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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA and STATE OF MONTANA,

Plaintiffs,

v.

BLUE CROSS AND BLUE SHIELD OF MONTANA, INC., BILLINGS CLINIC, BOZEMAN DEACONESS HEALTH SERVICES, INC., COMMUNITY MEDICAL CENTER, INC., NEW WEST HEALTH SERVICES, INC., NORTHERN MONTANA HEALTH CARE, INC., and ST. PETER'S HOSPITAL,

Defendants.

Case No.1:11-cv-00123-RFC

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 November 8, 2011, the United States and the State of Montana filed a civil antitrust lawsuit challenging an agreement (the "Agreement") between defendant Blue Cross and Blue Shield of Montana, Inc. ("Blue Cross") and defendants Billings Clinic; Bozeman Deaconess Health Services, Inc.; Community Medical Center, Inc.; Northern Montana Health Care, Inc.; and St. Peter's Hospital (collectively, the "hospital defendants").

The hospital defendants are five of the six hospitals that own defendant New West Health Services, Inc. ("New West"), a health insurer that competes against Blue Cross to provide commercial health insurance to Montana consumers. In the Agreement, Blue Cross agreed to pay $26.3

million to the hospital defendants in exchange for their agreeing to collectively stop purchasing health insurance for their own employees from New West and instead buy insurance for their employees from Blue Cross exclusively for six years. Blue Cross also agreed to provide the hospital defendants with two seats on Blue Cross's board of directors if the hospitals do not compete with Blue Cross in the sale of commercial health insurance.

The Complaint alleges that the Agreement will likely cause New West to exit the markets for commercial health insurance, eliminating an important competitor to Blue Cross and ultimately leading to higher prices and lower-quality service for consumers. Consequently, the Complaint alleges that the Agreement unreasonably restrains trade in the sale of commercial health insurance within Montana in the Billings Metropolitan Statistical Area ("MSA"), Bozeman Micropolitan Statistical Area ("MiSA"), Helena MiSA, and Missoula MSA, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; and that the Agreement has substantially lessened competition in the sale of commercial health insurance in those same areas, and will likely continue to do so, in violation of Section 7 of the Clayton

Act, 15 U.S.C. § 18, and the Montana Unfair Trade Practices Act, Mont. Code Ann. § 30-14-205.

With the Complaint, the United States and the State of Montana filed an Asset Preservation Stipulation and Order and proposed Final Judgment which are designed to eliminate the anticompetitive effects of the Agreement. The proposed Final Judgment, which is explained more fully below, would permit Blue Cross and the hospital defendants to proceed with the Agreement but would require the divestiture of New West's commercial health-insurance business (the "Divestiture Assets") and other injunctive relief sufficient to preserve competition in the sale of commercial health insurance in Billings, Bozeman, Helena, and Missoula.

Until the divestiture has been accomplished, the Asset Preservation Stipulation and Order requires New West and the hospital defendants to take all steps necessary to ensure that New West's commercial health-insurance business will be maintained and operated as an ongoing, economically viable, and active line of business; that competition between New West and Blue Cross in the sale of commercial health insurance is

maintained during the pendency of the ordered divestiture; and that New West and the hospital defendants preserve and maintain the Divestiture Assets. The Asset Preservation Stipulation and Order thus ensures that that competition is protected pending completion of the required divestiture and that the assets are preserved so that relief will be effective.

The United States, the State of Montana, and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. 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. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Agreement

Blue Cross is a nonprofit corporation based in Helena, Montana. It sells a range of commercial health-insurance products, including PPOs, HMOs, indemnity products, and individual products, and its group

products are offered on a fully-insured and self-insured basis. (Under fully-insured plans, the insurer bears the risk that health-care claims will exceed anticipated losses; under self-insured plans, the employer itself pays a large portion of medical costs and bears a large portion of the risk of unanticipated losses.) In 2010, Blue Cross's annual revenues were approximately $530 million. For many years, Blue Cross has dominated the commercial health-insurance markets in Montana.

New West is a nonprofit corporation, also based in Helena. Four of the hospital defendants—Billings Clinic, Community Medical Center, Northern Montana Health Care, and St. Peter's Hospital—formed New West in 1998 to compete directly against Blue Cross. In 2006, two additional hospitals acquired an ownership interest in New West: defendant Bozeman Deaconess and Benefis Health System (in Great Falls). Like Blue Cross, New West offers PPO products, HMO products, indemnity products, and individual products, and its group products are offered on a fully-insured and self-insured basis. As the Complaint alleges, New West has offered Montana residents a high-quality option for their

health insurance, routinely pressuring Blue Cross to offer lower prices and better customer service. New West's annual revenues in 2010 were approximately $120 million.

