Federal Regulations (CFR) at 50 CFR 18 require that we invite public comment before final action on these permit applications. Under the MMPA, you may request a hearing on any MMPA application received. If you request a hearing, give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Service Director.

III. Permit Applications

A. Endangered Species

Applicant: Dr. Michael A. Jarvis, Oregon Health and Sciences University, Portland, OR, PRT–01458A

The applicant requests a permit to acquire from Coriell Institute of Medical Research, Camden, NJ, in interstate commerce fibroblast cell line cultures from gorillas (*Gorilla gorilla*) for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Felix Staninoha, Houston, TX, PRT–093431

The applicant request renewal of their permit authorizing interstate and foreign commerce, export, and cull of excess male barasingha (*Recurvus duvauceli*) from their captive herd for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Douglas Wayne Swick, Fort Worth, TX, PRT–03756A

Applicant: Brian Charles Isham, Houston, TX, PRT–03194A

B. Endangered Marine Mammals and Marine Mammals

Applicant: U.S. Fish and Wildlife Service, Boquerón, PR, PRT–231088

The applicant requests a permit and a letter of authorization for the rescue, rehabilitation and release of unlimited number of stranded West Indian manatees (*Trichechus manatus*) in the waters of the United States, the import of rescued manatees, and import and export of biological specimens. This notification covers activities to be conducted by the applicant over a 5-year period.

Concurrent with publishing this notice in the **Federal Register**, we are forwarding copies of the above application to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

Dated: March 5, 2010.

Brenda Tapia,

Program Analyst, Branch of Permits, Division of Management Authority.

[FR Doc. 2010–5512 Filed 3–12–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States, et al. v. Election Systems and Software, Inc.; 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, et al.* v. *Election Systems and Software Inc.,* Civil Action No. 10–00380. On March 8, 2010, the United States filed a Complaint alleging that the proposed acquisition by Election Systems and Software, Inc., ("ES&S") of Premier Election Services, Inc., and PES Holdings, Inc. violated Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed the same time as the Complaint, requires ES&S to divest certain tangible and intangible assets.

Copies of the Complaint, proposed Final Judgment, 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, U.S. Department of Justice, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530 (telephone: 202–307–0924).

Patricia A. Brink,

Deputy Director of Operations.

United States District Court for the District of Columbia

CASE: 1:10–cv–00380
Assigned To: Bates, John D.
Assign Date: 3/8/2010
Description: Antitrust

UNITED STATES OF AMERICA Department of Justice, Antitrust Division, 450 5th Street, NW., Suite 8700, Washington, D.C. 20530; STATE OF ARIZONA Office of the Attorney General, 1275 West Washington, Phoenix, Arizona 85007; STATE OF COLORADO Office of the Attorney General, 1525 Sherman St., Seventh Floor, Denver, Colorado 80203; STATE OF FLORIDA Office of the Attorney General, PL–01, The Capitol, Tallahassee, Florida 32399; STATE OF MAINE Office of the Attorney General, 6 State House Station, Augusta, Maine 04333; STATE OF MARYLAND Office of the Attorney General, Antitrust Division, 200 St. Paul Place, 19th Floor, Baltimore, Maryland 21202; COMMONWEALTH OF MASSACHUSETTS Office of the Attorney General Martha Coakley, One Ashburton Place, Boston, Massachusetts 02108; STATE OF NEW MEXICO Office of the Attorney General of New Mexico, 111 Lomas Blvd. NW., Suite 300, Albuquerque, New Mexico 87102; STATE OF TENNESSEE Office of the Attorney General and Reporter, 425 Fifth Avenue North, Nashville, Tennessee 37243; and STATE OF WASHINGTON Office of the Attorney General, 800 Fifth Avenue, Suite 2000, Seattle, Washington 98104; *Plaintiffs*, v. ELECTION SYSTEMS AND SOFTWARE, INC. 11208 John Galt Boulevard, Omaha, Nebraska 68137; *Defendant.*

COMPLAINT

Plaintiffs, the United States of America ("United States"), acting under the direction of the Attorney General of the United States, and the States of Arizona, Colorado, Florida, Maine, Maryland, New Mexico, Tennessee, and Washington, and the Commonwealth of Massachusetts (the "Plaintiff States"), acting under the direction of their respective Attorneys General, bring this civil antitrust action against defendant Election Systems and Software, Inc. ("ES&S"), to obtain a permanent injunction and other relief to remedy the harm to competition caused by

ES&S's acquisition of Premier Election Solutions, Inc. and PES Holdings, Inc. (collectively, "Premier"). Plaintiffs allege as follows:

I. NATURE OF THE ACTION

1. ES&S is the largest provider of voting equipment systems in the United States. On September 2, 2009, ES&S acquired Premier, a subsidiary of Diebold, Inc. ("Diebold"), then the second largest provider of voting equipment systems in the United States. As a result of that acquisition, ES&S provides more than 70 percent of the voting equipment systems that registered voters rely on to vote in federal, state and local elections held in the United States.

2. Competition in the provision of voting equipment systems is critical to ensure that vendors continue to develop accurate, reliable and secure systems, and provide those systems to state, county and local election administrators at competitive prices.

3. ES&S's acquisition of Premier combined the two largest providers of voting equipment systems in the United States and the two firms that had been, for many customers, the closest bidders for the provision of voting equipment systems. As a result of this transaction, prices for voting equipment systems likely will increase, while quality and innovation likely will decline, as a consequence of reduced competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

II. THE DEFENDANT

4. Defendant Election Systems and Software, Inc. ("ES&S") is a Nebraska corporation with its headquarters in Omaha, Nebraska, and includes its successors and assigns, its subsidiaries, including Premier, and its divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees. Prior to its acquisition of Premier, ES&S was already the largest provider of voting equipment systems in the United States, had systems installed in at least 41 states, and collected revenue of $149.4 million in 2008. Premier, now an ES&S subsidiary, was the second largest provider of voting equipment systems in the United States prior to its acquisition, had equipment installed in 33 states, and collected revenue of approximately $88.3 million in 2008.

III. JURISDICTION AND VENUE

5. The United States brings this action against defendant ES&S under Section 15 of the Clayton Act, 15 U.S.C. § 25, as amended, to prevent and restrain ES&S from continuing to violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Each of the Plaintiff States brings this action under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain the violation by Defendant of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Plaintiff States, by and through their respective Attorneys General, or other authorized officials, bring this action in their sovereign capacities and as parens patriae on behalf of the citizens, general welfare, and economy of each of their states.

6. Defendant ES&S develops, sells and services voting equipment systems in the flow of interstate commerce. ES&S's activities in developing, selling and servicing voting equipment systems substantially affect interstate commerce. The Court has jurisdiction over this action and over the parties pursuant to 15 U.S.C. § 25 and 28 U.S.C. §§ 1331 and 1337.

