UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

Plaintiff,

v.

ZF FRIEDRICHSHAFEN AG

and

WABCO HOLDINGS, INC.

Defendants.

COMPETITIVE IMPACT STATEMENT

The United States of America, under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "APPA" or "Tunney Act"), 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 March 28, 2019, Defendant ZF Friedrichshafen AG ("ZF") agreed to acquire Defendant WABCO Holdings, Inc. ("WABCO") in a transaction that would unite two of the leading global suppliers of large commercial vehicle ("LCV") components. The United States filed a civil antitrust Complaint on January 23, 2020, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen

competition for the design, manufacture, and sale of LCV steering gears in North America, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to address the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, the Defendants are required to divest WABCO's wholly-owned subsidiary R.H. Sheppard Co., Inc. ("R.H. Sheppard") and other WABCO assets related to LCV steering gears. Under the terms of the Hold Separate, the Defendants will take certain steps to ensure that R.H. Sheppard is operated as a competitively independent, economically viable, and ongoing business concern, which will remain independent and uninfluenced by ZF, and that competition is maintained during the pendency of the required divestiture.

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

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

ZF is a German company headquartered in Friedrichshafen, Germany. It has 149,000 employees in 40 countries, and had annual sales of $36.9 billion in 2018, $9.6 billion of which were in the United States. ZF's North American business historically focused on the production and sale of transmissions to passenger and light vehicle manufacturers, but in 2015, ZF acquired a leading U.S. steering systems manufacturer, TRW, Inc. ZF's U.S. headquarters are in Livonia, Michigan.

WABCO is a Delaware corporation with a North American headquarters in Auburn Hills, Michigan, and a global headquarters in Bern, Switzerland. WABCO descends from the original Westinghouse Air Brake Company formed in 1869. It has 16,000 employees in 40 countries, and had annual sales in 2018 of $3.8 billion, $850 million of which were in the United States. WABCO's North American business historically focused on commercial vehicle air brake and air suspension components, but in 2017, WABCO acquired a leading U.S. commercial vehicle steering component company, R.H. Sheppard.

On March 28, 2019, pursuant to an agreement and plan of merger, ZF agreed to acquire WABCO in a deal valued at approximately $7 billion.

B. The Competitive Effects of the Transaction

1. Background on LCV Steering Gears

Steering system components work together to direct a vehicle, and include steering gears, steering pumps, pitman arms, steering columns, steering linkages, and electronic steering controls. Steering equipment suitable for LCVs is sophisticated and highly engineered, especially the key component: steering gears. LCVs include all trucks, buses, and off-road vehicles that weigh over 19,501 pounds (defined as Class 6-8 vehicles by the United States Department of Transportation (49 C.F.R. § 565.15)).

Steering gears are located below the steering column (which is attached to the steering wheel) and translate direction to the steering linkage. Steering gears for LCVs have a complex hydraulic power recirculating ball gear. Steering gears must be tuned carefully to operate within the specifications of the individual LCV's design and performance requirements, and must work together with the entire system of steering equipment.

Advanced LCV steering gears also include what is known as a torque overlay. A torque overlay adds hardware that enables the steering gear to quickly and independently direct the vehicle without the input of the steering column, and allows for advanced driver assistance system ("ADAS") steering features. ADAS technology in general includes features such as lane keeping assist, adaptive cruise control, automated emergency braking, blind spot detection, and other similar features. For ADAS steering features, torque overlay steering gears work with sensors and electronic controls that detect the environment around the vehicle and then work with the steering hardware to keep the vehicle on the correct path and avoid collisions. Within the last five years, truck and bus manufacturers have begun to use steering-related ADAS features, and both Defendants are actively engaged in research and development to improve steering-related ADAS features for eventual use in autonomous trucks and buses. In the future, steering-related ADAS features may be developed to the point where they can be combined with other ADAS technology related to braking and powertrain control, enabling the potential for fully autonomous operation of commercial vehicles. LCV steering gears will continue to be a key component as future ADAS technology is developed.

Truck and bus manufacturers are the primary customers for LCV steering gears. These customers incorporate LCV steering gears into the vehicle's final assembly, and then sell to end-use customers. Other LCV steering gear customers include manufacturers of commercial vehicles for off-road, military, mining, and agriculture uses. Typically, customers purchase LCV steering gears separately from other steering components, although they also may choose to purchase a whole steering system. In some cases, another entity may buy the LCV steering gear from one of the merging parties and then integrate it into a whole steering system that it sells to truck or bus manufacturers. Customers generally buy steering gears either based on pre-

established price lists or after a competitive bidding process. The annual size of the North American market for LCV steering gears is approximately $220 million.

2. Relevant Product Market: LCV Steering Gears

As alleged in the Complaint, LCV steering gears must be durable and powerful enough to move large trucks or buses that utilize hydraulic steering systems without electronic power-assisted steering, because electronic power-assisted steering is not used on LCVs. This distinguishes LCV steering gears from lighter and simpler electronic steering gears used for smaller vehicles such as passenger cars. The quality and usefulness of an LCV steering gear is defined by several special characteristics, the most important of which are size, weight, torque required to move, and sensitivity, which relates to the ability of the gear to respond quickly and accurately to the driver or inputs from electronic controls.

