause customers to switch to other ice machines in sufficient numbers so as to make such a price increase unprofitable.

17. Accordingly, the development, production, distribution, and sale of commercial cube ice machines is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

B. The Relevant Geographic Market

18. Commercial ice machines are complex and break down more frequently than other types of food service equipment, and customers often need quick access to replacement machines, parts, and service. Sales of commercial cube ice machines in the United States by manufacturers are primarily made to distributors that supply equipment dealers and repair companies who sell to end-users. In addition, these distributors typically train service representatives regarding repair and maintenance of the commercial ice machines, as well as manage warranty claims. In order to be a competitive supplier of commercial cube ice machines within the United States, manufacturers must have an established network of local distribution, service, and support.

19. A small but significant increase in the prices of commercial cube-ice machines would not cause a sufficient number of customers in the United States to turn to manufacturers of commercial cube ice machines that do not have an established a network of local distribution, service, and support in the United States. As a result, such manufacturers would not be able to constrain such an increase.

20. Accordingly, the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

C. Competitive Effects

1. Concentration

21. The market for commercial cube ice machines is highly concentrated. Manitowoc and Enodis are the two largest manufacturers of commercial cube ice machines in the United States. Only one other company has demonstrated the ability to produce commercial cube ice machines of the same quality and with similar features as the Manitowoc and Enodis machines and has an established a network of local distribution, service, and support in the United States.

22. Manitowoc accounts for approximately 40 percent of the sales of commercial cube ice machines in the United States. Enodis accounts for approximately 30 percent of the sales of commercial cube ice machines in the United States.

23. The market for commercial cube ice machines would become substantially more concentrated if Manitowoc were to acquire Enodis. Combined, Manitowoc and Enodis would account for approximately 70 percent of the sales of commercial cube ice machines in the United States. Using a measure of market concentration called the Herfindahl-Hirschman Index (''HHP'), which is explained in Appendix A, the proposed transaction would increase the HHI in the market for commercial cube ice machines by approximately 2,400 points to a post-acquisition level of approximately 5,800. This is well in excess of levels that raise significant antitrust concerns.

2. The Proposed Transaction Would Harm Competition in the Market for Commercial Cube Ice Machines.

24. The vigorous and aggressive competition between Manitowoc and Enodis in the development, production, distribution, and sale of commercial cube ice machines has benefitted customers. Manitowoc and Enodis compete directly on price, quality, and innovation. Although commercial cube ice machine offerings are differentiated, many commercial cube ice machine customers view the Manitowoc and

Scotsman brands as close substitutes for one another.

25. The proposed acquisition would eliminate the competition between Manitowoc and Enodis and reduce the number of significant manufacturers of commercial cube ice machines in the United States from three to two. Post-merger, Manitowoc would profit by unilaterally raising the price (or reducing quality and innovation) of one or more of the brands it would own. Although Manitowoc could lose some sales in that brand or brands as a result of such a price increase (or decline in quality and innovation), many sales would be diverted to one of the other brands under its ownership. Capturing such diverted sales would make a post-merger price increase (or reduction in quality and innovation) profitable, when it would not have been profitable before the merger.

26. The response of other commercial cube ice machines manufacturers in the United States would not be sufficient to constrain a unilateral exercise of market power by Manitowoc after the acquisition because, they do not have the incentive or the ability, individually or collectively, to do so.

27. Therefore, the proposed acquisition would enable Manitowoc to exercise market power unilaterally, lessen competition in the development, production, distribution, and sale of commercial cube ice machines in the United States, and lead to higher prices, lower quality, and less innovation for the ultimate consumers of commercial cube ice machines, in violation of Section 7 of the Clayton Act.

V. Entry

28. Successful entry or expansion into the development, production, distribution, and sale of commercial cube ice machines would be difficult, time-consuming, and costly. Firms attempting to enter or expand into the commercial cube ice machine market face a combination of distribution, reputation, and technology-related barriers to entry.

29. Customers need quick access to replacement ice machines and parts, and, as a result, the three significant commercial cube ice machine competitors each have a nationwide network of local distributors. These distributors maintain sizeable inventories at locations across the United States so as to meet individual customer demands.