7. ES&S transacts business, and has consented to venue and personal jurisdiction, in the District of Columbia. Venue is therefore proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

IV. BACKGROUND

8. In the wake of the 2000 Presidential Election, Congress enacted the Help America Vote Act (HAVA) to address perceived shortfalls in the accuracy, security and reliability of voting equipment. 42 U.S.C. 15301–15545 (2002). HAVA authorized funding of approximately $3.86 billion to encourage jurisdictions responsible for the administration of elections to replace mechanical voting devices such as lever and punch card machines with new electronic voting equipment systems. HAVA also created a new agency, the Election Assistance Commission (EAC), to adopt standards for and certify voting equipment systems to ensure their reliability and security. The EAC issued standards in 2002 and 2005, and those standards continue to evolve. HAVA also required that voting equipment systems contain devices that allow disabled voters to cast and verify their votes privately and independently. 42 U.S.C. 15481(a)(3)(A)–(B) (2002).

9. State law sets the certification requirements for any voting equipment system installed within a state. Most states require that voting equipment systems or the devices that comprise those systems be certified, either at the federal level by the EAC, or at the state level according to standards set by the election authorities of that state. State certification regimes may be more or less rigorous than that of the EAC, and some states require that a vendor be certified by both the EAC and the state's own process. A minority of states require neither federal nor state certification, but describe technical standards for vendors responding to requests for proposal ("RFP") for voting equipment systems.

10. Voting equipment systems are purchased either by a state agency or by an election board or official at the county or local level. A jurisdiction typically goes through an extensive public procurement process to identify the correct system to meet its needs and determine its preferred vendor. Before bids are seriously considered, vendors often must be qualified by meeting certain financial criteria. The procurement process for large, complex customers can span more than a year, involves extensive communications between the customer and vendors, typically requires public demonstrations of equipment, and often involves third-party consultants hired by the customer. As vendors proceed through the procurement process, they usually become more familiar with the needs of the customer and the competing vendors under consideration. Often, customers allow a discrete group of vendors to proceed to a best and final round, where vendors may revise the terms of their bids, including price terms, before a winning bid is selected.

11. Performance of voting equipment systems on Election Day is critical because the failure of a system, or any of the devices within a system, can affect the integrity of the democratic process, a failure that often cannot be remedied. Although certification testing of voting equipment systems and devices is designed to identify technical deficiencies, many certified devices have demonstrated security and accuracy problems when deployed in the field for an election. However, customers typically use voting equipment systems only once or twice every two years, so opportunities to test the reliability of equipment are few. As a result, an established record of successful voting equipment performance is of great importance to customers in evaluating the likely accuracy and reliability of a voting equipment system. Election administrators, who often are elected officials themselves, use successful past experience as one basis for judging the reliability of a voting equipment system.

12. The significant variation of election laws and practices among jurisdictions results in substantial differences in customers' technical requirements for their voting equipment systems. A jurisdiction's voting equipment system needs also may be

based on the number of registered voters; the density of population within geographic boundaries; the number of polling sites; accommodation of the needs of disabled voters; ballot complexity, including legal requirements for ballot design, and the number of different ballot layouts, languages, and political parties; frequency of elections; requirements for processing absentee ballots; timing of reporting results; and other issues.

13. Between 2002 and 2006, most states procured new voting equipment systems, exhausting their HAVA funds. Most of these jurisdictions anticipate that their new systems will last at least ten years. Given the current economic environment, many jurisdictions are considering attempts to extend the life of existing systems by investing in repair, service, and upgrades, in order to forestall the need to purchase new systems. However, a few states and several large counties anticipate purchasing a new voting equipment system in the next year or two. A number of other jurisdictions have relatively old voting equipment systems that may need to be replaced within the next several years.

14. Since 2005, several jurisdictions have required that voting equipment systems create a paper-based record of each vote cast, out of concern that the electronic audit component of some devices within the system was insufficiently secure to guarantee the accuracy of election results. Vendors believe this movement has created and will continue to create additional demand for new voting equipment systems over the next few years, despite the exhaustion of HAVA funding.

V. TRADE AND COMMERCE

A. The Relevant Product Market

15. A voting equipment system is the integrated collection of customized hardware, software, firmware and associated services used to electronically record, tabulate, transmit and report votes in an election. The number, variety, and operation of electronic components vary depending on the needs of the jurisdiction responsible for administering elections, which may be the state, county or local government, depending on state law.

16. A voting equipment system differs from the mechanical lever and punch card voting devices used in the past in conjunction with manual tabulation methods. Mechanical systems cannot accommodate speedy tabulation across a large number of voters; do not allow disabled voters the opportunity to cast an independent, private ballot; and are considered less accurate and reliable than voting equipment systems.

17. Hardware devices used to electronically record votes vary by recording method, and can be used for a variety of functions. These devices may include precinct or central count Optical Scan ("OS") devices; Direct Recording Electronic ("DRE") devices; and Ballot Marking Devices ("BMD"). In addition to the basic function of recording a vote cast on Election Day, these devices may be used to create a paper record of each vote, to allow independent voting by disabled voters, and to read votes cast by absentee or vote-by-mail voters. Depending on the needs of the jurisdiction, a voting equipment system may include only one type of device, or several different types of devices used in concert. All three types of recording devices feed votes into a tabulator, which counts each vote and prepares a report, with the assistance of associated software and firmware.

18. OS devices create a paper record of each vote and are commonly used to read absentee ballots, but cannot provide a completely private and independent voting experience for any disabled voter. OS devices require a voter to mark an individual paper ballot, which is then inserted into a scanner to be electronically read. Central Count OS devices, particularly high-speed, digital models, are commonly used to read ballots submitted by absentee or vote-by-mail voters. Most OS devices read and record voter marks as data, though some digital devices capture the actual image of the ballot, to better judge the intent of the voter. Typically, OS devices cannot fully enable a disabled voter to cast a ballot independently, as assistance in marking the ballot and transferring it to the ballot box is required.

19. DRE devices, sometimes referred to as touch screens, allow a voter to enter a vote by interfacing directly with a monitor screen, and some models are equipped with a device that creates a scrolling paper record of the votes recorded, often referred to as a Voter Verified Paper Trail. DRE devices allow disabled voters to cast their vote independently, so they often are provided exclusively for the use of disabled voters at polling places that may otherwise rely on OS equipment. DRE devices cannot be used to read ballots submitted by mail.

20. BMD's require a voter to insert an individual paper ballot into an electronic device, and then mark that ballot using a small monitor interface and specialized electronic pen. BMDs are designed to accommodate disabled voters, allowing the independent recording of a vote, but pollworker assistance still is required to transfer the marked ballot to the ballot box. BMDs cannot be used to read ballots submitted by mail.

21. The recording and tabulation devices contained within a voting equipment system are bound together by a collection of proprietary election management software and firmware. The software and firmware enables the operation of each device, communication between devices and reporting of the election results.