On or around August 1, 2011, Blue Cross and the hospital defendants entered into the Agreement, a letter of intent in which Blue Cross agreed to pay $26.3 million to the hospital defendants in exchange for their agreeing to collectively stop purchasing health insurance for their own employees from New West and instead buy insurance for their employees from Blue Cross exclusively for six years, starting January 1, 2012. (The only New West owner that did not sign the Agreement was Benefis Health System, which already used Blue Cross for its employees and had never used New West.) The hospital defendants collectively account for approximately 11,000 enrolled lives, or roughly one-third of New West's commercial health-insurance business at the time of the Agreement.

The Agreement further requires that *all* of the hospital defendants participate for the agreement to be effective: if any hospital defendant withdraws, the Agreement is terminated. Additionally, Blue Cross agreed

to install two representatives of the hospital defendants on Blue Cross's board of directors if the hospitals do not own or belong to an entity that competes with Blue Cross in the sale of commercial health insurance.

B. The Relevant Markets

1. Product Markets

The Complaint alleges two relevant product markets: (1) the sale of commercial group health insurance, and (2) the sale of commercial individual health insurance. These products are collectively referred to as "commercial health insurance."

(a) Group Health Insurance

As the Complaint explains, most employees obtain commercial health insurance through their employers, which is called "group health insurance." There are no reasonable alternatives to group health insurance for employers, or for most employees. The closest alternative—individual health insurance—is typically much more expensive than group health insurance, in part because while group health insurance is purchased using pre-tax dollars, individual health insurance is not. Furthermore,

purchasing hospital services directly (*i.e.*, without insurance), rather than through a commercial insurer, is typically prohibitively expensive and is not a viable substitute for group health insurance.

Thus, a small but significant increase in the price of group health insurance in the relevant geographic markets would not cause a sufficient number of groups to switch to other health-insurance products, such that the price increase would be unprofitable.

(b) Individual Health Insurance

Individual health insurance is the only health-insurance product available to individuals without access to group coverage or government programs, such as Medicare or Medicaid. As with group insurance, purchasing hospital services directly, rather than through a commercial insurer, is typically prohibitively expensive and is not a viable substitute for individual health insurance. Thus, as the Complaint alleges, a small but significant increase in the price of individual health insurance in the relevant geographic markets would not cause a sufficient number of

individuals to switch to other health-insurance products, such that the price increase would be unprofitable.

2. Geographic Markets

Because patients typically seek medical care close to their homes or workplaces, consumers strongly prefer health-insurance plans with local networks of hospital and physicians. Thus, employers that offer group health insurance to their employees demand insurance products that provide access to health-care provider networks, including primary- and tertiary-care hospitals, in the areas in which substantial numbers of their employees live and work. Likewise, individuals who purchase individual health insurance demand insurance products that provide access to health-care provider networks, including hospitals, in the areas in which they live and work.

The following local areas are relevant geographic markets for the sale of group and individual commercial health insurance:

- The Billings MSA (Yellowstone and Carbon Counties);
- The Bozeman MiSA (Gallatin County);

- The Helena MiSA (Lewis and Clark County and Jefferson County); and
- The Missoula MSA (Missoula County).

As the Complaint alleges, a small but significant increase in the price of commercial health insurance in these areas would not cause a sufficient number of consumers to switch to insurers outside of these areas to make such a price increase unprofitable.

C. Anticompetitive Effects of the Agreement

According to the Complaint, the Agreement effectively eliminates New West as a viable competitor in the sale of commercial health insurance. First, news that none of New West's owners will buy health insurance for their own employees from New West creates a perception that New West is exiting the commercial health-insurance market, and will likely cause many existing and potential customers to stop purchasing (or decline to purchase) insurance from New West. Second, the Agreement will lead New West and its hospital owners to significantly reduce their support for and efforts to win commercial health-insurance customers, further hindering its ability to compete. Furthermore, because the hospital

defendants agreed to act collectively, the Agreement with Blue Cross ensures that New West would lose the support of all its owners and likely exit the market. And the Agreement further deters the hospitals from supporting New West by granting them two positions on Blue Cross's board of directors, but only if the hospitals do not own or belong to a competing insurer.