30. Developing a nationwide distribution network would be difficult and time consuming. Finding good distributors would be difficult because each of the current three commercial cube ice machine competitors has contracted exclusively with a large majority of the sizeable and reputable distributors across the United States, and an existing or potential distributor likely would not agree to distribute a commercial ice machine unless it could be assured of a sufficient volume of sales of machines and parts to make a profit on the inventory and other investments it must make. Further, distributors must build relationships with the food service equipment dealers, air-conditioning and refrigeration repair companies, and others that sell commercial ice machines to end-users. Building such relationships would take a significant amount of time and effort.

31. Reputation or brand recognition is another barrier to entry. Because commercial cube ice machines are so important to customers' operations, customers are reluctant to purchase machines from a company that has not established a reputation for making high-quality, durable machines. Establishing a track record of reliable performance takes years.

32. The technology involved in developing and manufacturing a commercial cube ice machine is a third significant entry barrier. The three current competitors produce—and customers expect and demand—commercial cube ice machines that last seven to ten years, that consistently produce ice that is clear and pure under conditions of varying water chemistries and air and water temperatures, and that meet federal and state energy regulations. Designing and manufacturing commercial cube ice machines that have these characteristics and are comparable in quality to the machines of the three current competitors would take years, even for firms that already produce other types of ice machines.

33. Therefore, entry or expansion by any other firm into the commercial cube ice machine market would not be timely, likely, or sufficient to defeat an anticompetitive price increase in the event that Manitowoc acquires Enodis.

VI. Violations Alleged

34. The proposed acquisition of Enodis by Manitowoc would substantially lessen competition and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

35. Unless restrained, the transaction will have the following anticompetitive effects, among others:

a. Actual and potential competition between Manitowoc and Enodis in the development, production, distribution, and sale of commercial cube ice machines in the United States will be eliminated;

b. Competition generally in the development, production, distribution, and sale of commercial cube ice machines in the United States will be substantially lessened; and

c. Prices for commercial cube ice machines in the United States likely will increase, the quality of commercial cube ice machines in the United States likely will decline, and innovation relating to commercial cube ice machines in the United States likely will decline.

VII. Request for Relief

36. Plaintiff requests that:

a. Manitowoc's proposed acquisition of Enodis be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. Defendants and all persons acting on their behalf be permanently enjoined and restrained 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 Manitowoc with the operations of Enodis;

c. Plaintiff be awarded its costs for this action; and

d. Plaintiff receive such other and further relief as the Court deems just and proper.

Respectfully submitted,

For Plaintiff United States of America:

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Dated: October 6, 2008.

Appendix A—Herfindahl-Hirschman Index Calculations

''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting

numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 (302 + 302 + 202 + 202 = 2,600). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,000 and 1,800 points are considered to be moderately concentrated and those in which the HHI is in excess of 1,800 points are considered to be highly concentrated. Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the U.S. Department of Justice and the Federal Trade Commission. *See Horizontal Merger Guidelines* § 1.51.

United States District Court for the District of Columbia

United States of America, Plaintiff, v. the Manitowoc Company, Inc., Enodis Plc, and Enodis Corporation, Defendants

Civil Action No.:

Description: Antitrust

Judge:

Date Stamp:

Proposed Final Judgment

Whereas, Plaintiff, the United States of America, filed its Complaint on October 6, 2008, the United States and defendants, The Manitowoc Company, Inc., Enodis plc, and Enodis Corporation, 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 law or fact;

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 and 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 hereby 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 the defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. ''Acquirer'' means the entity to whom defendants divest the Divestiture Business.

B. ''Enodis'' means defendant Enodis plc, a corporation registered in England and Wales with its headquarters in London, England, and Enodis Corporation, a Delaware corporation with its headquarters in New Port Richey, Florida, and their successors, assigns, parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and all of their directors, officers, managers, agents, and employees.

C. ''Manitowoc'' means defendant The Manitowoc Company, Inc., a Wisconsin corporation headquartered in Manitowoc, Wisconsin, its successors, assigns, parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and all of their directors, officers, managers, agents, and employees.