22. Jurisdictions purchase voting equipment systems bundled with a variety of services for the initial implementation and long-term service and support of the system. Initial implementation services often include project management, equipment delivery, administrator and pollworker training, and warrantees on devices. Post-implementation services include hardware, software and firmware maintenance agreements, and also may include annual services such as ballot layout, ballot printing, Election Day help-desk support and other Election Day services. Typically, any service that may require changes to hardware, software or firmware must be performed by the original vendor, or that vendor's licensed representative.

23. Jurisdictions evaluate competing bids to provide voting equipment systems based on compliance with state law, technical standards, certification standards, experience in other jurisdictions and commercial standards such as price, delivery schedule and other terms of sale. The combined technical and commercial needs of the customer differ for each voting equipment system bid.

24. A small but significant increase in the price that vendors bid to provide voting equipment systems to customers would not cause customers to substitute away from electronic voting equipment systems so as to make such a price increase unprofitable. Accordingly, voting equipment systems are a line of commerce and relevant product market within the meaning of Section 7 of the Clayton Act.

B. Geographic Market

25. In the United States, customers of voting equipment systems prefer suppliers with a substantial physical presence in the United States, including a network of sales, technical and support personnel and parts distribution.

26. Customers prefer such vendors because, during the design, bid, and implementation phases of installing a

new voting equipment system, customers interact with vendors to test system functionality, adjust technical specifications, correct design flaws, track progress and ensure successful implementation. Further, customers require that vendors have a significant local service presence to assist annually in the preparation for Election Day, and to immediately address system problems arising on Election Day.

27. A small but significant increase in the price of voting equipment systems would not cause a sufficient number of U.S. customers to turn to suppliers of voting equipment systems that do not have a substantial physical presence in the United States so as to make such a price increase unprofitable. Accordingly, the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

C. Anticompetitive Effects of the Acquisition

28. ES&S's acquisition of Premier united two firms that many customers considered the two closest competitors in the provision of voting equipment systems, with the likely effects of higher prices, a decline in quality and innovation and changes in other key elements that are considered detrimental by most U.S. customers in the evaluation of bids to provide voting equipment systems. ES&S and Premier were considered the closest competitors by many customers because the two companies offer systems certified in the greatest number of jurisdictions; offer a complete suite of voting equipment system products; and have a reputation for reliable equipment. Having acquired its closest competitor, ES&S will have a reduced incentive to compete as aggressively for bids or to invest in new products, unilaterally reducing the quality and increasing the price of voting equipment systems available to most jurisdictions.

29. Some customers identified ES&S and Premier as the only vendors qualified to meet the jurisdiction's certification requirements. For instance, ES&S and Premier are the only two vendors that offer EAC-certified voting equipment systems that include an OS device and a BMD. Indeed, at the time of the acquisition, ES&S and Premier were the only active vendors that had achieved EAC-certification at all. Likewise, ES&S and Premier voting equipment systems are certified or approved in 42 and 33 states, respectively; more states, by far, than any other vendor.

30. Prior to the acquisition, ES&S and Premier had the unique ability to offer a complete suite of voting equipment choices. An array of devices often is important to meet the goals of providing a paper-based system, accommodating disabled voters, and processing absentee ballots expeditiously. Because voting equipment systems use proprietary software, customers do not have the option of selecting the best in breed of each type of device from many vendors and integrating those pieces into a coherent system. A vendor that can offer a full complement of equipment choices within a given system often provides a benefit to the customer.

31. In order to better secure voting equipment systems that have been tested by past experience in similar jurisdictions, many customers view the past experience of a vendor's equipment as a key element in evaluating its bid. Moreover, the more that past experience replicates conditions anticipated in the customer's jurisdiction, the more it augurs for success. ES&S and Premier are two of only three vendors whose voting equipment systems have been deployed in multiple statewide implementations. Likewise, the two companies have the broadest range of past experiences to call upon, making them most likely to be the bidders with the most experience and the most relevant experience for any particular bid.

32. Only three other firms compete to provide voting equipment systems. None of these competitors is likely to replace the constraint Premier once exercised on ES&S's bidding behavior. Each of these firms is limited by the level of certification obtained, lack of a full product line, and the lack of proven equipment. At least one of these firms is also limited by the lack of financial ability to expand. None of these vendors shares the attributes that made Premier a close competitor to ES&S, and none is likely to substantially constrain ES&S's behavior in future bids.

33. In contrast, numerous jurisdictions have benefitted from vigorous price competition between ES&S and Premier in the past. ES&S and Premier were the first and second lowest bidders for recent bids let by states for statewide voting equipment systems. In at least three recent bids for county-wide voting equipment systems, each worth between $1 million and $6 million, ES&S and Premier were the closest bidders.

34. ES&S and Premier have been more successful than any other vendor in competing to meet the disparate requirements of U.S. customers, as evidenced by each company's portion of the installed base of voting equipment systems. Prior to the acquisition, ES&S was the incumbent provider to 47 percent of all registered voters in the United States, and Premier was the incumbent to 23 percent of all registered voters. As a result of its acquisition of Premier, ES&S became the incumbent for more than 70 percent of all registered voters in the United States.

35. One recent state-wide procurement illustrates the closeness of competition between ES&S and Premier, and how that competition restrained ES&S's bidding behavior. The state issued a long-anticipated set of RFPs for procurement of a new statewide voting equipment system that called for the provision of a system that included OS devices that had been tested by an EAC-certified laboratory. As part of the scoring methodology, the RFPs also required that bidders identify past installations of voting equipment systems, and describe the scope and complexity of the installed jurisdiction. ES&S anticipated Premier would be the front runner for this opportunity. In early 2009, ES&S projected that Premier would low-ball the bid, and gave serious consideration to changing its bid price in response. Six days before bids were due, ES&S acquired Premier. Bids were submitted on behalf of both Premier and ES&S, but the state could not consider the Premier bid as a result of ES&S's acquisition of and changes to Premier. No other vendor responded to this RFP, and ES&S was approved by the state board overseeing the procurement in December 2009.

36. The acquisition of Premier both ended its competitive influence on specific bids, and reduced ES&S's incentive to develop new products and upgrade existing products. In response to continuing concerns about the security and reliability of voting equipment systems, technical standards for voting equipment systems are constantly evolving. ES&S considered Premier the firm most responsive to these evolving certification standards, and elected to follow Premier's lead in the development of new products. For example, in the Fall of 2009, ES&S introduced its own digital scan high-speed OS central count device in response to a similar device introduced by Premier a year earlier. ES&S is unlikely to continue such innovation absent competition from Premier. Prior to its acquisition, Premier submitted an improved voting equipment system to certification authorities for testing in two states, but ES&S withdrew those applications following the acquisition. In the absence of competitive pressure from Premier, ES&S is unlikely to have the same incentive to develop new products in the future.

37. ES&S's acquisition of Premier, therefore, likely will substantially lessen competition in the United States market for voting equipment systems, which likely will lead to higher prices, lower quality and less innovation in violation of Section 7 of the Clayton Act.