The Complaint alleges that by eliminating New West as an effective competitor, the Agreement would significantly increase concentration in the markets for commercial health insurance in Montana. In the four relevant areas, Blue Cross's share of commercial health insurance ranged from approximately 43% to 75% at the time the Agreement was signed, and New West's share ranged from 7% to 12%. The Agreement increases Blue Cross's share directly through the transfer of the hospital defendants' accounts from New West, and indirectly because New West's remaining customers are likely to switch insurers, with most moving to Blue Cross because it is the market leader.

Using the Herfindahl-Hirschman Index ("HHI"), a standard measure of market concentration, and assuming that (1) all of the hospital defendants' business transfers to Blue Cross per the terms of the Agreement and (2) that New West's other commercial business is lost to the remaining competitors in proportion to their current shares, the HHIs would increase by 640 in Billings to 2,290; by 1,277 in Bozeman to 5,870; by 1,100 in Helena to 6,900; and by 512 in Missoula to 3,690. These HHI levels far exceed concentration levels that many courts have found create a presumption that an acquisition likely would substantially lessen competition in violation of the Clayton Act.

The Agreement also eliminates vigorous head-to-head competition between Blue Cross and New West. For the past several years, New West has been one of only two significant alternatives to Blue Cross for commercial health insurance in the relevant areas. Many consumers view Blue Cross and New West as the two most significant insurers in the relevant areas and each other's main competitor. Without New West as an effective competitor, Blue Cross will likely increase prices and reduce the

quality and service of commercial health-insurance plans to employers and individuals in the relevant areas.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. The Divestiture Assets

The proposed Final Judgment will eliminate the anticompetitive effects identified in the Complaint by requiring New West and the hospital defendants to divest New West's commercial health-insurance business, including its administrative-services-only contracts and its fully-insured business, but excluding the contracts that cover the hospital defendants' employees and their dependents. This divestiture will allow the acquirer to compete vigorously in the relevant geographic markets.

New West and the hospital defendants must divest New West's fully-insured commercial health-insurance business to the acquirer through a bulk-reinsurance agreement, as provided by Mont. Code Ann. § 33-2-1212. At the same time, they must also divest the remainder of New West's commercial health-insurance business, including its administrative-services-only contracts. This divestiture structure ensures that all of New

West's rights and obligations relating to its commercial health-insurance business immediately transfer to the acquirer. The Final Judgment does not require New West to divest its Medicare Advantage business, and New West plans to continue selling this health-insurance product to the Medicare-eligible population.

New West and the hospital defendants have proposed to sell the Divestiture Assets to PacificSource Health Plans, and the United States, after consulting with the State of Montana, has tentatively approved PacificSource as the acquirer. Consequently, Section IV(F) of the proposed Final Judgment requires New West and the hospital defendants first to attempt to sell the Divestiture Assets to PacificSource.

Under the proposed Final Judgment, the United States and the State of Montana must be satisfied that none of the terms in any agreement between New West and the hospital defendants and the acquirer enable New West or the hospital defendants to interfere with the acquirer's ability to compete effectively.

Although the proposed Final Judgment does not require New West and the hospital defendants to divest the New West health-insurance contracts that covered the hospital defendants' employees and dependents, the proposed Final Judgment does require New West and the hospital defendants to use their best efforts to maintain New West's contracts for coverage of at least 14,600 enrollees in its fully- or self-insured plans until the Divestiture Assets are transferred to the acquirer. To ensure that New West's management will work aggressively to meet this membership target, New West and the hospital defendants will fund an incentive pool of at least $50,000, which will be available to New West's management if they meet the membership target as of the closing date for the sale of the Divestiture Assets. This will allow the acquirer to obtain sufficient enrollees to preserve existing levels of competition.

Section IV(A) of the proposed Final Judgment requires New West and the hospital defendants to divest the Divestiture Assets as a viable, ongoing business within 30 days after the filing of the Complaint. The quick divestiture will help preserve the existing level of competition

because it will convey to the market that a new competitor will rapidly replace New West, and it will help to reduce the possibility that the Divestiture Assets will lose their value.