D. ''Closing Date'' means the date on which the transfer of the Divestiture Assets from the defendants to the Acquirer has been completed

E. ''Divestiture Business'' means Enodis's entire business engaged in the development, production, distribution, and sale of ice machines, ice machine parts, and related equipment (such as ice bins, ice dispensers, and water filtration systems) in the United States, including, but not limited to:

(1) Enodis's facility located in Fairfax, South Carolina, which is owned by Scotsman Group, Inc. (now known as Scotsman Group L.L.C.);

(2) Enodis's facility located in Vernon Hills, Illinois, which is leased by Scotsman Group, Inc. (now known as Scotsman Group L.L.C.);

(3) Enodis's facility located in Denver, Colorado, which is owned by Welbilt Corporation (now known as Enodis Corporation);

(4) Enodis's facility located in Pomona, California, which is leased by Scotsman Group, Inc. (now known as Scotsman Group L.L.C.);

(5) All tangible assets used in the Divestiture Business, including, but not limited to, all research and development activities; all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies, and other tangible property (including replacement hardware for the Vernon Hills, Illinois facility that defendants are required to purchase pursuant to Section II, Paragraph E below); all licenses, permits and authorizations issued by any governmental organization relating to the Divestiture Business; all contracts, teaming alTangements, agreements, leases, commitments, certifications, and understandings relating to the Divestiture Business, including, but not limited to, supply and distribution agreements; all customer lists, accounts, and credit records; all repair and performance records and all other records; and

(6) All intangible assets used in the development, production, distribution, and sale of ice machines, ice machine parts, and related equipment, including, but not limited to, all contractual rights (to the extent assignable), except for contracts that are not primarily for products or services used by the Divestiture Business; all rights under licenses, permits and authorizations issued by any governmental organization relating to the Divestiture Business; patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names (including any use of the name Scotsman or Ice-O-Matic in the United States), service marks, service names, technical information, computer software and related documentation (including replacement software and related documentation that defendants are required to purchase, and applications and data that defendants are required to transfer to hardware, for the Vernon Hills, Illinois facility pursuant to Section II, Paragraph E below), 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 defendants provide to their own

employees, customers, suppliers, agents or licensees; and all research data concerning historic and current research and development efforts (up to the Closing Date of the divestiture required by section IV or section V), including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments; except that the Divestiture Business shall not include the servers, applications, and related documentation located at the Vernon Hills, Illinois facility that are not used primarily in the operation of the Divestiture Business, provided that within 45 days after the filing of the Complaint in this matter, defendants take all steps necessary (including the purchase of replacement hardware, the purchase, licensing, or provision of software and related documentation, and the transfer of applications and data) to ensure that all information technology operations used by the Divestiture Business are maintained at levels of functionality equivalent or superior to the levels of functionality that exist as of the filing of the Complaint in this matter. Defendants shall also take all steps necessary to purge any data related to the Divestiture Business from hardware and backup media at Vernon Hills that will not be divested under this provision. The Divestiture Business shall not include the tangible or intangible assets comprising the Enodis facility in New Port Richey, Florida, with the exception of the following: (1) Any software, electronically stored information, or documents arising from research and development activities related to the ice machine business; (2) any assets used primarily in the operation of the ice machine business, or (3) any assets necessary for operation of the ice machine business.

F. ''Frimont Business'' means Enodis plc's Frimont S.p.A. business, which produces commercial ice machines for the European market and which the European Commission has required to be divested.

III. Applicability

A. This Final Judgment applies to Manitowoc and Enodis, 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 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 Business, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. Defendants are ordered and directed, within 150 calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Business in a manner consistent with this Final Judgment to a single Acquirer acceptable to the United States, in its sole discretion after consultation with the European Commission. The United States, in its sole discretion, may agree to one or more extensions of this tune 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 Business as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Business. Defendants shall inform any person making inquiry regarding a possible purchase of the Divestiture Business that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Business customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege 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.

C. Defendants shall provide the Acquirer and the United States information relating to all personnel involved in development, production, distribution, and sales related to the Divestiture Business to enable the Acquirer to make offers of employment Defendants will not interfere with any negotiations by the Acquirer to employ any employee whose primary responsibility is development, production, distribution, and sales related to the Divestiture Business, and will not interfere with negotiations by the Acquirer to employ the following three Enodis employees who work at the Vernon Hills, Illinois facility: (1) The Senior Business Analyst and Developer; (2) the Unix Administrator and Network Manager; and (3) the Computer Operator and Systems Specialist.

D. Defendants shall permit prospective Acquirers of the Divestiture Business to have reasonable access to personnel and to make inspections of the physical facilities of the Divestiture 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.

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

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Business. Defendants shall not exercise any contractual right to prevent, or otherwise attempt in any way to impede, sales or service representatives that represent Enodis in connection with the Divestiture Business from representing the Acquirer in the sale or servicing of products sold by the Divestiture Business.