D. Difficulty of Entry Into the Provision of Voting Equipment Systems

38. Successful entry into the provision of voting equipment systems is challenging, time-consuming, and costly. Entry requires not only the design and development of hardware, software and firmware products, but also obtaining multiple levels of certification, establishing a reputation for reliable performance, and financial wherewithal sufficient to assure a buyer of long-term service capabilities.

39. EAC certification may cost more than $1 million for each system certified, and may take fifteen to twenty-four months. These costs are in addition to internal development costs, estimated at $2.5 to $5 million. Previous certification attempts by established companies such as Premier have consumed more than $3 million and required three years. For at least three of the largest state jurisdictions, certification requires an additional investment of time and money. ES&S, for instance, spent approximately $4 million to become certified in one state. Other states may be even more rigorous, requiring that voting systems be certified both by the EAC and by the state.

40. Certification alone is not sufficient for a company that does not have equipment with a proven record of reliable performance. One company recently obtained 2005 EAC-certification for its new OS device, after two years of product development and testing, and an investment of millions of dollars. Despite the time and money invested, the company has yet to sell a single certified device.

41. Given the time and expense required for certification, the long lifecycle of voting equipment systems, the time required to demonstrate reliable performance of equipment, and the absence of ready capital to fund new investment in the voting equipment system industry, entry into the provision of voting equipment systems would not be timely, likely and sufficient to prevent an exercise of market power by ES&S.

VI. VIOLATION ALLEGED

42. ES&S's acquisition of Premier substantially lessened competition in the U.S. market for voting equipment systems in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

43. This acquisition has had the following anticompetitive effects, among others:

a. competition between ES&S and Premier in the provision of voting equipment systems in the United States has been eliminated;

b. competition generally in the provision of voting equipment systems in the United States has been substantially lessened; and

c. prices will likely increase, quality will likely decrease, and innovation will be less likely.

VII. REQUESTED RELIEF

44. Plaintiffs request that this Court:

a. Adjudge and decree that the Defendant ES&S's acquisition of Premier violated Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. Compel ES&S to divest Premier assets related to the development, manufacture and sale of the relevant products to enable independent and effective competition;

c. Award such temporary and preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of the dissipation of Premier's tangible and intangible assets during the pendency of this action and to preserve the possibility of effective final relief;

d. Award the Plaintiffs the cost of this action; and

e. Grant the Plaintiffs such other and further relief as the case requires and the Court deems just and proper.

Dated: March 8, 2010.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

/s/ _____
Molly S. Boast,
Acting Assistant Attorney General.

/s/ _____
Patricia A. Brink,
Deputy Director of Operations.

/s/ _____
Maribeth Petrizzi,
Assistant Chief, Litigation II Section, D.C. Bar # 435204.

/s/ _____
Dorothy B. Fountain,
Assistant Chief, Litigation II Section, D.C. Bar #439469.

Stephanie A. Fleming, James K. Foster, Erin Carter Grace, Blake Rushforth,
Attorneys, U.S. Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, D.C. 20530, Tel: (202) 514–9228, Fax: (202) 514–9033, Email: Stephanie.Fleming@usdoj.gov.

CERTIFICATE OF SERVICE

I, Stephanie Fleming, hereby certify that on March 8, 2010, I caused a copy of the Complaint to be served on defendant Election Systems and Software, Inc., by mailing the document via email to the duly authorized legal representative of the defendant, as follows:

FOR ELECTION SYSTEMS & SOFTWARE, INC.
Joseph G. Krauss, Hogan & Hartson LLP, 555 Thirteenth Street, NW., Washington, DC. 20004, (202) 637–5600, *jgkrauss@hhlaw.com*

/s/ _____
Stephanie A. Fleming, Esq.
United States Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, D.C. 20530, (202) 514–9228, (202) 514–9033, stephanie.fleming@usdoj.gov

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CASE NO.:
JUDGE:
DECK TYPE: Antitrust
DATE STAMP:

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. ELECTION SYSTEMS AND SOFTWARE, INC., *Defendant.*

FINAL JUDGMENT

WHEREAS, Plaintiffs, the United States of America ("United States"), the States of Arizona, Colorado, Florida, Maine, Maryland, New Mexico, Tennessee, and Washington, and the Commonwealth of Massachusetts (the "Plaintiff States"), filed their Complaint on March 8, 2010; Plaintiffs and Defendant, Election Systems and Software, Inc., 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, Defendant agrees 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 Defendant to restore competition;

AND WHEREAS, the United States requires Defendant to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendant has represented to the United States that the

divestiture required below can and will be made and that it 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 Defendant 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 Defendant divests the Divestiture Assets.

B. "ES&S" means Defendant, Election Systems & Software, Inc., a Delaware corporation with its headquarters in Omaha, Nebraska, its successors and assigns, its subsidiaries, including Premier Election Solutions, Inc. and PES Holdings, Inc., both Delaware corporations (collectively, "Premier"), and its divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Premier Voting Equipment System Products" means all versions, past, present, and in development, of Premier hardware, software, and firmware used to record, tabulate, transmit or report votes, including all such systems certified by federal certification authorities (including, but not limited to the Assure 1.2 system that was certified by the United States Election Assistance Commission on August 6, 2009), and all such systems certified by the election authorities of any state.

D. "AutoMARK Products" means ES&S's ballot marking device that allows voters with disabilities to privately and independently mark a ballot.

E. "Divestiture Assets" means:

(1) all intangible assets related to the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products, including, but not limited to, intellectual property (including, but not limited to, patents, patent applications, licenses, sublicenses, copyrights, databases containing design information and, with respect to the Assure 1.2 suite of products only, trademarks, trade secrets, trade names, service marks, service names, slogans, domain names, logos and trade dress); the unregistered trademark "Premier"; data related to the use, operation, certification testing, internal testing, and beta testing; documentation of pending and current certification efforts with the United States Election Assistance Commission ("EAC") and the election authorities of any state; technical information, software, software source code and related documentation, know-how, drawings, blueprints, designs, design tools and simulation capability, and specifications for materials, parts, and devices; safety procedures for the handling of materials and substances; quality assurance and control procedures; all manuals, performance, financial, operational, and other records Defendant provides to its own employees, customers, suppliers, agents, dealers or licensees; and all available research data concerning historic and current research and development efforts relating to the Premier Voting Equipment System Products, including, but not limited to, designs of experiments and the results of successful and unsuccessful designs and experiments;

(2) tangible assets, including:

(a) all tooling and fixed assets owned by Defendant and used in connection with the manufacture, assembly, production, service and repair of the Premier Voting Equipment System Products, as detailed in Section 2.7 and Schedule 2.7(a) of the Purchase Agreement by and among ES&S, Diebold, Inc., Premier Election Solutions, Inc., PES Holdings, Inc., and Premier Election Solutions Canada ULC, dated September 2, 2009 ("Diebold Purchase Agreement").

