DEPARTMENT OF JUSTICE
Antitrust Division

United States V. Heraeus Electro-Nite Co., LLC

Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in United States v. Heraeus Electro-Nite Co., LLC, Civil Action No. 1:14-cv-00005. On January 2, 2014, the United States filed a Complaint alleging that the September 7, 2012 acquisition by Heraeus Electro-Nite Co., LLC ("Heraeus") of substantially all of the assets of Midwest Instrument Company, Inc. ("Minco") violated Section 7 of the Clayton Act, 15 U.S.C. §18. The proposed Final Judgment, filed at the same time as the Complaint, requires Heraeus to divest a package of assets, including the former Minco facilities located in Hartland, Wisconsin and Johnson City, Tennessee, along with associated tangible and intangible assets. The proposed Final Judgment also requires Heraeus to waive any existing noncompete agreement that may bind any former employee of Heraeus or Minco in the United States.

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 U.S. Department of Justice's website 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, including the name of the submitter, and responses thereto, will be posted on the U.S. Department of Justice, Antitrust Division's internet website, filed with the Court and, under certain circumstances, published in the *Federal Register*. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, N.W., Suite 8700, Washington, D.C. 20530, (telephone: 202-307-0924).

Patricia A. Brink
Director of Operations

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA U.S. Department of Justice Antitrust Division 450 Fifth Street, N.W., Suite 8700 Washington, D.C. 20530 Plaintiff, v. HERAEUS ELECTRO-NITE CO., LLC One Summit Square, Suite 100 Langhorne, PA 19047 Defendant.	CASE NO: 1:14-cv-00005 JUDGE: James Boasberg FILED: 01/02/2014

COMPLAINT

The United States of America, acting under the Attorney General of the United States, brings this civil antitrust action seeking equitable relief to remedy the actual and potential anticompetitive effects of the September 2012 acquisition by Defendant Heraeus Electro-Nite Co., LLC ("Heraeus") of substantially all of the assets of Midwest Instrument Company, Inc. ("Minco"). The United States alleges as follows:

I. INTRODUCTION

1. In 2012, Defendant Heraeus surveyed the U.S. market for single-use sensors and instruments used to measure and monitor the temperature and chemical composition of molten steel ("S&I") and found that its once-commanding 85% market share had been reduced to an estimated 60%, while its closest competitor, Minco, had gained substantially, reaching about a 35% share. Consequently, Heraeus decided to restore its "market leadership" in the United

States by acquiring Minco and thereby eliminating Minco's production capacity. The acquisition removed significant head-to-head competition between Minco and Heraeus on price, innovation and service, and created a near-monopoly in the supply of S&I in the United States. Accordingly, Heraeus' acquisition of Minco's assets was unlawful and violated Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. Nearly 100 million tons of steel were produced in the United States in 2012. Steelmaking is a continuous process during which the chemistry and temperature of each batch of steel must be measured and monitored in order to ensure the quality, reliability, and consistency of the finished steel, as well as the safety and efficiency of the manufacturing operation. S&I products are integral to the steel making process; indeed, steel makers cannot produce steel without using the S&I that is developed, produced and sold by companies such as Heraeus and, previously, Minco. Steel companies also rely on S&I suppliers as virtual partners in the steel-making process.

3. Heraeus became the dominant S&I supplier in the United States after it acquired its main rival, Leeds & Northrup ("L&N"), in 1995.

4. Until the mid-1990s, Minco was a small company that supplied low-end equipment to steel mill chemistry labs. Heraeus' acquisition of L&N left steel mill customers looking for alternatives. As a result, Minco made a strategic decision to enter the high-tech, higher-end of the market and offer customers an alternative to Heraeus. Over a period of years, Minco slowly gained market share by offering superior customer service and innovation. In 2010, as the steel industry recovered from the economic downturn, Minco sales increased significantly when it introduced user-friendly, innovative products, such as a combination 3-in-1

sensor and a wireless transmitter. By 2012, Minco's market share had increased to 35%, while Heraeus' market share had decreased to about 60%.

5. Given the competitive threat presented by Minco, Heraeus' parent company determined in July 2012 that that the acquisition of Minco presented the "[o]pportunity to improve and defend [Heraeus'] position in the North American market."

6. Accordingly, Heraeus acquired substantially all of Minco's assets on September 7, 2012. The transaction was not reportable under the filing thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and therefore was not subject to antitrust review prior to being consummated. Instead, the transaction was brought to the attention of the United States Department of Justice after the fact by customers concerned that the acquisition of Minco by Heraeus substantially lessened competition in the S&I market in the United States.

II. PARTIES TO THE TRANSACTION

7. Defendant Heraeus, a Delaware corporation with its headquarters in Langhorne, Pennsylvania, is a subsidiary of Heraeus Electro-Nite International N.V. ("HEN"), a Belgian company, which itself is a subsidiary of Heraeus Holding GmbH, a privately held German corporation based in Hanau, Germany. HEN's U.S. subsidiary Heraeus had approximately $92 million in revenue in fiscal year 2011.

8. Prior to being acquired by Heraeus, Minco was a privately held company headquartered in Hartland, Wisconsin that sold S&I. In 2011, Minco's U.S. revenues were approximately $29 million. Minco's manufacturing facilities were located in Hartland, Wisconsin, Johnson City, Tennessee and Monterrey, Mexico.

9. On September 7, 2012, Heraeus and Minco completed a $42 million asset sale whereby Heraeus acquired all of Minco's business engaged in the development, production, sale,

and service of S&I in the United States and certain other countries, including Canada, Brazil and Australia.

III. JURISDICTION AND VENUE

10. The United States brings this action against Defendant Heraeus under Section 15 of the Clayton Act, 15 U.S.C. § 25, as amended, to prevent and restrain Heraeus from continuing to violate Section 7 of the Clayton Act, 15 U.S.C. § 18.

11. Heraeus sells S&I in the flow of interstate commerce, and its development, production, sale, and service of S&I substantially affects interstate commerce. This Court has subject matter jurisdiction over this action and over Heraeus pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, 28 U.S.C. §§ 1331 and 1337(a) and 1345.

12. Heraeus has consented to personal jurisdiction and venue in this District.

IV. TRADE AND COMMERCE

A. Background: The Critical Role of S&I in U.S. Steel Production

13. The temperature and chemical composition of molten steel must be measured and monitored throughout the steel-making process. Each stage of production has specific chemical concentration and temperature requirements. The accuracy, reproducibility and reliability of molten steel temperature measurements and chemical properties directly influence the quality of the end product, as well as the safety and productivity of the steel mill. As the finished steel product may be used in demanding applications, such as steel beams for a building or automotive exterior panels, steel mills must ensure the molten steel exactly meets the required specifications. Testing and sampling the molten steel to ensure that it meets these specifications is a critical aspect of the steel-making process. S&I systems play a vitally important role in this essential aspect of the steel-making process.

