IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, *Plaintiff*, v. PARKER–HANNIFIN CORPORATION, and CLARCOR INC., *Defendants*.	C.A. No. 17-1354-JEJ

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 February 28, 2017, defendant Parker-Hannifin Corporation ("Parker-Hannifin") acquired 100% of the voting stock of CLARCOR Inc. ("Clarcor") for $4.3 billion (the "Transaction"). Following customer complaints and an investigation into the competitive impact of that acquisition, the United States filed a civil antitrust Complaint on September 26, 2017 seeking an order compelling Parker-Hannifin to divest tangible and intangible assets, whether possessed originally by Clarcor, Parker-Hannifin, or both, sufficient to create a separate, distinct, and viable competing business that could replace Clarcor's competitive significance in the marketplace that existed prior to the Transaction. The Complaint alleges that the Transaction

resulted in an effective monopoly in the United States between the only two domestic manufacturers of industry-qualified aviation fuel filtration systems and filter elements, thereby significantly lessening competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint further alleges that, if permitted to stand, the merger will harm competition in the development, manufacture, and sale of these critical aviation fuel filtration systems. The results would be higher prices, reduced innovation, less reliable delivery times, and less favorable terms of service.

Concurrent with the filing of this Competitive Impact Statement, the United States and Parker-Hannifin have filed a [Proposed] Order Stipulating to Modification of Order to Preserve and Maintain Assets ("Stipulation and [Proposed] Preservation Order") and a proposed Final Judgment.[1] The proposed Final Judgment, which is explained more fully below, requires Parker-Hannifin to divest the Facet Filtration Business, which includes the assets of Parker-Hannifin used in the design, development, manufacturing, testing, marketing, sale, distribution or service of aviation fuel filtration products used in aviation ground fuel filtration and sold under the Facet or PECOFacet brand (the "Divestiture Assets").[2] The Divestiture Assets encompass the systems and elements that include and comprise all microfilters, filter water separators, and filter monitor components used in aviation ground fuel filtration and sold to customers under the Facet or

[1] The Stipulation and [Proposed] Preservation Order seeks to modify the Stipulation and Order to Preserve and Maintain Assets (D.I. 20) entered on October 16, 2017 to ensure the preservation of the divestiture assets and their economic and competitive viability until entry of the proposed Final Judgment.

[2] As set forth in the proposed Final Judgment, the Facet Filtration Business also includes (1) clay filter systems and elements used in aviation ground fuel filtration; (2) sewage water treatment systems, fuel/water separator and filter component systems and elements, and bilge water separators, that, in each instance are used in commercial marine, offshore drilling and military marine filtration, and sold to customers under the PECOFacet brand; and (3) oil/water filtration and separation systems and sewage treatment systems, that, in each instance are used in environmental water filtration, and sold to customers under the PECOFacet brand.

PECOFacet brands. These aviation fuel filtration products were sold by Clarcor prior to the Transaction and the divestiture of these assets thereby restores the competition that was lost as a result of the acquisition.

The United States and defendants Parker-Hannifin and Clarcor have stipulated that the defendants are bound by the terms of the proposed Final Judgment and 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. *Parker-Hannifin and the Clarcor Acquisition*

Parker-Hannifin is an Ohio corporation headquartered in Cleveland, Ohio. It is a diversified manufacturer of filtration systems, and motion and control technologies for the mobile, industrial, and aerospace markets with operations worldwide. In 2016, the company had sales revenues of $11.4 billion, and $12.0 billion in 2017. Parker-Hannifin manufactures and sells aviation fuel filtration products under the Velcon brand.

Prior to its acquisition by Parker-Hannifin, defendant Clarcor was a Delaware corporation headquartered in Franklin, Tennessee. Clarcor was a leading provider of filtration systems for diversified industrial markets with net sales of approximately $1.4 billion in 2016. Clarcor manufactured and sold aviation fuel filtration products through its PECOFacet subsidiary, which has facilities in the United States to develop and manufacture products, and provide service and technical support for its U.S. aviation fuel filtration customers.