(b) inventory, parts and components for both the Premier Voting Equipment Products and the AutoMARK Products, including those that are not commercially available, sufficient for the Acquirer to assemble, manufacture, produce, service and repair the Premier Voting Equipment System Products and the AutoMARK Products.

(3) a fully paid-up, non-exclusive, perpetual, transferable license to certify, produce, modify, enhance, distribute, sell, repair and service the AutoMARK Products. Such license shall include all intellectual property (including, but not limited to, patents, patent applications, licenses, sublicenses, copyrights, trademarks, trade names, trade secrets, service marks, service names, slogans, domain names, logos, and trade dress), data, drawings, ideas, concepts, know-how, procedures, processes, technical information, software, software source code and related documentation, blueprints, specifications, manuals, and any other intangible assets related to the use, operation, certification, production, modification, enhancement, distribution, sale, repair or service of the AutoMARK Products.

III. APPLICABILITY

A. This Final Judgment applies to ES&S, as defined above, and all other persons in active concert or participation with it 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, Defendant sells or otherwise disposes of all or substantially all of its assets or of lesser business units that include the Divestiture Assets, it shall require the purchaser to be bound by the provisions of this Final Judgment. Defendant need not obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

IV. DIVESTITURE

A. Defendant is ordered and directed, within sixty (60) 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 Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion, after consultation with the Plaintiff States. The United States, in its sole discretion, after consultation with the Plaintiff States, 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. Defendant agrees to use its best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, Defendant promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendant shall inform any person making 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. Defendant shall offer to furnish to any prospective Acquirer, 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 privilege or work-product doctrine. Defendant shall make available such information to the

United States at the same time that such information is made available to any other person.

C. Defendant shall provide the Acquirer and the United States information relating to its current and former employees involved in the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products and/or Premier's use of the AutoMARK Products to enable the Acquirer to make offers of employment to such personnel. Defendant shall not interfere with any negotiations by the Acquirer to employ any such employee whose primary responsibility is the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products and/or Premier's use of the AutoMARK Products.

D. Defendant shall waive all nondisclosure and noncompete agreements for all of the current and former employees of Premier for a period of six (6) months following the date of the divestiture of the Divestiture Assets, for the exclusive purpose of allowing those employees to seek employment with the Acquirer.

E. Defendant shall permit any prospective Acquirer of the Divestiture Assets to have reasonable access to personnel involved in the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products and/or the AutoMARK Products, and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. At the option of the Acquirer, Defendant shall enter into a contract for the purchase of additional parts and inventory for up to two (2) years sufficient to meet the Acquirer's needs to assemble, manufacture, produce, service or repair the Premier Voting Equipment System Products. The terms and conditions of any sale or contractual arrangement intended to satisfy this provision must be commercially reasonable.

G. In addition, Defendant shall provide any Acquirer of the Divestiture Assets information relating to suppliers of parts and components used for the assembly, manufacture, production, repair or service of the Premier Voting Equipment System Products and the AutoMARK Products. Defendant shall not interfere with the Acquirer's ability to contract for the supply of parts or components from any vendor.

H. Defendant shall immediately provide any Acquirer with a list of all current and former customers for the Premier Voting Equipment System Products.

I. To the extent that current Premier contracts prevent Premier customers from selecting the Acquirer as its provider of equipment or services related to the Premier Voting Equipment System Products, the Defendant agrees to waive any such contractual impediment at the option of the customer.

J. At the option of the Acquirer, Defendant shall enter into a transition services agreement sufficient to meet the Acquirer's needs for assistance in the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products and/or the AutoMARK Products for a period of up to six (6) months. The terms and conditions of any contractual arrangement intended to satisfy this provision must be commercially reasonable.

K. On the date of the sale of the Divestiture Assets, Defendant shall provide Acquirer with copies of contracts with all current and former customers for any of the Premier Voting Equipment System Products.

L. The Acquirer shall grant Defendant a non-exclusive license to use the Premier Voting Equipment System Products and the assets described in II(E)(2)(A), but Defendant may not use such a license to attempt to compete for any opportunity to sell or lease Premier Voting Equipment System Products contained within a Request for Proposal (or RFP) or a Request for Quote (or RFQ) for a voting equipment system, or any upgrade, request or order that calls for replacement of 50 percent or more of a customer's installed voting equipment, other than in the case of a force majeure event (i.e., Act of God, fire, earthquake, flood, explosion, war, or terrorist act), or to the extent the Defendant is obligated under a contract with a Premier or Diebold customer in existence at the time of Closing, or to the extent that the Defendant is obligated under a settlement agreement formed by Diebold pursuant to Section 4.2(d) of the Diebold Purchase Agreement. Subject to the limitations described in Section IV, Defendant may use the license described in this paragraph to provide equipment and services to current customers.

M. Any improvement or modification to the Divestiture Assets developed by either Defendant or the Acquirer shall be owned solely by the developing party.

N. Defendant shall not take any action that will impede in any way the operation or divestiture of the Divestiture Assets.

O. Unless the United States, in its sole discretion, after consultation with the Plaintiff 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 Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, after consultation with the Plaintiff States, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business that is engaged in the provision of voting equipment systems and services. The divestiture, whether pursuant to Section IV or Section V of this Final Judgment:

(1) Shall be made to an Acquirer that, in the United State's sole judgment, after consultation with the Plaintiff States, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the provision of voting equipment systems and services; and

(2) Shall be accomplished so as to satisfy the United States, in its sole discretion, after consultation with the Plaintiff States, that none of the terms of any agreement between an Acquirer and Defendant gives Defendant 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 Trustee

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

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States, in its sole discretion, after consultation with the Plaintiff States, at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of

this Final Judgment, the trustee may hire at the cost and expense of Defendant 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. Defendant shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendant must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of Defendant, 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 Defendant 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 Assets 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. Defendant shall use its 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 Defendant 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. Defendant 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, the Plaintiff 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 Assets, 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 Assets.