14. An S&I system consists of four basic parts: (1) the single-use sensor; (2) the cardboard tube; (3) the pole; and (4) the instrument, or display. The single-use sensor, typically encased in heavy paper or cardboard and attached to a cardboard tube, contains the actual measurement device. The cardboard encasement provides momentary protection to allow the single-use sensor to transmit a reading to the instrument before the heat from the molten steel consumes the sensor. For standard single-use sensors, the cardboard tube is attached to a long, hollow metal pole that allows a steel mill worker safely to dip the sensor into the liquid steel to obtain the desired measurement. The instrument is a specialized electronic component or computer that interprets the signal from the single-use sensor and displays the temperature or chemical content measurement on a display screen or print-out. Unlike the single-use sensor, which is consumed by the molten steel, the instrument is a long-lived component that can be used for years.

15. S&I are used to monitor temperature, oxygen content, steel and slag chemistry, hydrogen concentration and the carbon content of molten steel and are differentiated primarily by the type of sensor used. A particular steel mill may utilize one type or multiple types of S&I during a particular batch, depending upon its proprietary steel-making process and the specifications of the steel's end use. The three main categories of S&I used by steel mills are thermocouples, sensors and samplers, though "combination" sensors are designed to conduct two or more tests at once.

a. *Thermocouples*. Thermocouples measure the temperature of molten steel in the furnace and in other stages of steel processing.

b. *Sensors*. Sensors measure the dissolved oxygen, carbon, hydrogen, or other elements present in molten steel. Oxygen and carbon sensors are used in most

steel-making processes, while hydrogen sensors typically are needed to produce high-purity, high-grade steel. Each type of sensor has a distinct design.

c. *Samplers*. Samplers are used during the steel-making process to withdraw a sample of molten steel for analysis outside of the molten bath. While most samplers do not contain internal electronics, they can be manufactured as a combination unit that includes a thermocouple or a type of sensor.

16. Although single-use sensors appear to be simple, each one consists of tiny platinum wires and specialized electronic controls. The lowest-priced single-use sensors may be one to two dollars per unit, while higher-end single-use sensors may be priced at ten to twenty dollars per unit.

17. The high temperature and harsh environment of the furnace necessitates the use of S&I capable of reliable, accurate measurement in extreme conditions. Temperatures in the furnace can approach or exceed 3,000 degrees Fahrenheit, and a variation of only 20 to 30 degrees can critically affect the quality and properties of the final steel product. Failure of a single-use sensor can have catastrophic results. For example, if the molten steel overheats, the steel can melt through the vessel or "break-out," which is extremely dangerous and costly. Similarly, if the molten steel cools too quickly, or has the wrong chemical composition, it may slow or stall the production process and/or produce low-quality steel. The failure of a single-use sensor can thus potentially cost a steel mill hundreds of thousands of dollars whenever the steel fails to meet the desired physical characteristics and specifications.

18. Single-use sensors are the consumable component of the S&I system. Because single-use sensors are used continuously in the steel-making process, steel mills can use hundreds of units daily and up to millions of units annually. S&I suppliers must therefore be

capable of producing thousands of these high-precision, high-reliability products daily at a very low cost.

B. S&I Is a Relevant Product Market

19. Within the broad category of S&I, each type of single-use sensor performs a distinct function and cannot be substituted for another type of sensor or a different type of measuring device. For example, a hydrogen sensor cannot detect temperature and a thermocouple does not detect hydrogen. Accordingly, single-use sensors are not interchangeable or substitutable for one another. There is separate demand for thermocouples, oxygen sensors, carbon sensors, hydrogen sensors, and other sensors. In the event of a small but significant price increase for a given type of single-use sensor, customers would not stop using that sensor in sufficient numbers so as to defeat the price increase. Thus, each type of S&I is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

20. Each steel-making customer purchases a different mix of S&I to suit the specific needs of its steel mill, steel-making process, and application. Prior to the acquisition, Minco and Heraeus produced a full range of S&I and were, by far, the two producers with the largest market shares for each individual product. Minco and Heraeus competed across the full product line of S&I and typically provided customers with a mix of various single-use thermocouples, sensors and samplers. Although numerous narrower product markets also may be defined, the competitive dynamic for each individual single-use thermocouple, sensor and sampler is nearly identical. Therefore, these products can all be aggregated for analytical convenience into a single relevant product market for the purpose of assigning market shares and evaluating the competitive impact of the acquisition. Accordingly, the development, production, sale and

service of S&I is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

C. The United States Is a Relevant Geographic Market

21. The United States is a relevant geographic market because suppliers of S&I cannot make sales in the United States without having a U.S. service and sales network and U.S. manufacturing presence. The consumable portion of S&I consists of a single-use sensor and a cardboard tube. A single-use sensor is small and light and can be shipped economically from overseas. However, the cardboard tubes for S&I can be four to eight feet long and are mostly air. They have a low value-to-volume ratio, so they cannot be shipped from overseas economically. For this reason, Heraeus, Minco and the one other existing U.S. competitor manufacture finished S&I in the United States.

22. Steel manufacturers can use up to hundreds of single-use sensors each day. The steel manufacturers are staffed leanly and do not employ in-house technicians or engineers to service S&I. A defective single-use sensor or malfunctioning instrument can shut down an entire steel line, so the steel manufacturers rely on the S&I suppliers to provide on-site technical service and support that is on call at all times. Heraeus and Minco have provided experienced service technicians and product engineers on-site to assist with inventory management, trouble-shooting, calibration, and other critical services. These service technicians and product engineers routinely visit a busy mill multiple times per week and often increase the number of their visits when the mill is implementing a new process or is having trouble with a particular S&I. These service technicians also make service calls in the middle of the night to fix a problem that has shut down a line. Service and technical support have been critical to the success of Heraeus and Minco in selling S&I in the United States.

23. Given that (1) it is uneconomic to ship fully assembled S&I from overseas to the United States and (2) U.S. customers require extensive on-site service, customers would not switch to producers outside the United States to defeat a small but significant price increase. Accordingly, the United States is a relevant geographic market for the development, production, sale and service of S&I within the meaning of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

V. HERAEUS' ACQUISITION OF MINCO IS ANTICOMPETITIVE

A. The Acquisition Increased Concentration in a Highly Concentrated Market

24. Heraeus' acquisition of Minco greatly increased the already high level of concentration in the S&I market in the United States. Concentration in relevant markets typically is measured by the Herfindahl-Hirschman Index ("HHI") (defined and explained in Appendix A). The more concentrated a market, and the more a transaction would increase concentration in a market, the greater the likelihood that the transaction will result in a meaningful reduction in competition. Markets in which the HHI is in excess of 2500 points are considered highly concentrated, and an increase in concentration by 150 points or more is considered significant. *See* Appendix A.

25. Prior to the acquisition, Heraeus had a 60% market share, Minco had a 35% market share and a third firm had the remaining 5% market share. The pre-acquisition HHI was 4850, and the post-acquisition HHI is 9050, an increase of 4200. The pre- and post-acquisition market concentration measures demonstrate that Heraeus' acquisition of Minco is presumptively anticompetitive.