B. Selected Provisions of the Proposed Final Judgment

Other provisions of the proposed Final Judgment will enable the acquirer to promptly and effectively compete in the market for commercial health insurance. Most importantly, Sections IV(G)–(I) ensure that the acquirer has a cost-competitive health-care provider network. To compete effectively in the sale of commercial health insurance, insurers need a network of health-care providers at competitive rates because hospital and physician expenses constitute the large majority of an insurer's costs. By requiring New West and the hospital defendants to help to provide the acquirer with a cost-competitive provider network, Sections IV(G)–(I) help ensure that the acquirer will be able to compete as effectively as New West before the parties entered the Agreement.

Specifically, Section IV(G) requires the hospital defendants to sign three-year contracts with the acquirer on terms that are substantially

similar to their existing contractual terms with New West. This requirement is vital because three of the hospital defendants (Bozeman Deaconess, St. Peter's, and Northern Montana Hospital) are the only hospitals in their respective geographic markets, while Billings Clinic and Community Medical Center each only compete with one other hospital. Because these three-year contracts provide the acquirer with a cost structure comparable to New West's costs, they position the acquirer to be competitive selling commercial health insurance in all four geographic markets.

To address health-care provider contracts that are not under the hospital defendants' control, Sections IV(H) and IV(I) require New West and the hospital defendants— at the acquirer's option—to (1) use their best efforts to assign the contracts that are not under their control to the acquirer, or (2) lease New West's provider network to the acquirer for up to three years, using their best efforts to maintain the network, including maintaining contracts with substantially similar terms.

Sections IV(M) and IV(N) also require New West and the hospital defendants to provide transitional support services as necessary for the acquirer to operate the Divestiture Assets. New West and the hospital defendants may not provide these transitional support services for more than 12 months without approval from the United States.

The proposed Final Judgment contains three provisions that address Blue Cross's relationships with health-insurance brokers and health-care providers. First, under Section V(A), Blue Cross must provide 30 days' written notice to the plaintiffs before entering into exclusive contracts with health-insurance brokers. This provision prevents Blue Cross from blocking the acquirer's access to brokers. Access to brokers is important because many customers purchase health insurance through a broker. Second, under Section V(B), Blue Cross must provide 30 days' written notice to the plaintiffs before entering into any agreement that prohibits a health-care provider from contracting with other insurers. Third, under Section V(C), Blue Cross must provide 30 days' written notice before entering into any most-favored-nation agreement with a health-care

provider, which would require the provider to give Blue Cross rates that are equal to or better than other insurers. If the United States issues a Civil Investigative Demand ("CID") within 30 days after Blue Cross notifies the plaintiffs that it intends to engage in the practices covered by Sections V(A)–(C), then Blue Cross may not adopt the practices until 30 days after certifying compliance with the CID. These provisions help ensure that Blue Cross will not interfere with the acquirer's ability to compete effectively.

Finally, if New West and the hospital defendants do not accomplish the divestiture within the period prescribed in the proposed Final Judgment, the Court will appoint a trustee selected by the United States to carry out the divestitures. If a trustee is appointed, New West and the hospital defendants must pay the trustee's costs and expenses, and the trustee's commission will provide an incentive based on the price, terms, and speed of the divestiture. Once the trustee is appointed, the trustee will file monthly reports with the Court and the United States explaining his or her efforts to accomplish the divestiture. At the end of six months, if the

divestitures have not been accomplished, the trustee and the United States will make recommendations to the Court, which will enter such orders as it deems appropriate in order to carry out the purpose of the trust. This may include extending the trust or the term of the trustee's appointment for up to six additional months. However, if at the end of all extensions of the trustee's term, the trustee has not accomplished the divestiture, then New West and the hospital defendants will have no further obligations to preserve the divestiture assets.

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 the defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least 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 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 before the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Joshua H. Soven
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 4100
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against the defendants. The United

States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will fully address the competitive concerns set forth in the Complaint. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(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 also 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.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the

antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.").[1]

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' 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; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

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[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts 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).

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also 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.

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

2003) (noting that the court should grant due respect to the United States' "prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for 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. A court "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 using 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). This language effectuates 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.[3]

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[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United*

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.

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 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.").

Respectfully submitted,

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Dated: November 8, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on November 8, 2011, a copy of the foregoing document was served on the following persons by the following means:

1 CM/ECF
____ Hand Delivery
____ U.S. Mail
____ Overnight Delivery Service
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2,3 E-Mail

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