The Complaint alleges that there are no other steering methods or technologies that can accomplish the required functions of LCV steering gears. Truck and bus manufacturers require the highly-capable LCV steering gears discussed above, because the lives and safety of drivers and other motorists, pedestrians, and property depend on the unfailing performance of an LCV steering gear to direct the vehicle. Other steering gears are less capable, and are therefore not a substitute for LCV steering gears purchased for use in LCVs in North America.

For the foregoing reasons, according to the Complaint, customers will not substitute less-capable steering gears, or any other product, for LCV steering gears in response to a small but significant and non-transitory increase in the price of LCV steering gears. The Complaint, therefore, alleges that LCV steering gears are a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. § 18.

3. Relevant Geographic Market: North America

As alleged in the Complaint, LCV steering gears used in North America require a different design and alignment than those used outside North America. This is because of distinct truck and bus design differences, such as those related to higher weight and power, and a common configuration in which the cab is located behind the axles rather than over them. Because of these differences, the Complaint alleges that truck and bus manufacturers strongly prefer LCV steering gears that have performed successfully on North American commercial vehicles, and have been unwilling to purchase steering gears used only in foreign markets. Customers also require their steering gear manufacturers to have an established North American presence for sales, service, and aftermarket support. Having an installed North American base helps customers to ensure that both in-house and third-party service technicians have experience with the relevant steering gears and have an existing spare parts inventory when gears need to be repaired or replaced. According to the Complaint, in the face of a small but significant and non-transitory price increase by North American producers of LCV steering gears, customers are unlikely to turn to manufacturers located outside North America and who produce LCV steering gears solely for markets outside North America. The Complaint therefore alleges that North America is a relevant geographic market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

4. Anticompetitive Effects of the Proposed Transaction

As alleged in the Complaint, ZF and WABCO are the only firms that design, manufacture, and sell LCV steering gears in North America. After its acquisition of TRW in 2015, ZF became the leading North American firm selling steering systems and components for commercial vehicles. In the market for LCV steering gears in North America, it is estimated to

have a 54 percent market share. WABCO is the only other market participant and has an estimated 46 percent market share. WABCO sells LCV steering gears through its wholly-owned R.H. Sheppard subsidiary, which it acquired in 2017. The Complaint alleges that the merger would give the combined firm a monopoly over LCV steering gears in North America, leaving North American customers without a sufficient competitive alternative for this critical component.

According to the Complaint, ZF and WABCO compete for sales of LCV steering gears on the basis of price, quality, service, innovation, and contractual terms such as delivery times. This competition has resulted in lower prices, higher quality, better service, and shorter delivery times. Competition between ZF and WABCO has also fostered innovation, leading to LCV steering gears with higher reliability and the innovative features such as torque overlay that are expected to be integral to the development of future ADAS technology, including features for autonomous LCVs. The Complaint alleges that the combination of ZF and WABCO would eliminate this competition and its future benefits to truck and bus manufacturers and end-use customers. Post-transaction, the merged firm likely would have the incentive and ability to increase prices, lower quality or service, offer less favorable contractual terms, and reduce research and development efforts that would otherwise lead to innovative and high-quality products.

According to the Complaint, the proposed merger, therefore, likely would substantially lessen competition in the design, manufacture, and sale of LCV steering gears in North America in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

5. Difficulty of Entry

The Complaint alleges that sufficient, timely entry of additional competitors into the market for LCV steering gears in North America is unlikely. Truck and bus manufacturers have shown little interest in buying steering gears and other components from anyone other than the only two established suppliers, ZF and WABCO, because of these companies' proven performance and North American presence.

According to the Complaint, production facilities and sales and service infrastructure for LCV steering gears require a substantial investment in both capital equipment and human resources. To be competitively viable, a new entrant would need to construct a factory to produce a range of steering components, establish production lines capable of manufacturing the components, and build assembly lines and establish or acquire access to testing equipment and facilities.

A new entrant also would need to retain engineering and research personnel to design, test, and troubleshoot the detailed manufacturing process necessary to produce LCV steering gears acceptable to North American customers. Any new LCV steering gears also would require extensive customer testing and qualification before they would be used by North American truck and bus manufacturers or accepted by end users. Moreover, because LCV steering gears now being designed and developed by ZF and WABCO are undergoing continuous technological improvement and innovation for use in the development of ADAS features, any new entrant would need to acquire equivalent expertise and proprietary technologies to enable steering-related ADAS features to be efficiently incorporated into the advanced electronic control components of future North American LCVs. Finally, because customers prefer to use LCV steering gear manufacturers with an existing installed base to ensure efficient and quality service

by customers' in-house or third-party service centers, a new entrant lacking an installed base would be at a severe disadvantage. The Complaint alleges that as a result of all of these barriers, entry would be costly and time-consuming.