B. The Acquisition Has Eliminated Head-to-Head Competition between Heraeus and Minco

26. Prior to the acquisition, U.S. customers could turn to Minco as a viable alternative source of S&I, which forced Heraeus to compete with Minco on price, service and innovation. Customers benefitted from this robust competition between Heraeus and Minco.

27. Heraeus became the dominant supplier in the United States by acquiring its competitor L&N in 1995. Around 2000, Heraeus owned 85% of the S&I market in the United States.

28. In or about 1994, Minco decided to build its own research furnace to facilitate its product development. In 2000, after several years of development, Minco began introducing high-tech products in order to compete against Heraeus. Over the next several years, Minco began selling an oxygen sensor, a hydrogen sensor and a modern instrument based on the familiar Microsoft Windows software. Minco's "Big 3" product innovations helped it to gain acceptance with steel mill customers that produce higher grades of steel. Minco expressly marketed itself to customers as a service-oriented, high-quality alternative to the dominant Heraeus and dedicated significant effort and resources toward meeting this standard. During the 2000s, Minco chipped away at Heraeus' share by competing on price, service and technology.

29. After slowly gaining market share throughout the 2000s, Minco broke through in 2010 when it introduced two more innovations that significantly raised its profile and threatened what Heraeus called its market "leadership." First, Minco introduced its combination 3-in-1 sensor head, which both increased plant efficiency and reduced the risk to steel mill workers by reducing the number of necessary measurements.

30. Second, Minco introduced its wireless transmitter, which sends the sensor's signal from the pole to the instrument. Customers viewed this technology as a "game-changer" because

it eliminated a cable dragging along the floor of the steel-making facility. This innovation enhanced worker safety by eliminating a tripping hazard, and it also saved customers money because the long cables need to be replaced frequently.

31. Prior to the acquisition, Minco and Heraeus competed head-to-head on price. Post-acquisition, Heraeus' steel mill customers are vulnerable to price increases because of the critical function of S&I and their small cost relative to the value of the finished steel product. The lowest-priced single-use sensors may be one to two dollars per unit, while higher-end single-use sensors can be ten to twenty dollars per unit. Only a few dollars worth of single-use sensors are used in each batch of steel, which makes numerous tons of steel that sell for about $600 per ton at current prices. As a result, the per-ton cost of single-use sensors is measured in fractions of a percent of the sales price of finished steel. Moreover, because the process of making steel costs thousands of dollars per minute, any interruption of the steel-making process caused by a defective single-use sensor can be extremely costly.

32. Prior to the acquisition, Minco and Heraeus also competed to provide a high level of service to steel mills. Each company had service representatives that would visit the mills multiple times each week, sometimes daily at the largest mills, to repair equipment, perform routine maintenance, and train mill employees. Post-acquisition, Heraeus has the incentive to impose on customers less favorable terms of service than those that were provided before the acquisition. Thus, the acquisition likely has led to deterioration of service, longer delivery times and less certain delivery, which have imposed significant risks and delays on the U.S. steel industry. Indeed, Heraeus began cutting its marketing and service staff immediately after the acquisition.

33 Prior to the acquisition, Heraeus monitored Minco's innovative efforts and attempted to match or exceed Minco's offerings. Post-acquisition, Heraeus has less incentive to continue its research and development efforts on new and innovative product offerings.

34. The elimination of Minco as an independent and strong competitor likely will lead to higher prices, reduced service, and less innovation. Through its acquisition of the Minco assets, Heraeus has substantially lessened competition in the U.S. market for the development, production, sale and service of S&I, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

C. The Anticompetitive Effects of the Acquisition Will Not Be Counteracted by Entry or Expansion.

35. Entry and/or expansion into the development, production, sale and service of S&I will not be timely, likely or sufficient to counteract the anticompetitive effects of Heraeus' acquisition of Minco. The development, production, sale and servicing of S&I requires highly specialized know-how, specialized equipment, a full-line of S&I products, a U.S. production facility, and a U.S.-based sales and service network.

36. The machinery used to manufacture S&I is highly specialized to meet exacting mass production requirements. For example, it took one S&I supplier two years of engineering time to develop a customized machine that could mass produce reliable and accurate single-use oxygen sensors. Thus, entry by producers of other types of measurement devices will not be likely, timely or sufficient.

37. S&I suppliers currently outside the United States cannot sell into the United States because it is uneconomic to transport fully assembled S&I into the United States and because they do not have a U.S. sales and service network, which is a prerequisite to selling to U.S. customers. The development of a U.S. production/assembly facility and, even more importantly, a dependable sales and service network often can take a significant period during

which the potential entrant is not making sales. U.S-based customers will not purchase S&I from a foreign supplier that does not maintain a dependable sales/support network that can provide on-call service for its S&I products.

38. Establishing a reputation for successful performance and gaining customer confidence in a specific firm's S&I are also significant barriers to expansion and/or entry. Establishing a reputation for dependable, accurate supply and service is critical to success in the S&I market. A track record and reputation for reliability must be earned over years.

VI. VIOLATION ALLEGED

Violation of Clayton Act Section 7, 15 U.S.C. § 18

39. The United States incorporates the allegations of paragraphs 1 through 38 above as if set forth fully herein.

40. Heraeus' acquisition of the assets of Minco is likely to substantially lessen competition in interstate trade and commerce in violation of Section 7 of the Clayton Act.

41. The transaction has had or will have the following effects, among others:

a. Competition between Heraeus and Minco in the development, production, sale and service of S&I in the United States has been eliminated;

b. Heraeus has significantly reduced incentives to discount prices, increase the quality of its services, or invest in innovation;

c. Prices for S&I will likely increase above levels that would have prevailed absent the transaction, leading steel mills and other customers to pay higher prices for S&I for molten steel; and

d. Innovation will likely decrease, delivery times likely will lengthen, and the quality and terms of service likely will become less favorable than those that would have prevailed absent the transaction.

VII. REQUEST FOR RELIEF

42. The United States requests that this Court:

a. Adjudge and decree the acquisition by defendant Heraeus of the assets of Minco to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. Compel Heraeus to divest all of Minco's tangible and intangible assets related to the development, production, sale and service of S&I and to take any further actions necessary to restore the market to the competitive position that existed prior to the acquisition;

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

d. Award the United States the cost of this action; and

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

Respectfully submitted,

DATE: January 2, 2014
FOR PLAINTIFF UNITED STATES

_____/s/_____
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APPENDIX A

HERFINDAHL-HIRSCHMAN INDEX CALCULATIONS

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,500 and 12,500 points are considered to be moderately concentrated and those in which the HHI is in excess of 2,500 points are considered to be highly concentrated. *See* U.S. Department of Justice & FTC, *Horizontal Merger Guidelines* § 5.3 (2010). Transactions that increase the HHI by more than 200 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the U.S. Department of Justice and the Federal Trade Commission. *See id.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. HERAEUS ELECTRO-NITE CO., LLC, Defendant.	CASE NO: 1:14-cv-00005 JUDGE: James Boasberg FILED: 01/02/2014

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

On September 7, 2012, defendant Heraeus Electro-Nite Co., LLC ("Heraeus") acquired substantially all of the assets of Midwest Instrument Company, Inc. ("Minco"). After investigating the competitive impact of that acquisition, the United States filed a civil antitrust Complaint on January 2, 2014, seeking an order compelling Heraeus to divest certain assets and other relief to restore competition. The Complaint alleges that the acquisition substantially lessened competition in the U.S. market for the development, production, sale and service of single-use sensors and instruments used to measure and monitor the temperature and chemical composition of molten steel ("S&I"), in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. As a result of the acquisition, prices for these products did or would have increased, delivery

times would have lengthened, and terms of service would have become less favorable.