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 and the Plaintiff 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, Defendant shall notify the United States, and the Plaintiff States, of any proposed divestiture required by Section IV of this Final Judgment. Within two (2) business days following execution of a definitive divestiture agreement, the trustee shall notify the United States of any proposed divestiture required by Section V of this Final Judgment. 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 and the Plaintiff States of such notice, the United States and any Plaintiff State may request from Defendant, 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. Defendant 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 Defendant, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States, in its sole discretion, after consultation with the Plaintiff States, shall provide written notice to Defendant and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States, after consultation with the Plaintiff States, provides written notice that it does not object, the divestiture may be consummated, subject only to Defendant's limited right to object to the sale under Section 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 Defendant under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. FINANCING

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

VIII. ASSET PRESERVATION

Until the divestiture required by this Final Judgment has been accomplished, Defendant shall take all steps necessary to comply with the Asset Preservation Stipulation and Order entered by this Court. Defendant 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, Defendant shall deliver to the United States, the Plaintiff 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 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 Defendant 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, after consultation with the Plaintiff States, to information provided by Defendant, 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, Defendant shall deliver to the United States an affidavit that describes in reasonable detail all actions it has taken and all steps Defendant has implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendant shall deliver to the United States, the Plaintiff States, an affidavit describing any changes to the efforts and actions outlined in Defendant's earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendant 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 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 ("Antitrust Division"), 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 Defendant, be permitted:

(1) Access during Defendant's office hours to inspect and copy, or at the option of the United States, to require Defendant to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendant, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendant's 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 Defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendant 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, or to the Attorneys General of any of the Plaintiff 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 Defendant to the United States, Defendant represents and identifies 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 Defendant marks 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 Defendant ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. NOTIFICATION

Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), Defendant, without providing advance notification to the Antitrust Division, the Plaintiff States, shall not directly or indirectly acquire any assets of or any interest (including, but not limited to, any financial, security, loan, equity, or management interest) in any entity engaged in the provision of voting equipment systems and services in the United States during the term of this Final Judgment.

Such notification shall be provided to the Antitrust Division, the Plaintiff States, in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions must be provided only about voting equipment systems and services. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If, within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, Defendant shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XII. NO REACQUISITION

Defendant may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. 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.

XIV. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XV. 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 responses 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

CASE: 1:10–cv–00380
Assigned To: Bates, John D.
Assign Date: 3/8/2010
Description: Antitrust

UNITED STATES OF AMERICA, *et al., Plaintiffs,* v. ELECTION SYSTEMS & SOFTWARE, Inc., *Defendant.*

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 Election Systems and Software, Inc. ("ES&S") executed a Purchase Agreement on September 2, 2009, pursuant to which ES&S agreed to acquire Premier Election Solutions, Inc. and PES Holdings, Inc. (collectively, "Premier"), and other subsidiaries of Diebold, Inc ("Diebold"). ES&S's acquisition of Premier was consummated on the same day. Since the acquisition, Premier no longer functions as an independent subsidiary, but has been integrated into ES&S's corporate structure.

The United States and the States of Arizona, Colorado, Florida, Maine, Maryland, New Mexico, Tennessee, and Washington, and the Commonwealth of Massachusetts (the "Plaintiff States"), filed a civil antitrust Complaint on March 8, 2010, seeking injunctive and other relief to remedy the likely anticompetitive effects arising from ES&S's acquisition of Premier. The Complaint alleged that the acquisition combined the two largest providers of voting equipment systems in the United States, and the two firms that had been, for many customers, the closest bidders for the provision of voting equipment systems. This combination resulted in a substantial reduction in competition for the provision of voting equipment systems in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The loss of Premier as an independent competitor likely would result in higher prices, a reduction in quality, and less innovation in the U.S. voting equipment systems market.

At the same time the Complaint was filed, the United States filed an Asset Preservation Stipulation and Order ("APSO") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of ES&S's consummated acquisition of Premier. Under the proposed Final Judgment, which is explained more fully below, ES&S is required to divest all of the assets needed for an acquirer to compete to provide voting equipment systems, including the intellectual property related to the Premier voting equipment systems that it purchased from Diebold; the tooling and fixed assets used to manufacture those systems; and existing inventory and parts related to the Premier voting equipment systems (collectively, "Divestiture Assets"). In addition, ES&S is required to divest a fully paid-up, non-exclusive, irrevocable license to ES&S's AutoMARK products. Under the proposed Final Judgment, only the Acquirer may offer Premier systems to compete for a new voting equipment system procurement, including orders that would require replacement of more than fifty percent of an installed system. To facilitate the Acquirer's ability to service the existing installations of Premier voting equipment systems, the proposed Final Judgment also requires that ES&S waive all non-competition agreements for employees and waive any contractual terms that would otherwise prevent customers from selecting the Acquirer as their voting equipment system service provider. ES&S must also provide transition services to the Acquirer. Under the terms of the APSO, ES&S will take certain steps to ensure that the Divestiture Assets are preserved in their current condition and segregated from ES&S.

The United States and ES&S 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 Final Judgment until the divestiture is consummated and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS

A. The Defendant

Election Systems and Software, Inc. is the largest provider of voting equipment systems in the United States. Prior to its acquisition of Premier, ES&S provided 47 percent of installed systems, in at least 41 states, and collected revenue of $149.4 million in 2008. Premier, now an ES&S subsidiary, was the second largest provider of voting equipment systems in the United States prior to its acquisition, with approximately 23 percent of all installed systems in 33 states, and collected revenue of approximately $88.3 million in 2008. On September 2, 2009, ES&S acquired Premier and other Diebold Inc., subsidiaries, for $5 million in cash, and 70 percent of certain receivables.[1]

B. The Competitive Effects of the Acquisition on the U.S. Market for Voting Equipment Systems

1. Relevant Markets

Since the 2002 implementation of the Help America Vote Act ("HAVA"), 42 U.S.C. 15301–15545, most Americans rely on voting equipment systems to electronically cast their votes in local, state and federal elections. HAVA authorized funding for voting equipment systems to replace mechanical voting devices, such as lever and punch card machines, and established a new federal certification agency, the Election Assistance Commission (EAC), in order to ensure the accuracy, security and reliability of the voting process. Id. The EAC issued standards for voting equipment systems in 2002 and 2005, and those standards are continually evolving. HAVA also required that the voting equipment systems provide disabled voters the opportunity to cast a private and independent ballot. 42 U.S.C. 15481(a)(3)(A)–(B) (2002).

A voting equipment system consists of the integrated collection of customized hardware, software, firmware and associated services used to electronically record, tabulate, transmit and report votes in an election. Hardware components may include recording devices such as precinct or central count Optical Scan ("OS") machines; Direct Recording Electronic

[1] Because the purchase price for this transaction fell below the reporting thresholds of the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976, ES&S was not required to report the acquisition to the Department of Justice or the Federal Trade Commission before consummation. See 15 U.S.C. § 18a(a)(2)(B)(i) (2000); 75 Fed. Reg. 3468 (Jan. 21, 2010).

("DRE") machines; and Ballot Marking Devices ("BMD"). Recording devices may be used not only to cast votes, but also to create a paper record of each vote, to allow independent voting by disabled voters, and to read votes cast by absentee or vote-by-mail voters. Depending on the needs of the jurisdiction, a voting equipment system may include only one type of device, or several different types of devices used in concert. Each type of recording device feeds votes into a tabulator, which counts each vote and prepares a report. All devices are bound together by a collection of proprietary election management software and firmware, which enables their operation and the communication and reporting of election results.