On December 1, 2016, Parker-Hannifin and Clarcor entered into an Agreement and Plan

of Merger whereby Parker-Hannifin, through a newly formed Delaware corporation and wholly-owned subsidiary of Parker-Hannifin ("Merger-Sub"), acquired 100% of the voting stock of Clarcor. On February 28, 2017, Parker-Hannifin completed its acquisition. Pursuant to the terms of the Merger Agreement, the Merger Sub merged with and into Clarcor, with Clarcor surviving the merger, and existing today as a Delaware-incorporated, wholly-owned subsidiary of Parker-Hannifin.

B. *The Competitive Effects of the Transaction*

1. Industry Background

Aviation fuel originates from the refinery processing of crude oil. Following manufacture, batch production and certification, aviation fuel is released into the distribution system or sent directly by pipeline to an airport. The distribution system may use a number of transportation methods such as pipelines, barges, railcars, ships, and tankers, before it is delivered to airport storage tanks and then pumped into the aircraft.

Fuel contaminated by water, particulates or organic material creates unacceptable safety risks to aircraft. Because of the risks of such contaminants being introduced into the fuel at any point in the supply chain, it is critical that fuel be filtered properly at multiple stages in the process before being delivered into the airplane. Due to safety concerns, filtration at airports is subject to specific industry standards. The quality of aviation fuel in the United States is regulated by the Federal Aviation Administration, but airlines and their contracted refueling agents are responsible for the handling and filtration of aviation fuel at airports.

For more than 25 years, Airlines for America (formerly known as the Air Transportation Association), a trade association for U.S. passenger and cargo carriers, has published standards for aviation fuel quality control at airports, recognizing the "importance of using quality jet fuel

for ensuring the highest degree of flight safety." In particular, ATA Specification 103 ("ATA 103") sets forth specifications, standards, and procedures in the United States for ensuring that planes receive uncontaminated aviation fuel. ATA 103 is the industry standard for aviation fuel handling in the United States and all U.S. commercial airlines have adopted ATA 103 into their operating manuals. Specifically, ATA 103 requires the use of aviation fuel filtration systems and filter elements that are qualified to meet the latest standards set by the Energy Institute ("EI")—an independent, international professional organization for the energy sector. In addition, ATA 103 requires that all aviation fuel be filtered at least three times before it is consumed in an aircraft engine: (1) as it enters an airport storage tank; (2) as it exits the airport storage tank and is pumped into a hydrant system, refueling truck or hydrant cart; and (3) as it is pumped from a hydrant cart or refueling truck into an aircraft.

The primary customers of EI-qualified aviation fuel filtration systems and filter elements include commercial airline ground fueling agents, fixed based operators at airports, airport fuel storage operators, and manufacturers of fueling equipment. These customers must follow ATA 103 and are therefore required to purchase and use EI-qualified filtration systems and filter elements. EI-qualified filtration systems and filter elements are also used by customers supplying aviation fuel to U.S. airports. Like commercial airlines, the Department of Defense also requires that aviation fuel filtration suppliers meet EI specifications.

2. Relevant Markets

An aviation fuel filtration system is made up of a pressurized vessel that houses consumable filter elements. While vessels can last for decades, the filter elements must be replaced pursuant to a schedule set by ATA 103—or sooner, if contaminants in the fuel affect the filtration system's performance.

There are three types of aviation fuel filtration systems that must be qualified to EI standards pursuant to ATA 103: (i) microfilter systems; (ii) filter water separator systems; and (iii) filter monitor systems (collectively "EI-qualified aviation fuel filtration systems"). Each type of EI-qualified aviation fuel filtration system uses different filter elements—microfilters, coalescers, separators, and monitors—which must also meet EI standards (collectively "EI-qualified aviation fuel filtration elements"). Each system and its associated filter elements is qualified to separate EI standards.