Concurrent with the filing of this Competitive Impact Statement, the United States and Heraeus have filed an Asset Preservation Stipulation and Order and a proposed Final Judgment. These filings are designed to eliminate the anticompetitive effects of Heraeus' acquisition of Minco. The proposed Final Judgment, which is explained more fully below, requires Heraeus, among other things, to divest the assets that it acquired from Minco that are located in the United States and Mexico.

The United States and Heraeus have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

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

A. Heraeus and the Minco Acquisition

Defendant Heraeus, a Delaware corporation with its headquarters in Langhorne, Pennsylvania, is a subsidiary of Heraeus Electro-Nite International N.V. ("HEN"), a Belgian company, which itself is a subsidiary of Heraeus Holding GmbH, a privately held German corporation based in Hanau, Germany. HEN's U.S. subsidiary, Heraeus, had approximately $92 million in revenue in fiscal year 2011.

Minco was a privately held company headquartered in Hartland, Wisconsin that also sold S&I. In 2011, Minco's U.S. revenues were approximately $29 million. Minco's manufacturing facilities were located in Hartland, Wisconsin, Johnson City, Tennessee and Monterrey, Mexico.

On September 7, 2012, Heraeus acquired substantially all of the assets of Minco. The transaction was not subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR

Act"), which requires companies to notify and provide information to the Department of Justice and the Federal Trade Commission before consummating certain acquisitions. As a result, the Department of Justice did not learn of the transaction until after it had been consummated.

B. The Competitive Effects of the Acquisition on the Market for S&I

1. Industry Background

S&I products are integral to the steel-making process. Steel makers cannot produce steel without using S&I such as those developed, produced and sold by Heraeus and, formerly, by Minco. Steel making is a continuous process, in which the chemistry and temperature of each batch of steel must be measured and monitored in order to ensure the quality, reliability, and consistency of the finished steel, as well as the safety and efficiency of the manufacturing operation. S&I are used to measure and monitor the temperature and chemical composition of the molten steel. Steel companies rely on S&I; moreover, they rely on S&I suppliers as virtual partners in the steel-making process.

The temperature and chemical composition of molten steel must be measured and monitored throughout the steel-making process, and each stage of production has specific chemical concentration and temperature requirements. The accuracy, reproducibility and reliability of the measurement of molten steel temperature and chemical properties directly influence the quality of the end product, as well as the safety and productivity of the steel mill. Because the finished steel product may be used in demanding applications, such as steel beams for a building or automotive exterior panels, steel mills must ensure the molten steel exactly meets the required specifications. Testing and sampling the molten steel to ensure that it meets these specifications is a critical aspect of the steel-making process.

An S&I system consists of four basic parts: (1) the single-use sensor; (2) the cardboard tube; (3) the pole; and (4) the instrument, or display. The single-use sensor, typically encased in heavy paper or cardboard and attached to a cardboard tube, contains the actual measurement device. The cardboard encasement provides momentary protection to allow the single-use sensor to transmit a reading to the instrument before the heat from the molten steel consumes the sensor. For standard single-use sensors, the cardboard tube is attached to a long, hollow metal pole that allows a steel mill worker safely to dip the sensor into the liquid steel to obtain the desired measurement. The instrument is a specialized electronic component or computer that interprets the signal from the single-use sensor and displays the temperature or chemical content measurement on a display screen or print-out. Unlike the single-use sensor, which is consumed in molten steel, the instrument is a long-lived component that can be used for years.

S&I are used to monitor temperature, oxygen content, steel and slag chemistry, hydrogen concentration and the carbon content of molten steel and are differentiated primarily by the type of sensor used. A particular steel mill may utilize one type or multiple types of S&I during a particular batch depending upon its proprietary steel-making process and the specifications of the steel's end use. The three main categories of S&I used by steel mills are thermocouples, sensors and samplers, though "combination" single-use sensors are designed to conduct two or more tests at once. Thermocouples measure the temperature of molten steel in the furnace and in other stages of steel processing. Sensors measure the dissolved oxygen, carbon, hydrogen, or other elements present in molten steel. Oxygen and carbon sensors are used in most steel-making processes, while hydrogen sensors typically are needed to produce high-purity, high-grade steel. Each type of sensor has a distinct design. Samplers are used during the steel-making process to withdraw a sample of molten steel for analysis outside of the molten bath. While most samplers

do not contain internal electronics, they can be manufactured as a combination unit that includes a thermocouple or a type of sensor.

Although single-use sensors appear to be simple, each one consists of tiny platinum wires and specialized electronic controls. The lowest-priced single-use sensors may be one to two dollars per unit, while higher-end single-use sensors may be priced at ten to twenty dollars per unit. Because single-use sensors are used continuously in the steel-making process, steel mills can use hundreds of units daily and up to millions of units annually. S&I suppliers must therefore be capable of producing thousands of these high-precision, high-reliability products daily at a very low cost.

The high temperature and harsh environment of the furnace necessitates the use of S&I capable of reliable, accurate measurement in extreme conditions. Temperatures in the furnace can approach or exceed 3,000 degrees Fahrenheit, and variation of only 20 to 30 degrees can critically affect the quality and properties of the final steel product. Failure of a single-use sensor can have catastrophic results. For example, if the molten steel overheats, the steel can melt through the vessel or "break-out," which is extremely dangerous and costly. Similarly, if the molten steel cools too quickly, or has the wrong chemical composition, it may slow or stall the production process and/or produce low-quality steel. The failure of a single-use sensor may cost a steel mill hundreds of thousands of dollars, if the steel fails to meet the desired physical characteristics and specifications.