G. Enodis shall warrant to the Acquirer that there are no material defects, and Manitowoc shall warrant that it is not aware of any material defects, in the environmental, zoning or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Business, defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Business

H. Notwithstanding anything to the contrary in this Final Judgment, at the option of the Acquirer, defendants shall enter into a transition services agreement for a limited period, with respect to information technology and other support services that are reasonably necessary to operate the Divestiture Business, with the scope, terms and conditions of such agreement being subject to the approval of the United States in its sole discretion.

I. At the option of the Acquirer, defendants shall use their best efforts to procure the assignment of contractual rights referenced in section II, Paragraph E(6) before the Closing Date of the divestiture required by section IV or section V.

J. Defendants shall not interfere with any effort by the Acquirer to negotiate a contract with any supplier of any product purchased by the Divestiture Business as of the filing of the

Complaint in this matter. If requested by the Acquirer:

(1) Defendants shall provide information or documentation relating to controllers, compressors, condensers, valves, and copper strips, or any other product customized for the Divestiture Business by any supplier, that are purchased by the Divestiture Business under contracts as to which the defendants are unable to secure effective assignment to the Acquirer or under contracts that are not primarily for products or services used by the Divestiture Business; and

(2) If the Acquirer is unable, prior to the Closing Date of the divestiture required by section IV or section V, to negotiate and enter into a contract, on commercially reasonable terms with a qualified and reliable supplier, providing for the Acquirer's supply of copper strips, or any other product for which an alternative supplier is not available as of the Closing Date, that have the same characteristics (or, so long as the product allows continuation of the Divestiture Business without disruption, having substantially the same characteristics) and are of the same, or superior, quality as those purchased by the Divestiture Business as of the filing of the Complaint in this matter, defendants shall purchase any such product on behalf of the Acquirer and resell it to the Acquirer at the price specified in defendants' supply contract as of the date of the purchase of the product for the Divestiture Business. This obligation shall expire upon the earlier of (1) the Acquirer or Divestiture Business having negotiated a contract of purchase of any such product meeting the criteria set forth above, (2) the Acquirer notifying defendants in writing that the Divestiture Business no longer intends to purchase any such product under this provision, (3) the expiration of the supply contract in accordance with the terms of that contract as they existed as of the date of the filing of the Complaint in this matter, or (4) one year after the date of the divestiture required under section IV or section V Defendants shall not discuss, provide, disclose, or otherwise make available, directly or indirectly, any information related to such purchases and resales to any defendant personnel involved in production, marketing, distribution, or sales of ice machines.

K. Unless the United States otherwise consents in writing, the divestiture pursuant to section IV, or by trustee appointed pursuant to section V, of this Final Judgment, shall include the entire Divestiture Business, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Business can and will be used by the Acquirer as part of a viable, ongoing business engaged in the development, production, distribution, and sale of commercial cube ice machines, ice machine parts, and related equipment in the United States. The divestitures, whether pursuant to section IV or section V of this Final Judgment, (1) shall be made to the acquirer of the Frimont Business; (2) shall be made to an Acquirer that, in the United States's sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the development, production, distribution, and sale of commercial cube ice machines, ice machine parts, and related equipment in the United States; and

(3) Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the 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 in the development, production, distribution, and sale of commercial cube ice machines, ice machine parts, and related equipment in the United States.

V. Appointment of Trustee

A. If defendants have not divested the Divestiture Business within the time period specified in section IV, Paragraph A, defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States, in consultation with the European Commission to enable selection of a trustee acceptable to both the United States and the European Commission, and approved by the Court to effect the divestiture of the Divestiture Business.

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

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance or that the Acquirer has not been approved by the European Commission. Any objection by defendants on the ground of the trustee's malfeasance must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under section VI; any objection by defendants based on lack of approval from the European Commission must be conveyed in writing to the United States and the trustee within two (2) business days after the European Commission notifies defendants that it does not approve of the proposed Acquirer.

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

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

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports

contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Business, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Business.

G. If the trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the 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 trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

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

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

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V, Paragraph 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 section V, Paragraph 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 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 V, defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (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 Business, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the Divestiture Business, 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 Business 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 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 Antitrust Division (''DOJ''), 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 responses 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 Reaction

Defendants may not reacquire any part of the Divestiture Business during the term of this Final Judgment.