EI-qualified aviation fuel filtration systems and EI-qualified aviation fuel filtration elements are separate relevant product markets and lines of commerce under Section 7 of the Clayton Act. The filtration of aviation fuel at airports in the United States must be performed using aviation fuel filtration systems that are qualified to the latest EI standards. Similarly, to comply with U.S. industry standards, only EI-qualified aviation fuel filtration elements may be used for the filtration of aviation fuel used at airports in the United States. U.S. customers that process aviation fuel typically will accept no substitutes for (i) EI-qualified aviation fuel filtration systems, or (ii) EI-qualified aviation fuel filtration elements. A company that controls all EI-qualified aviation fuel filtration systems or all EI-qualified aviation fuel filtration elements in the United States could profitably raise prices. In the event of a small but significant non-transitory increase in price, customers are unlikely to switch away from EI-qualified aviation fuel filtration systems or EI-qualified filtration elements in sufficient numbers to make that price increase unprofitable.

Further, as alleged in the Complaint, the relevant geographic market for the development, manufacture, and sale of EI-qualified aviation fuel filtration systems and filter elements is the United States. U.S. customers of aviation fuel filtration systems and filter elements rely on

domestic sales and technical support, warehousing and distribution. Ready, available supply of filtration systems and elements is critical to ensuring the proper filtration of aviation fuel. Domestic service, including technical support and training, is also essential for many U.S. customers. Parker-Hannifin and Clarcor recognize the need for local support and have U.S. facilities that provide sales, technical support and distribution to U.S. customers. These customers are unlikely to switch to a foreign supplier with no U.S. presence in the event of a significant price increase.

3. Competitive Effects

Prior to the acquisition, Parker-Hannifin and Clarcor were the only two U.S. manufacturers of EI-qualified aviation fuel filtration systems and EI-qualified aviation fuel filtration elements and were engaged in head-to-head competition in each of the relevant markets. That competition enabled customers of the relevant products to negotiate better pricing, service and terms and to receive innovative product developments from Parker-Hannifin and Clarcor. The Transaction eliminates this head-to-head competition in each of the relevant markets. This elimination of head-to-head competition will provide Parker-Hannifin with the power to raise prices without fear of losing a significant amount of sales.

As discussed in the Complaint, the merger also reduces non-price competition. Prior to the acquisition, Clarcor's PECOFacet (or Facet) brand had distinguished itself as the leading provider of services and non-price benefits, e.g., innovative product improvements, training programs, customer service, and strong on-time delivery. Following the merger, Parker-Hannifin's need to compete with these Clarcor programs and services is eliminated, to the detriment of customers.

4. Entry and Expansion

The only other firm that manufactures EI-qualified aviation fuel filtration systems and EI-qualified filter elements is located in Germany. This company lacks a U.S. manufacturing facility and a U.S. network for sales, warehousing, distribution, technical support and delivery. Without that infrastructure, effective near-term expansion by that firm into the United States is unlikely. Even if such expansion were to occur, however, such expansion likely would not be timely or sufficient to restore competition and restrain the anticompetitive effects resulting from the Transaction.

Timely and sufficient *de novo* entry is also unlikely. Barriers to entry for the relevant market are significant. They include the high costs and long time frames needed to design, develop, and manufacture the products, as well as the testing needed to obtain EI-qualification. Indeed, there has been no effective entry in the United States in the development, manufacture, or sale of EI-qualified aviation fuel filtration systems and filter elements in decades.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will create an independent and economically viable competitor in the markets for EI-qualified aviation fuel filtration systems and EI-qualified aviation fuel filtration elements sold to U.S. customers.