The number, variety, and operation of electronic components within a voting equipment system vary depending on the needs of the jurisdiction responsible for administering elections, which may be the state, county or local government, depending on state law. Voting equipment systems typically are sold to state, county and municipal jurisdictions, pursuant to request for proposals. The jurisdictions typically evaluate competing bids using a public procurement process and select a winning bid based on its compliance with state law, technical standards, certification standards, experience in other jurisdictions and commercial terms, such as price, delivery schedule and other conditions of sale. The combined technical and commercial needs vary among customers. Most successful bids also include multi-year service agreements.

A voting equipment system differs from the mechanical lever and punch card voting devices used in the past in conjunction with manual tabulation methods. Mechanical systems cannot accommodate speedy tabulation across a large number of voters; do not allow disabled voters the opportunity to cast an independent, private ballot; and are considered less accurate and reliable than voting equipment systems.

A small but significant increase in the price that vendors bid to provide voting equipment systems to customers would not cause customers to substitute away from electronic voting equipment systems so as to make such a price increase unprofitable. Accordingly, the Plaintiffs allege that voting equipment systems are a relevant product market within the meaning of Section 7 of the Clayton Act.

In the United States, customers of voting equipment systems prefer suppliers with a substantial physical presence in the United States, including a network of sales, technical and support personnel and parts distribution. Customers prefer such vendors because, during the design, bid, and implementation phases of installing a new voting equipment system, customers interact with vendors to test system functionality, adjust technical specifications, correct design flaws, track progress and ensure successful implementation. A significant local service presence also is required to assist annually in the preparation for Election Day, and to address immediately system problems arising on Election Day.

A small but significant increase in the price of voting equipment systems in the United States would not cause a sufficient number of U.S. customers to turn to suppliers of voting equipment systems that do not have a substantial physical presence in the United States so as to make such a price increase unprofitable. Accordingly, the Plaintiffs allege that the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

2. Anticompetitive Effects

ES&S's acquisition of Premier combined two firms that many customers considered the two closest competitors in the provision of voting equipment systems, and the two largest providers of U.S. voting equipment systems, substantially reducing competition for the provision of voting equipment systems in the United States. As a result of ES&S's acquisition of its closest competitor, ES&S has a reduced incentive both to compete as aggressively for bids and to invest in new products, thereby increasing the price and reducing the quality of the voting equipment systems available to most jurisdictions.

Prior to the acquisition, ES&S and Premier were considered the closest competitors by many customers because the two companies offered voting equipment systems certified in the greatest number of jurisdictions; offered a complete suite of voting equipment system products; had a reputation for reliable equipment; and enjoyed an incumbent vendor's expertise on election administration in several jurisdictions. ES&S and Premier were certified in more states by far than any other vendor, and were the only two active vendors with EAC certification at the time of the acquisition. Prior to the acquisition, ES&S and Premier also offered two of the most complete suites of voting equipment choices, an important factor for many jurisdictions because proprietary election management software prevents customers from selecting the best in breed of each type of device. Further, ES&S and Premier voting equipment systems had the broadest installed bases prior to the acquisition, which helped assure customers that the systems were proven by experience in the field. A proven voting equipment system is an important consideration for many customers because, although certification testing is designed to screen out technical problems, even certified machines have demonstrated security and accuracy problems when deployed in an actual election, which can undermine the integrity of the democratic process. In addition to supplying customers with proven equipment, ES&S and Premier employees provided a variety of valuable services to their customers, which gave the companies greater familiarity with the needs of each customer, and a resulting advantage in competing to sell each customer a new installation in the future.

A number of recent bid events substantiate the close competition between ES&S and Premier prior to the acquisition, and demonstrate that ES&S has responded to Premier's competition by reducing its own prices and offering other favorable terms. ES&S's acquisition of Premier eliminated ES&S's strongest competitor and, as a result, has given ES&S both the incentive and ability to profitably raise its bid prices significantly above the level they would be absent the acquisition. The remaining three competitors, limited by the lack of a full product line, inadequate certification, a limited record of proven equipment and, in at least one case, lack of financing, cannot fully constrain a unilateral exercise of market power by ES&S.

The acquisition of Premier also reduces ES&S's incentive to develop new, more accurate, and more secure voting equipment system products. In the past, ES&S has responded to Premier's efforts to meet new standards by following Premier's lead in the development of new products. The acquisition removes the firms' competitive pressure on each other to innovate, and is likely to reduce the quality and variety of new products brought to the market, reducing the choices offered to customers. Since its acquisition of Premier, ES&S has already withdrawn Premier products from certification testing in two states. In the absence of competitive pressure from Premier, ES&S is unlikely to have the same incentive to develop new products in the future.

Finally, entry or expansion by any other firm into the U.S. market for the provision of voting equipment systems is unlikely to prevent the substantial lessening of competition resulting from ES&S's acquisition of Premier. Firms attempting to enter into the development, production, and sale of voting equipment systems in the United States face several barriers that make successful entry challenging, time-consuming, and costly. Entry requires not only the design and development of hardware, software and firmware products, but also obtaining multiple levels of certification, establishing a reputation for reliable equipment performance, and the financial wherewithal sufficient to assure a buyer of long-term service capabilities. The design and development of technology requires a considerable, risky capital investment over a period of several years. Most jurisdictions also require that vendors obtain federal and/or state certification, which can cost millions and take multiple years to complete. In addition, firms must establish a reputation for reliable system performance. As most voting equipment systems are used only once or twice every two years, establishing a reputation for reliable system operation takes several years of successful performance. Finally, providers of voting equipment systems must demonstrate both that they are financially sound and that they will respond quickly and effectively to requests for service or parts for many years after a new voting equipment system has been installed.

Therefore, ES&S's completed acquisition of Premier likely will substantially lessen competition in the United States market for voting equipment systems, which likely will lead to higher prices, lower quality and less innovation in violation of Section 7 of the Clayton Act.

III. *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 Defendant. The United States could have continued the litigation and sought a permanent injunction requiring that ES&S divest the Premier assets and voting securities. However, the acquisition of Premier by ES&S was consummated before the United States learned of the transaction and could commence an investigation. Given the diminution of the Premier assets since ES&S acquired the company, relief that replicates the condition of Premier prior to the acquisition is not available. Premier operated as an independent subsidiary of Diebold prior to the acquisition. After ES&S acquired the company, it dismantled the business units necessary for independent operation, subsuming Premier operations into the ES&S corporate structure. Less than a month after the acquisition, the Premier business units responsible for sales, product design and development, and voting equipment system certification all were dismantled, and most employees of these business units were terminated. While ES&S continues to serve current Premier customers, it does so with the assistance of ES&S resources, staffing and operations. Consequently, unwinding the transaction to require a divestiture of only Premier voting securities and remaining assets would not be sufficient to restore the Premier entity that existed prior to ES&S's acquisition of the company.