XII. Retention of Jurisdiction

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

XIII. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (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's 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

United States District Court for the District of Columbia

United States of America, Plaintiff, v. The Manitowoc Company, Inc., Enodis PLC, and Enodis Corporation, Defendants

Civil Action No.:
Description: Antitrust
Judge:
Case: 1:08–cv–01 704
Assigned to: Kennedy, Henry H.
Assign. Date: 10/6/2008
Description: Antitrust

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

Defendant The Manitowoc Company, Inc. (''Manitowoc'') and Defendant Enodis plc entered into an agreement, dated April 14, 2008, and amended May 27, 2008, pursuant to which Manitowoc agreed to acquire the entire issued and to be issued ordinary share capital of Enodis plc. Manitowoc's final revised offer price was determined on June 30, 2008, when Manitowoc outbid a competing offer or during an auction process implemented by the Panel on Takeovers and Mergers of the United Kingdom.

The United States filed a civil antitrust Complaint on October 6, 2008, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially in the development, production, distribution, and sale of commercial cube ice machines in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in higher prices, lower quality, and less innovation in the commercial cube ice machine market.

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 Manitowoc, Enodis plc, and Enodis Corporation (Enodis plc and Enodis Corporation will hereinafter be collectively referred to as ''Enodis'') are required to divest Enodis's entire business engaged in the development, production, distribution, and sale of ice machines, ice machine parts, and related equipment in the United States (hereafter, the ''Divestiture Business''). Under the terms of the Hold Separate, defendants will take certain steps to ensure that the Divestiture Business is operated as a competitively independent, economically viable and ongoing business that 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 Proposed Transaction

Defendant Manitowoc is a Wisconsin corporation with its principal place of business in Manitowoc, Wisconsin. It is a global industrial equipment company that manufacturers commercial ice machines and related equipment, refrigeration equipment, cranes, and ships and other water vessels. In 2007, Manitowoc reported total sales of approximately $4 billion. Manitowoc's sales of commercial ice machines and related equipment in the United States were approximately $152 million in 2007.

Enodis plc is a corporation registered in the United Kingdom and Wales with its principal place of business in London, England. Enodis Corporation, a wholly owned subsidiary of Enodis plc, is a Delaware corporation with its

headquarters in New Port Richey, Florida. Through its global food service equipment group, Enodis designs, manufactures, and sells cooking, food storage and preparation equipment, and ice machines and related equipment. Enodis plc's revenues for its 2007 fiscal year were $1.6 billion. In its fiscal year 2007, Enodis plc's sales of commercial ice machines and related equipment in the United States were approximately $153 million.

On June 30, 2008, Manitowoc offered to acquire Enodis plc for 328 pence in cash per share, in a transaction valued at $2.7 billion (including assumed debt). The proposed transaction, as initially agreed to by defendants, would substantially lessen competition in the development, production, distribution, and sale of commercial cube ice machines in the United States. This transaction is the subject of the Complaint and proposed Final Judgment filed by the United States on October 6, 2008.

B. The Competitive Effects of the Transaction

1. Commercial Ice Machines Generally

Restaurants, convenience stores, hotels, and other businesses need significant volumes of ice. These businesses usually meet their needs by using commercial ice-making machines located at their places of business. These machines make ice by a continuous cycle of condensation and expansion of a refrigerant through a network of tubing. As the refrigerant converts from a compressed liquid state to become a gas, heat is drawn from a component called an evaporator. Water running over the evaporator surface freezes to form ice that is then harvested by processes specific to the type of ice produced by the machine.

2. Relevant Product Market

The type of ice machine purchased by a customer depends on the type and volume of ice needed. Commercial ice machines are designed to produce either hard ice or soft ice. Hard ice melts slowly and has a higher density and less surface area than soft ice. Hard ice is most often shaped as cubes or dice, half-cubes or half-dice, octagons, or crescent cubes, and is commonly referred to as cube ice. Most customers that serve ice in beverages prefer cube ice because it melts slowly and thus minimizes deterioration in the flavor of the beverage.

Soft ice refers to small nuggets or flakes of ice that have a lower density and more surface area than cube ice and, therefore, melt more quickly than cube ice. Soft ice is used in hospitals, which demand a safe, chewable ice for their patients, by grocery stores or other establishments to display seafood, produce, and other perishable food, and for industrial cooling applications. The prices of commercial ice machines producing soft ice are often 15 to 20 percent higher than prices of ice machines that produce comparable quantities of cube ice per day.