2. Product Market

Within the broad category of S&I, each type of single-use sensor performs a distinct function and cannot be substituted for another type of sensor or a different type of measuring device. For example, a hydrogen sensor cannot detect temperature and a thermocouple does not

detect hydrogen. Accordingly, they are not interchangeable or substitutable for one another. There is separate demand for thermocouples, oxygen sensors, carbon sensors, hydrogen sensors, and other sensors. In the event of a small but significant price increase for a given type of single-use sensor, customers would not stop using that sensor in sufficient numbers so as to defeat the price increase. Thus, each type of S&I is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

Each steel-making customer purchases a different mix of S&I to suit the needs of the customer's steel mill, steel-making process, and application. Prior to the acquisition, Minco and Heraeus produced a full range of S&I and were, by far, the two producers with the largest market shares for each individual product. Minco and Heraeus competed across the full product line of S&I and typically provided customers with a mix of various single-use thermocouples, sensors and samplers. Although numerous narrower product markets also may be defined, the competitive dynamic for each individual single-use thermocouple, sensor and sampler is nearly identical. Therefore, they all may be aggregated for analytical convenience into a single relevant product market for the purpose of assigning market shares and evaluating the competitive impact of the acquisition. Accordingly, the development, production, sale and service of S&I is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

3. Geographic Market

The United States is a relevant geographic market because suppliers of S&I cannot make sales in the United States without having a U.S. service and sales network and U.S. manufacturing presence. The consumable portion of S&I consists of a single-use sensor and a cardboard tube. A single-use sensor is small and light and can be shipped economically from overseas. However, the cardboard tubes for S&I can be four to eight feet long and are mostly

air. They have a low value-to-volume ratio, so they cannot be shipped from overseas economically. For this reason, Heraeus and Minco both manufactured finished S&I in the United States.

Steel manufacturers can use up to hundreds of single-use sensors each day. The steel manufacturers are staffed leanly and do not employ in-house technicians or engineers to service S&I. A defective single-use sensor or malfunctioning instrument can shut down an entire steel line, so the steel manufacturers rely on the S&I suppliers to provide on-site technical service and support that is on call at all times. Heraeus and Minco have provided experienced service technicians and product engineers on-site to assist with inventory management, trouble-shooting, calibration, and other critical services. These service technicians and product engineers may visit a busy mill once or twice a week or more on a routine basis, and more frequently if the mill is implementing a new process, or is having trouble with a particular S&I. They also make service calls in the middle of the night to fix a problem that has shut down a line. Service and technical support have been critical to the success of Heraeus and Minco in selling S&I in the United States.

Because it is uneconomic to ship fully assembled S&I from overseas to the United States and U.S. customers require extensive on-site service, customers would not switch to producers outside the United States to defeat a small but significant price increase. Accordingly, the United States is a relevant geographic market for the development, production, sale and service of S&I within the meaning of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

4. Anticompetitive Effects

Heraeus' acquisition of Minco has increased concentration in a highly concentrated market. Concentration in relevant markets typically is measured by the Herfindahl-Hirschman

Index ("HHI"), which is defined and explained in Appendix A to the Complaint. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition. Markets in which the HHI is in excess of 2500 points are considered highly concentrated, and an increase in concentration by 150 points or more is considered significant.

Prior to the acquisition, Heraeus had a 60% market share, Minco had a 35% market share and a small third firm had the remaining five percent. Thus, the pre-acquisition HHI was 4850, and the post-acquisition HHI is 9050, an increase of 4200. Based on the pre- and post-acquisition market concentration measures, the acquisition is presumptively anticompetitive.

Prior to the acquisition, Minco was the best alternative source to Heraeus for S&I, and customers benefited from robust competition between the firms on price, service and innovation. By 2000, Heraeus owned 85% of the market. At the same time, after several years of development, Minco began introducing high-tech products in order to compete against Heraeus. Minco expressly marketed itself to customers as a service-oriented, high-quality alternative to the dominant Heraeus and dedicated significant effort and resources toward meeting this standard. During the 2000s, Minco chipped away at Heraeus' share and customers benefited from the head-to-head competition between Heraeus and Minco on price, service, technology, and innovation. Through its acquisition of the Minco assets, Heraeus has substantially lessened competition in the U.S. market for the development, production, sale and service of S&I for molten steel, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Entry and/or expansion into the development, production, sale and service of S&I will not be timely, likely or sufficient to counteract the anticompetitive effects of Heraeus' acquisition of Minco. The development, production, sale and servicing of S&I requires highly

specialized know-how, specialized equipment, a full-line of S&I products, a U.S. production facility, and a U.S.-based sales and service network. S&I suppliers currently outside the United States cannot sell into the United States because it is uneconomic to transport fully assembled S&I into the United States and they do not have a U.S. sales and service network, which is a prerequisite to selling to U.S. customers. Development of a U.S. production/assembly facility, and even more importantly, development of a dependable sales and service network can take a long time, during which the potential entrant is not making sales. U.S.-based customers will not purchase S&I from a foreign supplier that does not maintain a dependable sales and support network that can provide on-call service for its S&I products.

Establishing a reputation for successful performance and gaining customer confidence in a specific firm's S&I are also significant barriers to expansion. Establishing a reputation for dependable, accurate supply and service is critical to success in the market. A track record and reputation for reliability must be earned over years. Entry in the development, production, sale, and service of S&I in the United States would not be timely, likely, or sufficient to counteract the anticompetitive effects of Heraeus' acquisition of Minco.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestiture Assets

The United States opened its investigation of the transaction in December 2012, three months after the transaction was consummated. Heraeus had by then integrated the former Minco assets into Heraeus' S&I business, including terminating certain supply contracts and closing foreign production facilities. The United States therefore designed the partial divestiture required by the proposed Final Judgment to facilitate entry of a new firm or expansion of an existing competitor in the S&I industry by providing that firm with market-specific assets needed

for successful competition.

The proposed Final Judgment directs Heraeus to sell a package of assets in the United States and Mexico, including the former Minco facilities located in Hartland, Wisconsin and Johnson City, Tennessee, along with tangible and intangible assets associated with those facilities (the "Divestiture Assets"). Heraeus is required to sell the Divestiture Assets to a qualified Acquirer that has the intention and ability to compete in the development, production, sale, and service of S&I in the United States. Thus, the divestiture provisions of the proposed Final Judgment are designed to make available to an Acquirer all of the remaining Minco assets acquired by Heraeus for the purpose of remedying the competitive harm from the acquisition. Under the proposed Final Judgment, however, the Acquirer, at its option, and with the consent of the United States, may elect to acquire less than the entire package of assets.

B. Identification of an Upfront Buyer

The goal of the proposed Final Judgment is to restore the competition in the development, production, sale, and service of S&I that was lost as a result of the transaction. The United States favors the divestiture of an existing business unit that has the necessary experience to compete in the relevant market. In this case, however, the divestiture of an existing, intact business is impossible because of the integration of assets undertaken by Heraeus. Under these circumstances, the United States may consider the divestiture of less than an existing business and may identify and approve an Acquirer at the outset to ensure that the sale of the assets will create a viable entity that will restore effective competition.[1]

[1] U.S. Department of Justice Antitrust Division Policy Guide to Merger Remedies (June 2011), available at http://www.justice.gov/atr/public/guidelines/27350.pdf (Identifying an upfront buyer provides greater assurance that the divestiture package contains the assets needed to create a viable entity that will preserve competition.)