Further, the litigation process would likely take considerable time. The Premier assets likely would diminish substantially during the pendency of litigation, particularly as preliminary relief is not available to compel ES&S to invest in ongoing research, development and certification of future Premier voting equipment systems. Even if a court ultimately ordered a divestiture, the delay would diminish, if not forestall, the competitive value of the Premier assets in the hands of a divestiture buyer because the standards for voting equipment systems would have evolved away from Premier's current line of products. The United States is satisfied that the proposed Final Judgment has allowed the government to secure relief more quickly than if the matter had gone to litigation, and that the divestiture of the assets described in the proposed Final Judgment will preserve competition for the provision of voting equipment systems in the United States. Thus, the proposed Final Judgment will 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.

IV. *EXPLANATION OF THE PROPOSED FINAL JUDGMENT*

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects that would otherwise likely result from ES&S's acquisition of Premier. The divestiture will restore competition by making available to an independent competitor the Premier assets necessary to equip an economically viable competitor to ES&S in the provision of voting equipment systems in the United States.

The proposed Final Judgment requires ES&S to take certain actions, including divesting, within sixty (60) 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, the following assets: (1) all of the intangible assets related to past and present Premier voting equipment system products, as well as those that were in development at the time of the acquisition; (2) tangible assets including all tooling and fixed assets related to the production, assembly and repair of those products; and (3) inventory and parts sufficient to meet the needs of the Acquirer.

In addition to these divestitures, the proposed Final Judgment also requires ES&S to grant a fully paid-up, non-exclusive, irrevocable license to ES&S's AutoMARK products. The AutoMARK products are Ballot Marking Devices ("BMD"), used in some jurisdictions to allow some disabled voters the opportunity to cast a private and independent ballot. Prior to the acquisition, Premier used a limited, non-exclusive license from ES&S to offer AutoMARK products as part of its EAC-certified Assure 1.2 system. To allow customers the greatest number of choices of systems that include an EAC-certified BMD, ES&S must provide the Acquirer with a license to use, service, repair, modify and improve the AutoMARK products.

In order to facilitate the Acquirer's ability to provide services related to voting equipment systems to existing Premier customers, the proposed Final Judgement also requires that ES&S waive all non-competition and non-disclosure agreements for all current and former Premier employees. Access to Premier employees will allow the Acquirer to recruit employees with experience serving current customers, and expertise related to the development, sale, repair or service of Premier voting equipment system products. Allowing such recruitment will enable the Acquirer to re-establish the experience and expertise of Premier before its acquisition by ES&S, and so will facilitate its ability to restore competition in the sale of voting equipment systems. In addition to waiving all non-competition and non-disclosure agreements, ES&S is prohibited from interfering with the Acquirer's efforts to recruit Premier employees. The waiver is limited to six months, in order to encourage the Acquirer to solicit staff expeditiously, and minimize the disruption to upcoming elections that otherwise

might result from significant staff turnover.

Under the terms of the proposed Final Judgment, only the Acquirer will be permitted to offer Premier voting equipment systems to existing customers for new installations. New installations of voting equipment systems are defined broadly to capture any procurement let under a Request for Proposal or Request for Quote, as well as any procurement that calls for replacement of 50 percent or more of a customer's installed equipment. By providing the Acquirer with the exclusive right to offer the Premier voting equipment systems to customers for new installations, the remedy replicates the incentive that Premier would have had, giving the Acquirer the greatest incentive to invest in the development of new Premier products.

The proposed Final Judgment also provides for the creation of new competition in the provision of services related to voting equipment systems, in order to permit the Acquirer to replace the competition in the sale of voting equipment systems that was lost as a result of ES&S's acquisition of Premier. Currently, only one vendor typically is able to provide certain services to a voting equipment system customer, as these services are linked to the proprietary election management software that a particular vendor provides. The proposed Final Judgment, however, will allow both the Acquirer and ES&S to compete to provide all services related to Premier voting equipment systems, giving customers the option to switch to the Acquirer or to remain with ES&S for service of their existing Premier voting equipment systems. ES&S is required to waive any contractual provisions that otherwise would prevent or hinder the Acquirer from competing to provide services to current Premier customers. The potential to serve current customers enhances competition in the sale of voting equipment systems by enabling the Acquirer to develop expertise about a customer's election administration needs and practices. These provisions further enhance the divestiture's efficacy by ensuring that ES&S does not retain sole control over the quality and extent of service on the installed base of Premier equipment, and would not be able to use its provision of service to undermine the competitive goals of the divestiture. Leaving the ultimate choice of service providers to customers accommodates customer concerns that an outright divestiture of customer service contracts would disrupt the administration of upcoming primaries and elections.

In addition, the proposed Final Judgment requires that ES&S provide a transition services agreement and a transitional supply agreement for parts and inventory. The transition services agreement must be sufficient to meet the Acquirer's needs for assistance in matters relating to the utilization of the divestiture assets for a period of up to six months. ES&S also must agree to supply parts and inventory to the Acquirer at commercially reasonable terms for up to two years, in order to allow the Acquirer access to parts and inventory while it arranges for independent manufacturing. ES&S also must not interfere with the Acquirer's efforts to contract with third party manufacturers, on whom vendors typically rely for the manufacture of parts and assembly of finished devices.

The divestiture must be accomplished in such a way as to satisfy the United States in its sole discretion, after consultation with the Plaintiff States, that these assets can and will be operated by the Acquirer as a viable, ongoing business that will compete effectively in the development, production, sale, repair, and service of voting equipment systems in the United States. ES&S must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that ES&S does 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 ES&S 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 and terms 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 (6) 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.

The divestiture and other provisions of the proposed Final Judgment will eliminate the anticompetitive effects that likely would result from ES&S's acquisition of Premier.

V. *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 Defendant.

VI. *PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT*

The United States and Defendant 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, 450 Fifth Street, N.W., Suite 8700, Washington, D.C. 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.

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 in accordance with the statute, the court 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. InBev N.V./S.A., 2009–2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), 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.").

As the United States Court of Appeals for the District of Columbia 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); 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, the 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's 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). Therefore, 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 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." 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[3] Congress made clear its

[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' ").

[3] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and 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).

intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating: "[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 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 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]

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: March 8, 2010

Respectfully submitted,

_____/s/_____

Stephanie A. Fleming, Esq.

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CERTIFICATE OF SERVICE

I, Stephanie A. Fleming, hereby certify that on March 8, 2010, I caused a copy of the foregoing Competitive Impact Statement to be served upon Defendant Election Systems and Software, Inc. and the Plaintiff States by mailing the documents electronically to their duly authorized legal representatives as follows:

FOR DEFENDANT, ELECTION SYSTEMS & SOFTWARE, INC.

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_____/s/_____

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[FR Doc. 2010–5519 Filed 3–12–10; 8:45 am]

BILLING CODE 4410–11–P

[4] See United States v. Enova Corp., 107 F. Supp. 2d 10, 17 (D.DC 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.").

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Division of Federal Employees' Compensation; Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed collection: Notice of Law Enforcement Officer's Injury or Occupational Disease (CA–721) and Notice of Law Enforcement Officer's Death (CA–722). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before May 14, 2010.