The Complaint alleges that in response to a small but significant post-acquisition increase in the price of commercial machines producing cube ice, customers would not switch to machines that make soft ice in sufficient numbers so as to make such a price increase unprofitable.

Customers vary greatly with respect to their daily needs of cubed ice, and they require machines having an appropriate range of capacity to meet those needs. A significant and distinct segment of cube ice machine customers, including sit-down and fast-food restaurants, bars, and convenience stores, purchase commercial machines capable of producing between approximately 300 pounds to 2,000 pounds of cube ice per day (hereinafter, ''commercial cube ice machines''). Although customers can purchase units that produce between approximately 50 and 300 pounds of ice per day, these machines are not able to meet the needs of the large majority of commercial cube ice machine customers. Few customers are likely to meet their needs by purchasing two or more smaller machines because it would be cost-prohibitive to do so. Similarly, large units that produce over 2,000 pounds of ice per day are not substitutes for commercial cube ice machines and are used by customers that need extremely large volumes of ice, such as convention centers, sports arenas, or bagged-ice producers.

The Complaint alleges that because of the attributes of commercial cube ice machines, a small but significant post-acquisition increase in the prices of commercial cube ice machines would not cause customers to switch to other ice machines in sufficient numbers so as to make such a price increase unprofitable, and, accordingly, the development, production, distribution, and sale of commercial cube ice machines is a line of commerce and a relevant product market:

3. Relevant Geographic Market

Commercial ice machines are complex and break down more frequently than other types of food service equipment, and customers often need quick access to replacement machines, parts, and service. Sales of commercial cube ice machines in the United States by manufacturers are primarily made to distributors that supply equipment dealers and repair companies who sell to end-users. In addition, these distributors typically train service representatives regarding repair and maintenance of the commercial ice machines, as well as manage warranty claims. In order to be a competitive supplier of commercial cube ice machines within the United States, manufacturers must have an established network of local distribution, service, and support.

The Complaint alleges that a small but significant increase in the prices of commercial cube ice machines would not cause a sufficient number of customers in the United States to turn to manufacturers of commercial cube ice machines that do not have an established a network of local distribution, service, and support in the United States. As a result, such manufacturers would not be able to constrain such an increase. Accordingly, the United States is a relevant geographic market.

4. Competitive Effects

The market for commercial cube ice machines is highly concentrated, and would become substantially more so if Manitowoc were to acquire Enodis. Manitowoc and Enodis are the two largest manufacturers of commercial cube ice machines in the United States. Manitowoc accounts for approximately 40 percent of the sales of commercial cube ice machines in the United States, and Enodis accounts for approximately 30 percent of such sales. Only one other company has demonstrated the ability to produce commercial cube ice machines of the same quality and with similar features as the Manitowoc and Enodis machines and has an established network of local distribution, service, and support in the United States.

Combined, Manitowoc and Enodis would account for approximately 70 percent of the sales of commercial cube ice machines in the United States. Using a measure of market concentration called the Herfindahl-Hirscbman Index (''HHI''), the proposed transaction would increase the HHI in the market for commercial cube ice machines by approximately 2,400 points to a post-acquisition level of approximately 5,500. This is well in excess of levels that raise significant antitrust concerns.

The vigorous and aggressive competition between Manitowoc and Enodis in the development, production, distribution, and sale of commercial cube ice machines has benefited customers. Manitowoc and Enodis

compete directly on price, quality, and innovation. Although commercial cube ice machine offerings are differentiated, many commercial cube ice machine customers view the Manitowoc and Scotsman brands as close substitutes for one another.

The proposed acquisition would eliminate the competition between Manitowoc and Enodis and reduce the number of significant manufacturers of commercial cube ice machines in the United States from three to two. The Complaint alleges that post-merger, Manitowoc would profit by unilaterally raising the price (or reducing quality and innovation) of one or more of the brands it would own. Although Manitowoc could lose some sales in that brand or brands as a result of such a price increase (or decline in quality and innovation), many sales would be diverted to one of the other brands under its ownership. Capturing such diverted sales would make a post-merger price increase (or reduction in quality and innovation) profitable, when it would not have been profitable before the merger. The response of other commercial cube ice machines manufacturers in the United States would not be sufficient to constrain a unilateral exercise of market power by Manitowoc after the acquisition because they do not have the incentive or the ability, individually or collectively, to do so. Therefore, the Complaint alleges, the proposed acquisition would enable Manitowoc to exercise market power unilaterally, lessen competition in the development, production, distribution, and sale of commercial cube ice machines in the United States, and lead to higher prices, lower quality, and less innovation for the ultimate consumers of commercial cube ice machines.