In the proposed Final Judgment, the designated Acquirer of the Divestiture Assets is a new entrant, Keystone Sensors LLC, ("Keystone"), which was formed in May 2013 for the purpose of entering the U.S. market for S&I to provide an alternative to Heraeus. The founders have significant experience in the S&I industry and bring together experience in the U.S. market, as well as an innovative technology concept. Initially, Keystone had intended to enter the market with a limited portfolio of high-technology products and build sales incrementally. Through the purchase of the Divestiture Assets, Keystone will be able to enter the market more rapidly and compete more effectively with Heraeus and the other U.S. supplier. After its investigation, the United States has concluded that Keystone has the intention and ability to compete in the development, production, sale and service of S&I in the United States.

C. Procedure

The proposed Final Judgment requires Heraeus to divest the Divestiture Assets to Keystone within sixty (60) calendar days after the Court signs the Asset Preservation Stipulation and Order in this matter. The Divestiture Assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer to compete effectively in the relevant market. Heraeus must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with the Acquirer.

In the unlikely event that the sale to Keystone does not occur as anticipated, the proposed Final Judgment provides that a trustee would be appointed to effect the sale of the Divestiture Assets. In that event, the alternative Acquirer similarly would be able to determine which portion of the Divestiture Assets it would need to compete in the development, production, sale, and service of S&I in the United States.

D. Waiver of Noncompete Provisions

To be an effective S&I supplier, a firm must employ a network of dedicated sales and service representatives that can provide on-call service to steel mill customers. A robust sales and service organization is critical to establishing the firm's reputation to provide accurate and reliable service. Following the transaction, Heraeus terminated several experienced sales and service employees of Minco and/or Heraeus, and imposed, as a condition of the employees' severance agreements, a two-year ban on employment in the S&I industry. The United States has concluded that, under the facts and circumstances of this case, these noncompete provisions are overbroad and have impeded the expansion and/or entry of other S&I firms. Accordingly, the proposed Final Judgment requires Heraeus to waive any existing noncompete agreement or other restrictive covenant that may bind any former employee of either Heraeus or Minco in the United States, without imposing any financial penalty on any such former employee. Heraeus also shall not enter into any noncompete or other restrictive covenant with any former, current, or future employee of Heraeus or Minco during the two years following the filing of the Complaint. The United States has determined that the availability of experienced personnel may help facilitate the entry and/or expansion of other S&I firms in the United States.

E. Notice of Future Acquisitions

Because the transaction was not reportable under the HSR Act, the Division did not learn of the transaction until after it was consummated and Heraeus had undertaken significant integration of the former Minco assets. The proposed Final Judgment requires Heraeus to provide the United States with notice (similar to HSR Act notice) of any future acquisition by Heraeus of any firm that provides S&I in the United States. This provision will ensure that the United States has the opportunity to review any future transaction before the assets are

integrated.

F. Other Provisions

The proposed Final Judgment provides that, at the Acquirer's option, Heraeus shall enter into an agreement to provide training and technical support regarding the operation of any purchased Divestiture Asset to the personnel of the Acquirer. The proposed Final Judgment also requires Heraeus to provide the Acquirer with information relating to Heraeus and former Minco personnel in the United States to enable the Acquirer to make offers of employment, and prevents Heraeus from interfering with any negotiations to employ any current or former Heraeus or Minco employee.

Moreover, because the customer qualification process can be a high barrier to entry, the proposed Final Judgment provides that Heraeus shall allow customers to use Heraeus products and equipment in the testing and/or qualification of any S&I, and that Heraeus must waive any contractual restrictions that otherwise would preclude such usage.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Heraeus.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Heraeus have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, 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.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Heraeus. The United States could have continued the litigation and sought divestiture of the Minco assets. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of S&I in the relevant market identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, and avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is

necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. 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.").[2]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc*., 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc*., 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *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.

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

> The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland*

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[3] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

v. United States, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for 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 recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language 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.

[4] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

Dated: January 2, 2014

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. HERAEUS ELECTRO-NITE CO., LLC, Defendant.	CASE NO: 1:14-cv-00005 JUDGE: James Boasberg FILED: 01/02/2014

ASSET PRESERVATION STIPULATION AND ORDER

It is hereby stipulated and agreed by and between the undersigned parties, subject to approval and entry by the Court, that:

I. DEFINITIONS

As used in this Asset Preservation Stipulation and Order:

A. "Heraeus" means defendant Heraeus Electro-Nite Co., LLC, a Delaware corporation with its headquarters in Langhorne, Pennsylvania, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

B. "Minco" means Midwest Instrument Company, Inc., a Wisconsin corporation with its headquarters in Hartland, Wisconsin, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "S&I" means single-use sensors and instruments used to measure and monitor the temperature and chemical composition of molten steel.

D. "Acquirer" means Keystone Sensors, LLC or another entity to which Heraeus divests the Divestiture Assets.

E. "Keystone" means Keystone Sensors, LLC, a Delaware corporation headquartered in Cranberry Township, Pennsylvania, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

F. "Divestiture Assets" means all assets of Heraeus that (1) were acquired from Minco pursuant to the Asset Purchase Agreement between the companies dated August 29, 2012 (and subject to the conditions and limitations specified in that agreement), and (2) are located in the United States or Mexico, including, but not limited to:

1. The former Minco facilities located at 541 Industrial Drive, Hartland, Wisconsin and at 2735 E. Oakland Avenue, Johnson City, Tennessee;

2. All remaining assets from the former Minco facility, located at Avenida Letra D No. 1005, Monterrey, Mexico;

3. All remaining tangible assets, including, but not limited to, all manufacturing equipment, tooling and fixed assets, personal property, remaining finished or partially finished inventory, office furniture, materials, supplies, other tangible property, and all other assets, used in connection with the Divestiture Assets; all licenses, permits and authorizations issued by any governmental organization relating to the Divestiture Assets; all teaming arrangements, agreements, leases, commitments, certifications, and understandings, relating to the Divestiture Assets, including supply agreements; all customer lists, accounts, and credit records; all repair and performance records and all other records relating to the Divestiture Assets; and

4. All intangible assets, including, but not limited to, all intellectual property, including, but not limited to, patents, licenses and sublicenses, copyrights, trademarks, trade names, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Heraeus provides to its own employees, customers, suppliers, agents or licensees, and all research data concerning historic and current research and development efforts relating to S&I, including, but not limited to, designs of experiments and the results of successful and unsuccessful designs and experiments.

II. OBJECTIVES

The proposed Final Judgment filed in this case is meant to ensure Heraeus' prompt divestiture of the Divestiture Assets for the purpose of remedying the loss of competition alleged in the Complaint. This Asset Preservation Stipulation and Order ensures that, until such divestiture required by the Proposed Final Judgment has been accomplished, the Divestiture Assets will remain as economically viable, competitive, and saleable assets.