A. *The Divestiture*

The proposed Final Judgment requires Parker-Hannifin and Clarcor to divest the Facet Filtration Business as a viable, ongoing business. The Facet Filtration Business includes and comprises the microfilters, filter water separators, and filter monitor components that are used in aviation ground fuel filtration and sold to customers under the Facet or PECOFacet brands. As defined in Paragraph II(G) of the proposed Final Judgment, the Facet Filtration Business

includes facilities located in (i) Stillwell, Oklahoma, (ii) Tulsa, Oklahoma, (iii) La Coruña, Spain, (iv) Paris, France, (v) Torino, Italy, (vi) Cardiff, United Kingdom, and (vii) Almere, The Netherlands. It also includes the aviation fuel filtration testing lab in Greensboro, North Carolina, and the tangible and intangible assets used in connection with the Facet Filtration Business worldwide.

Due to the large number of assets located outside of the United States, the consummated nature of the transaction, and the administrative complexities involved in a divestiture of this nature, Paragraph IV(A) of the proposed Final Judgment provides that the defendants must divest the Divestiture Assets to an Acquirer acceptable to the United States within the later of: (1) one hundred thirty-five (135) days after filing of the Stipulation and [Proposed] Preservation Order; (2) five (5) calendar days after notice of entry of the Final Judgment by the Court; or (3) fifteen (15) calendar days after the Required Regulatory Approvals have been received. The Divestiture Assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant markets. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

The proposed Final Judgment also contains provisions to prevent against accidental customer confusion by transitioning away from the use of the "PECOFacet" brand on products that are not part of the assets being divested. Under Paragraph II(G)(4), the definition of the Facet Filtration Business excludes from the Divestiture Assets any trademark, trade name, service mark, or service name containing the names "Clarcor," "PECO," or "PECOFacet," except to the extent the Acquirer is required under existing U.S. military contracts with respect to Aviation Fuel Filtration Products qualified to EI standards to use the name "PECOFacet."

However, in no event shall such use extend beyond one (1) year following the entry of the Final Judgment. Such a provision ensures that the Acquirer can comply with registration and invoicing requirements for existing U.S. military contracts requiring the use of the "PECOFacet" trade name or brand, while transitioning away from the "PECOFacet" brand. Similarly, under Paragraph IV(I), Parker-Hannifin is required within two (2) years following the notice of entry of the Final Judgment, or as soon as is practicable under existing contracts or laws, to use reasonable best efforts to transition retained (i.e., non-divested) products sold under the "PECOFacet" brand to a brand that does not include the "Facet" name. The longer term for which Parker-Hannifin may continue to use the "PECOFacet" brand reflects the reality that the "PECOFacet" brand is attached to many more PECOFacet contracts globally (in the oil and gas industry) with private and state-owned companies. Because of the volume of these contracts, Parker-Hannifin is likely to expend more time than the Acquirer to move all of these contracts to a new brand.

B. *Transition Services Agreement*

In order to facilitate the Acquirer's immediate use of the Divestiture Assets, Paragraph IV(J) provides the Acquirer with the option to enter into a transition services agreement with Parker-Hannifin to obtain back office and information technology services and support for the Facet Filtration Business for a period of up to twelve (12) months. The United States, in its sole discretion, may approve one or more extensions of this agreement for a total of up to an additional twelve (12) months.

C. *Employee Retention Provisions*

The proposed Final Judgment also contains provisions intended to facilitate the Acquirer's efforts to hire the employees involved in the Facet Filtration Business. Paragraph

IV(C) of the proposed Final Judgment requires defendants to provide the Acquirer with organization charts and information relating to these employees and make them available for interviews, and provides that defendants will not interfere with any negotiations by the Acquirer to hire them. In addition, Paragraph IV(D) provides that for employees who elect employment with the Acquirer, defendants, subject to limited exceptions, shall waive all non-compete and non-disclosure agreements, vest all unvested pension in accordance with the plan, and provide all benefits to which the employees would generally be provided if transferred to a buyer of an ongoing business. The paragraph further provides, that for a period of 12 months from the filing of the Stipulation and [Proposed] Preservation Order, defendants may not solicit to hire, or hire, any such person who was hired by the Acquirer, unless (1) such individual is terminated or laid off by the Acquirer or (2) the Acquirer agrees in writing that defendants may solicit or hire that individual.