Further, successful entry or expansion into the development, production, distribution, and sale of commercial cube ice machines would be difficult, time-consuming, and costly. Firms attempting to enter or expand into the commercial cube ice machine market face a combination of distribution, reputation, and technology-related barriers to entry.

As noted above, customers need quick access to replacement ice machines and parts, and, as a result, the three significant commercial cube ice machine competitors each have a nationwide network of local distributors. These distributors maintain sizeable inventories at locations across the United States so as meet individual customer demands. The Complaint alleges that developing a nationwide distribution network would be difficult and time consuming. Finding good distributors would be difficult because each of the current three commercial cube ice machine competitors has contracted exclusively with a large majority of the sizeable and reputable distributors across the United States, and an existing or potential distributor likely would not agree to distribute a commercial ice machine unless it could be assured of a sufficient volume of sales of machines and parts to make a profit on the inventory and other investments it must make. Further, distributors must build relationships with the food service equipment dealers, air-conditioning and refrigeration repair companies, and others that sell commercial ice machines to end-users. Building such relationships would take a significant amount of time and effort.

The Complaint alleges that reputation or brand recognition is another barrier to entry. Because commercial cube ice machines are so important to customers' operations, customers are reluctant to purchase machines from a company that has not established a reputation for making high-quality, durable machines. Establishing a track record of reliable performance takes years.

The Complaint alleges that the technology involved in developing and manufacturing a commercial cube ice machine is a third significant entry barrier. The three current competitors produce—and customers expect and demand—commercial cube ice machines that last seven to ten years, that consistently produce ice that is clear and pure under conditions of varying water chemistries and air and water temperatures, and that meet federal and state energy regulations. Designing and manufacturing commercial cube ice machines that have these characteristics and are comparable in quality to the machines of the three current competitors would take years, even for firms that already produce other types of ice machines.

The Complaint alleges that as a result of these barriers to entry, entry or expansion by any other firm into the commercial cube ice machine market would not be timely, likely, or sufficient to defeat an anticompetitive price increase in the event that Manitowoc acquires Enodis.

III. Explanation of the Proposed Final Judgment

The divestiture requirement of the proposed Final Judgment will eliminate the likely anticompetitive effects of the acquisition in the development, production, distribution, and sale of commercial cube ice machines in the United States by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires defendants, within 150 days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as a viable ongoing business, the Divestiture Business, which comprises Enodis's entire business engaged in the development, production, distribution, and sale of ice machines ice machine parts, and related equipment in the United States. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the operations can arid will be operated by the 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 prospective purchasers.

In the event that defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. 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 his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her 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.

Described below are select provisions that have been included in the proposed Final Judgment to address special circumstances that exist in this case. Some provisions address complications arising from certain overlaps in divestitures required by the United States and the European Commission. Others address the fact that certain parts of the Divestiture Business must be severed from Enodis's other operations.

Selected Provisions of the Proposed Final Judgment

Enodis has information technology assets located at a data center within its Vernon Hills, Illinois facility that

supports various Enodis businesses, including the Divestiture Business. Definition II(D) of the proposed Final Judgment addresses the need to sever these joint information technology assets, excluding from the list of assets that form the Divestiture Business all hardware, software, and related documentation (''IT assets'') at this data center that is shared between the Divestiture Business and the other Enodis businesses. Defendants are required to divest IT assets used only by the Divestiture Business, and to purchase replacement IT assets for installation at Vernon Hills so that all information technology operations used by the Divestiture Business will be maintained at levels of functionality equivalent or superior to those which exist as of the filing of the Complaint. Definition II(D) also requires that any data or information related to the Divestiture Business will be purged from hardware and backup media that will not be divested. Section IV, Paragraph C of the proposed Final Judgment addresses the Acquirer's right to offer employment to three Enodis employees who provide information technology services and support to various Enodis businesses (including the Divestiture Business) from the Vernon Hills data center, but whose responsibilities do not relate primarily to the Divestiture Business as of the filing of the Complaint. These three employees are qualified to provide services and support that will enable the Acquirer to successfully operate the Vernon Hills data center post-divestiture.