III. JURISDICTION AND VENUE

The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

IV. COMPLIANCE WITH AND ENTRY OF PROPOSED FINAL JUDGMENT

A. The parties stipulate that a Final Judgment in the form attached hereto as Exhibit A may be filed with and entered by the Court, upon the motion of any party or upon the Court's

own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16, and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on Heraeus and by filing that notice with the Court. Heraeus agrees to arrange, at its expense, publication as quickly as possible of the newspaper notice required by the APPA, which shall be drafted by the United States, in its sole discretion. The publication shall be arranged no later than three business days after Heraeus' receipt from the United States of the text of the notice and the identity of the newspaper within which the publication shall be made. Heraeus shall promptly send to the United States (1) confirmation that publication of the newspaper notice has been arranged, and (2) the certification of the publication prepared by the newspaper within which the notice was published.

B. Heraeus shall abide by and comply with the provisions of the proposed Final Judgment, pending the proposed Final Judgment's entry by the Court, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Asset Preservation Stipulation and Order by the parties, comply with all the terms and provisions of the proposed Final Judgment. The United States shall have the full rights and enforcement powers in the proposed Final Judgment as though the same were in full force and effect as an order of the Court.

C. This Asset Preservation Stipulation and Order shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

D. In the event (1) the United States has withdrawn its consent, as provided in Section IV(A) above, or (2) the proposed Final Judgment is not entered pursuant to this Asset Preservation Stipulation and Order, the time has expired for all appeals of any court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then Heraeus is released from all further obligations under this Asset Preservation Stipulation and Order, and the making of this Asset Preservation Stipulation and Order shall be without prejudice to any party in this or any other proceeding.

E. Heraeus represents that the divestiture ordered in the proposed Final Judgment can and will be made, and that Heraeus will later raise no claim of mistake, hardship or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

V. ASSET PRESERVATION PROVISIONS

Until the divestiture required by the proposed Final Judgment have been accomplished:

A. Heraeus will not destroy, sell, lease, assign, transfer, pledge, or otherwise dispose of any of the Divestiture Assets, even if those assets are no longer used by Heraeus, except that Heraeus may continue to use, sell or dispose of inventory formerly owned by Minco in the normal course of business. Within twenty (20) days after the entry of the Asset Preservation Stipulation and Order, Heraeus will inform the United States of the steps it has taken to comply with this Asset Preservation Stipulation and Order.

B. Heraeus will preserve all corporate and commercial books and records formerly belonging to Minco that are currently in Heraeus' possession.

C. Heraeus will not terminate (except for cause) any United States-based full-time employee formerly employed by Minco. Heraeus' employees with primary responsibility for the productive use of the Divestiture Assets shall not be transferred or reassigned to other areas within the company except for transfer bids initiated by employees pursuant to defendant's regular, established job posting policy. Heraeus shall provide the United States with ten (10) calendar days' notice of such transfer.

D. Heraeus will preserve the tooling, equipment, product and process drawing and specifications, and other items necessary to manufacture products formerly manufactured by Minco.

E. Heraeus shall take no action that would jeopardize, delay, or impede the sale of the Divestiture Assets.

F. Heraeus shall take no action that would interfere with the ability of any trustee appointed pursuant to the Final Judgment to complete the divestitures pursuant to the Final Judgment to an Acquirer acceptable to the United States.

G. Subject to the approval of the United States, Heraeus shall appoint a person or persons to oversee the Divestiture Assets, and who will be responsible for Heraeus' compliance with this section. This person shall have complete managerial responsibility for the Divestiture Assets, subject to the provisions of this Final Judgment. In the event such person is unable to perform his duties, Heraeus shall appoint, subject to the approval of the United States, a replacement within ten (10) working days. Should Heraeus fail to appoint a replacement acceptable to the United States within this time period, the United States shall appoint a replacement.

VI. DURATION OF ASSET PRESERVATION OBLIGATIONS

Heraeus' obligations under Section V of this Asset Preservation Stipulation and Order shall remain in effect until (1) consummation of the divestitures required by the proposed Final Judgment or (2) until further order of the Court. If the United States voluntarily dismisses the Complaint in this matter, Heraeus is released from all further obligations under this Asset Preservation Stipulation and Order.

Dated: January 2, 2014

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

_____/s/_____
Lowell R. Stern * (D.C. BAR #440487)
United States Department of Justice
Antitrust Division
Litigation II Section
450 Fifth Street, NW, Suite 8700
Washington, DC 20530
Tel: (202) 514-3676

*Attorney of Record

FOR DEFENDANT
HERAEUS ELECTRO-NITE CO., LLC

_____/s/_____
Paul M. Honigberg, Esq. (D.C. Bar #342576)
Blank Rome LLP
Watergate
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 772-5800

_____/s/_____
Jeremy A. Rist, Esq.
Blank Rome LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103-6998
Phone: (215) 569-5361

ORDER

IT IS SO ORDERED by the Court, this ____ day of _____, 2014.

_____
United States District Judge

CERTIFICATE OF SERVICE

I, Lowell R. Stern, hereby certify that on January 2, 2014, I caused a copy of the foregoing Competitive Impact Statement, as well as the Complaint, Asset Preservation Stipulation and Order, proposed Final Judgment, and Explanation of Consent Decree Procedures, to be served upon defendant Heraeus Electro-Nite Co., LLC, by mailing the documents electronically to its duly authorized legal representative as follows:

Counsel for Defendant Heraeus Electro-Nite Co., LLC:

Paul M. Honigberg, Esq. (D.C. Bar #342576)
Blank Rome LLP
Watergate
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 772-5800

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_____/s/_____
Lowell R. Stern, Esquire
D.C. BAR #440487
United States Department of Justice
Antitrust Division, Litigation II Section
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. HERAEUS ELECTRO-NITE CO., LLC, Defendant.	CASE NO: 1:14-cv-00005 JUDGE: James Boasberg FILED: 01/02/2014

PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on January 2, 2014, the United States and Defendant Heraeus Electro-Nite Co., LLC ("Heraeus"), 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, Heraeus 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 Heraeus to assure that competition is substantially restored;

AND WHEREAS, the United States requires Heraeus to divest certain assets and take certain other actions for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Heraeus has represented to the United States that the divestiture required below can and will be made and that Heraeus will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the 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 Heraeus under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II. Definitions

As used in this Final Judgment:

A. "Heraeus" means defendant Heraeus Electro-Nite Co., LLC, a Delaware corporation with its headquarters in Langhorne, Pennsylvania, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

B. "Minco" means Midwest Instrument Company, Inc., a Wisconsin corporation with its headquarters in Hartland, Wisconsin, its successors and assigns, and its subsidiaries,

divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "S&I" means single-use sensors and instruments used to measure and monitor the temperature and chemical composition of molten steel.