D. *Divestiture Trustee*

In the event that the defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that the defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as

appropriate, in order to carry out the purpose of the trust, including extending the trust of the term of the trustee's appointment.

E. *Prohibition on Reacquisition*

Section XI of the proposed Final Judgment prohibits Parker-Hannifin or Clarcor from reacquiring any part of the Divestiture Assets that is primarily related to aviation fuel filtration products qualified to EI standards during the term of the Final Judgment.

F. *Stipulation and Preservation Order Provisions*

Defendants have entered into the Stipulation and [Proposed] Preservation Order, which was filed simultaneously with the Court, to ensure that, pending the completion of the divestiture, the Divestiture Assets are maintained as an ongoing, economically viable, and active business. The Stipulation and [Proposed] Preservation Order ensures that the Divestiture Assets are preserved and maintained in a condition that allows the divestiture to be effective.

In addition, the defendants are required to implement and maintain procedures to prevent the sharing by personnel of the Facet Filtration Business of competitively sensitive information with personnel with responsibilities relating to Parker-Hannifin's Velcon Filtration Business. Such procedures must be detailed in a document submitted to the United States within thirty (30) calendar days of the Court's entry of the Stipulation and [Proposed] Preservation Order. The United States and Parker-Hannifin will attempt to resolve objections regarding the procedures as promptly as possible, and in the event that the objections cannot be mutually resolved, either party may request for the Court to rule on the procedures.

As set forth in Section VIII of the proposed Final Judgment, until the divestiture required by the Final Judgment has been accomplished, defendants are required to take all steps necessary to comply with the Stipulation and [Proposed] Preservation Order filed simultaneously with the

Court and are prohibited from taking any action that would jeopardize the divestiture.

G. *Enforcement and Expiration of the Final Judgment*

The proposed Final Judgment contains provisions designed to promote compliance and make the enforcement of Division consent decrees as effective as possible. Paragraph XIII(A) provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. Under the terms of this paragraph, Parker-Hannifin has agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Parker-Hannifin has waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XIII(B) of the proposed Final Judgment further provides that should the Court find in an enforcement proceeding that Parker-Hannifin has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, in order to compensate American taxpayers for any costs associated with the investigation and enforcement of violations of the proposed Final Judgment, Paragraph XIII(B) requires Parker-Hannifin to reimburse the United States for attorneys' fees, experts' fees, or costs incurred in connection with any enforcement effort.

Finally, Section XIV of the proposed Final Judgment provides that the Final Judgment shall expire ten (10) years from the date of its entry, except that after five (5) years from the date

of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Parker-Hannifin that the divestiture has been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

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

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw

its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the 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, Defense, Industrials, and Aerospace Section
Antitrust Division
United States Department of Justice
450 5th Street, N.W., Suite 8700
Washington, DC 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Parker-Hannifin and Clarcor. The United States could have continued the litigation and sought divestiture of either Parker-Hannifin's or Clarcor's aviation fuel filtration assets. The United States is satisfied, however, that the divestiture of the assets in the manner prescribed in the proposed Final Judgment will restore competition in the markets for EI-qualified aviation fuel filtration systems and filter elements in the United States. The proposed Final Judgement would achieve all of the relief the United States would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in

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

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

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting the court has broad discretion of the adequacy of the relief at issue); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the

final judgment are clear and manageable.").[3]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[4] In determining whether a

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

[4] *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'").

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 U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the 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 U.S. Airways*, 38 F. Supp. 3d at 74 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461)); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in

relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 74 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As the United States District Court for the District of Columbia 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); *see also U.S. Airways*, 38 F. Supp. 3d at 75 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended

proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[5] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 75.

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.

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Respectfully submitted,

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

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