The European Commission has required defendants to divest most of Enodis's worldwide ice machine assets, including the Divestiture Business. As a result of the practical difficulties of splitting between two acquirers rights to certain intellectual property shared by the Divestiture Business and Enodis plc's European Frimont Business, section IV, paragraph K of the proposed Final Judgment requires defendants to sell the Divestiture Business to the acquirer of the Frimont Business. Because the United States and the European Commission must approve the same acquirer, section IV, paragraph A of the proposed Final Judgment provides that the United States will consult with the European Commission in exercising its review of defendants' sale of the Divestiture Business in a manner consistent with the proposed Final Judgment, to an acquirer acceptable to the United States in its sole discretion. As noted above, if the defendants do not divest the Divestiture Business within the required time period, the Court, upon application of the United States, is to appoint a trustee to complete the divestiture. Because the European Commission also requires selection of a trustee if the divestiture is not completed within a certain time, section V, paragraph A of the proposed Final Judgment provides that the United States shall select a trustee after consultation with the European Commission to ensure selection of a trustee acceptable to both the United States and the European Commission.

The United States has agreed to a longer-than-usual divestiture period also because of the overlapping divestitures required by the European Commission. Not only must an Acquirer be approved by the Division and the European Commission, but any potential Acquirer likely must file notices with, and obtain antitrust clearances from, multiple European Union member countries (or file an application seeking the jurisdiction of the European Commission) in connection with the Acquirer's purchase of the Divestiture Business and other Enodis ice machine business assets worldwide. section IV, paragraph A of the proposed Final Judgment thus requires defendants to divest the Divestiture Business within 150 calendar days after the filing of the Complaint, or five (5) calendar days after notice of the entry of the final judgment by the court, whichever is later.[1]

Although contracts used in the Divestiture Business generally must be divested, certain contracts that are unassignable or are not primarily used by the Divestiture Businesses are not required to be divested. Section P1, paragraph J of the proposed Final Judgment addresses the Acquirer's need to find a source for certain input components typically purchased under such contracts. Subsection (1) requires that defendants provide the Acquirer information or documents relating to any product that is customized for the Divestiture Business and purchased under any such contract so the Acquirer has the information it may need to negotiate its own supply contract. Subsection (2) addresses the possibility that the Acquirer may be unable to negotiate its own contracts to purchase at commercially reasonable terms certain products for which alternative suppliers are not available as of the time of the divestiture. Subsection (2) requires defendants for a prescribed period to purchase and resell any such product to the Acquirer at the price specified in defendants' current supply contract. To prevent the sharing of information that could foster coordination, defendants are prohibited from disclosing, directly or indirectly, information concerning such purchases and resales to defendant personnel involved in production, marketing, distribution, or sales of commercial cube ice machines. The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the development, production, distribution, and sale of commercial cube ice machines in the United States.

[1] Quick divestitures have the clear benefits of restoring premerger competition to the marketplace as soon as possible, and of mitigating the potential dissipation of asset value associated with a lengthy divestiture process. Achieving these benefits are of as much importance in this matter as in any other, and section IV, paragraph A of the proposed Final Judgment requires defendants to use their best efforts to divest the Divestiture Business as expeditiously as possible. In this matter, and in most other matters, the United States. in its sole discretion, may agree to one or more extensions of the divestiture period not to exceed 60 calendar days in total.

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 and published in the **Federal Register**.

Written comments should be submitted to: Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H St., NW., Suite 3000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the 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 Manitowoc's acquisition of Enodis plc. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition in the development, production, distribution, and sale of commercial cube ice machines in the United States. 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, while allowing the non-problematic aspects of the transaction to go forward.

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 60-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)(l). 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).[2]

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) (citing *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). 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).[3] 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 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 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 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

[2] 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).

[3] 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' '').

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. 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. *Id.* at 1459–60. As this Court recently 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). The language written 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 Senator 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.[4]

[4] 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.*, 1977–1 Trade Cas. (CCH) § 61,508, at 71,980 (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, 93d Cong., 1st Sess., 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.'').

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: October 6, 2008.

Respectfully submitted,

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