D. "Acquirer" means Keystone Sensors, LLC or another entity to which Heraeus divests the Divestiture Assets.

E. "Keystone" means Keystone Sensors, LLC, a Delaware corporation headquartered in Cranberry Township, Pennsylvania, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

F. "Divestiture Assets" means all assets of Heraeus that (1) were acquired from Minco pursuant to the Asset Purchase Agreement between the companies dated August 29, 2012 (and subject to the conditions and limitations specified in that agreement), and (2) are located in the United States or Mexico, including, but not limited to:

1. The former Minco facilities located at 541 Industrial Drive, Hartland, Wisconsin and at 2735 E. Oakland Avenue, Johnson City, Tennessee;

2. All remaining assets from the former Minco facility, located at Avenida Letra D No. 1005, Monterrey, Mexico;

3. All remaining tangible assets, including, but not limited to, all manufacturing equipment, tooling and fixed assets, personal property, remaining finished or partially finished inventory, office furniture, materials, supplies, other tangible property, and all other assets, used in connection with the Divestiture Assets; all licenses, permits and

authorizations issued by any governmental organization relating to the Divestiture Assets; all teaming arrangements, agreements, leases, commitments, certifications, and understandings, relating to the Divestiture Assets, including supply agreements; all customer lists, accounts, and credit records; all repair and performance records and all other records relating to the Divestiture Assets; and

4. All intangible assets, including, but not limited to, all intellectual property, including, but not limited to, patents, licenses and sublicenses, copyrights, trademarks, trade names, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Heraeus provides to its own employees, customers, suppliers, agents or licensees, and all research data concerning historic and current research and development efforts relating to S&I, including, but not limited to, designs of experiments and the results of successful and unsuccessful designs and experiments.

III. Applicability

This Final Judgment applies to Heraeus, as defined above, and all other persons in active concert or participation with Heraeus who receive actual notice of this Final Judgment by personal service or otherwise.

IV. Divestiture

A. Heraeus is ordered and directed, within sixty (60) calendar days after the signing of the Asset Preservation Stipulation and Order in this matter, 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. The United States, in its sole discretion, may agree to an extension of this time period not to exceed thirty (30) calendar days, and shall notify the Court in such circumstances. Heraeus agrees to use its best efforts to divest the Divestiture Assets as expeditiously as possible.

B. Notwithstanding the provisions of Paragraph IV.A, upon written request from Heraeus, the United States, in its sole discretion, may agree to exclude from the Divestiture Assets any portion thereof that the Acquirer, at its option, elects not to acquire.

C. Heraeus shall offer to furnish to the 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. Heraeus shall make available such information to the United States at the same time that such information is made available to any other person.

D. Heraeus shall provide the Acquirer and the United States with the name, job title and other contact information relating to all Heraeus personnel in the United States who were formerly employed by Minco, excluding shareholders and former shareholders of Minco, to enable the Acquirer to make offers of employment. Heraeus shall also provide the Acquirer and the United States with the name, last job title, and last known address and other contact information for former employees of Minco or Heraeus in the United States whose employment ended on or after January 1, 2012, to enable the Acquirer to make offers of employment to such

persons. Heraeus shall not interfere with any negotiations by the Acquirer to employ any such current or former Heraeus or Minco employee described in this section.

E. Heraeus shall permit the Acquirer to have reasonable access to personnel and to make inspections of the physical facilities included in the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. Should the Acquirer elect to acquire the Johnson City, Tennessee and/or Hartland, Wisconsin facilities that Heraeus acquired from Minco, Heraeus shall assign the lease(s) to these facilities to the Acquirer, subject to the landlord(s) permission, and shall not interfere with any negotiations between the Acquirer and the landlord(s) concerning assignment of the lease(s).

G. At the option of the Acquirer, Heraeus shall enter into an agreement to provide training and technical support regarding the operation of any purchased Divestiture Asset to the personnel of the Acquirer.

H. Heraeus shall warrant to the Acquirer that each asset that is currently operational will be operational on the date of sale.

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

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

any challenge to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

K. At the option of Heraeus, the Acquirer shall provide Heraeus with a non-exclusive, non-transferable license for the intangible assets described in II(F)(4), above, that prior to the filing of the Complaint in this matter were used in connection with the design, development, production, marketing, servicing, distribution, and/or sale of S&I.

L. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business of the development, production, sale and service of S&I in the United States. The divestiture shall be accomplished in such a way so as to satisfy the United States, in its sole discretion, that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. 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 States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the business of the development, production, sale and service of S&I; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirer and Heraeus gives Heraeus 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 Heraeus has not divested the Divestiture Assets within the time period specified in Section IV(A), Heraeus 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 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 Heraeus 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. Heraeus shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Heraeus 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 Heraeus, 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 Heraeus 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. Heraeus 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 Heraeus 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. Heraeus shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture 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 months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

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

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Heraeus, 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 of the Divestiture Assets. Heraeus 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 Heraeus, the Acquirer, any third party, and the trustee, whichever is later, the United States shall provide written notice to Heraeus and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Heraeus' 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 Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Heraeus under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

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

VIII. Preserving and Maintaining Divestiture Assets

Until the divestiture required by this Final Judgment has been accomplished, Heraeus shall take all steps necessary to comply with the Asset Preservation Order entered by this Court. Heraeus shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Waiver of Noncompete Agreements

A. Heraeus shall waive any existing noncompete agreement or other restrictive covenant that may bind any former employee of either Heraeus or Minco in the United States, without imposing any financial penalty on any such employee. Heraeus shall, no later than twenty-one (21) calendar days after the filing of the Complaint in this matter, provide each such former employee with written notice of the waiver and provide copies of each such waiver to the United States.

B. For a period of two years following Heraeus' agreement to the terms of this Final Judgment, Heraeus shall not require any employee in the United States to agree to a noncompete restriction or other restrictive covenant as a condition of severance or any other agreement relating to an employee's termination of employment.

C. This provision shall not apply to any current or former shareholder of Minco.

X. Use of Equipment

Heraeus shall allow customers, and shall so notify them, to use without consequence Heraeus products and equipment in the testing and/or qualification of any S&I, including waiving any contractual restrictions or the imposition of any warranty- or usage-related defenses to claims that may arise.

XI. 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, Heraeus shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the

name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture 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 Heraeus has taken to solicit buyers for the Divestiture Assets, and to provide required information to the prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Heraeus, 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, Heraeus shall deliver to the United States an affidavit that describes in reasonable detail all actions Heraeus has taken and all steps Heraeus has implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Heraeus shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Heraeus' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Heraeus shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

XII. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, the Asset Preservation Order, or any related orders, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from

time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Heraeus, be permitted:

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

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

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Heraeus shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the

United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Heraeus to the United States, Heraeus 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)(7) of the Federal Rules of Civil Procedure, and Heraeus marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give Heraeus ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XIII. 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"), Heraeus, without providing advance notification to the Antitrust Division, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in any entity engaged in the development, production, sale or service of S&I in the United States during the term of this Final Judgment.

Such notification shall be provided to the Antitrust Division 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 the development, production, sale and service of S&I. 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, Heraeus 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.

XIV. No Reacquisition

During the term of this Final Judgment, Heraeus may not reacquire any part of the Divestiture Assets purchased by the Acquirer.

XV. 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.

XVI. Expiration of Final Judgment

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

XVII. Public Interest Determination

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

Date: _____

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

_____
United States District Judge

[FR Doc. 2014-00709 Filed 01/15/2014 at 8:45 am; Publication Date: 01/16/2014]