The Complaint alleges that as a result of the barriers described above, entry into the market for LCV steering gears would not be timely, likely, or sufficient to defeat the anticompetitive effects likely to result from the merger of ZF and WABCO.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the market for LCV steering gears in North America. Paragraph IV(A) of the proposed Final Judgment requires the Defendants, within the later of ninety (90) calendar days after the filing of the Complaint in this matter or thirty (30) calendar days after Regulatory Approvals have been received, to divest the entirety of WABCO's subsidiary R.H. Sheppard, as well as related WABCO assets, to an Acquirer acceptable to the United States it its sole discretion.[1] Paragraph IV(L) of the proposed Final Judgment requires that the Divestiture Assets must be divested in such a way as to satisfy the United States in its sole discretion that they can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the design, manufacture, and sale of LCV steering gears. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with prospective purchasers.

[1] Paragraph II(G) of the proposed Final Judgment defines Regulatory Approvals as "(i) any approvals or clearances pursuant to filings with the Committee on Foreign Investment in the United States ("CFIUS"), or under antitrust or competition laws required for the Transaction to proceed; and (ii) any approvals or clearances pursuant to filings with CFIUS, or under antitrust, competition, or other U.S. or international laws required for Acquirer's acquisition of the Divestiture Assets to proceed."

If the Defendants do not accomplish the divestiture within the period prescribed in the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that the Defendants will pay all costs and expenses of the trustee. The divestiture 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 the divestiture trustee's appointment becomes effective, the trustee will provide periodic reports to 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 divestiture trustee and the United States will make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the trust, including by extending the trust or the term of the divestiture trustee's appointment.

The proposed Final Judgment contains several provisions to facilitate the immediate use of the Divestiture Assets by the Acquirer. Paragraph IV(I) of the proposed Final Judgment requires Defendants, at the Acquirer's option, to enter into a supply contract for the assembly of active steering electronic control units sufficient to meet all or part of the Acquirer's needs for a period of up to six (6) months. Upon Acquirer's request, the United States, in its sole discretion, may approve one or more extensions of any such agreement for a total of up to an additional six (6) months. In addition, Paragraph IV(J) of the proposed Final Judgment requires Defendants, at the Acquirer's option, to enter into a transition services agreement for back office, human resource, and information technology services and support for the Divestiture Assets for a period of up to twelve (12) months. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions for a total of up to an additional six (6) months

if the Defendants notify the United States in writing at least three (3) months prior to the date the transition services contract expires. Finally, Paragraph IV(J) provides that employees of the Defendants tasked with providing any transition services must not share any competitively sensitive information of the Acquirer with any other employee of the Defendants.

The proposed Final Judgment also contains provisions intended to facilitate the Acquirer's efforts to hire the employees involved in the R.H. Sheppard business, including any additional WABCO employees, wherever located, involved in the design, manufacture, or sale of LCV steering gears. Paragraph IV(C) of the proposed Final Judgment requires the 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, the Defendants, subject to exceptions, shall waive all noncompete and nondisclosure agreements, vest all unvested pension and other equity rights, 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 Complaint, the Defendants may not solicit to hire, or hire any such person who was hired by the Acquirer, unless such individual is terminated or laid off by the Acquirer or the Acquirer agrees in writing that Defendants may solicit or hire that individual.

The proposed Final Judgment also contains provisions designed to promote compliance and make the enforcement of the Final Judgment 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, the Defendants have 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 the Defendants have 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) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore competition that would otherwise be harmed by the transaction. The Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIII(C) of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that the Defendants have 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, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the proposed Final Judgment, Paragraph XIII(C) provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, that the Defendants will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

Paragraph XIII(D) states that the United States may file an action against a Defendant for violating the Final Judgment for up to four (4) years after the Final Judgment has expired or been

terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XIV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and the Defendants 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 neither impairs nor assists 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 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 U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final 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:

John R. Read
Acting Chief, Defense, Industrials, and Aerospace Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, 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

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against the Defendants. The United States could have continued the litigation and

sought preliminary and permanent injunctions against ZF's acquisition of WABCO. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the design, manufacture, and sale of LCV steering gears in North America. 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); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75

(D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *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 a court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the U.S. 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 in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[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." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted). More demanding requirements would "have enormous practical consequences for the

government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152-53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co.*, 900 F.2d at 309).

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 75 (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 ("[T]he '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.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added 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 76 (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). This language explicitly wrote into the statute what Congress intended when it first 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). "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 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: January 23, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel Monahan, hereby certify that on January 23, 2020, I caused a copy of the foregoing Competitive Impact Statement to be served on ZF Friedrichshafen AG and WABCO Holdings, Inc. by mailing the documents electronically to their duly authorized legal representatives, as follows:

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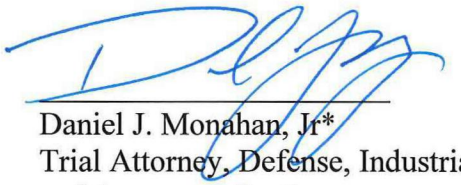

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