UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. THE WALT DISNEY COMPANY, and TWENTY-FIRST CENTURY FOX, INC., *Defendants*.	Civil Action No. 18- CV- 5800 (CM) (KNF)

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

Defendants The Walt Disney Company ("Disney") and Twenty-First Century Fox, Inc. ("Fox") (collectively, "Defendants") entered into an Agreement and Plan of Merger dated December 13, 2017, amended on June 20, 2018, pursuant to which Disney agreed to acquire certain assets, including Fox's ownership of, or interests in, twenty-two regional sports networks ("RSNs"), the FX cable networks, the National Geographic cable networks, television and film studios, Hulu, and international television businesses (the "Fox Sale Assets") from Fox for approximately $71.3 billion (the "Transaction").

Specifically, Fox proposes to sell to Disney its interests in the following RSNs: (i) Fox Sports Arizona; (ii) Fox Sports Carolinas; (iii) Fox Sports Detroit; (iv) Fox Sports Florida; (v) Fox Sports Indiana; (vi) Fox Sports Kansas City; (vii) Fox Sports Midwest; (viii) Fox Sports New Orleans; (ix) Fox Sports North; (x) Fox Sports Ohio; (xi) SportsTime Ohio; (xii) Fox Sports Oklahoma; (xiii) Fox Sports San Diego; (xiv) Fox Sports South; (xv) Fox Sports Southeast; (xvi) Fox Sports Southwest; (xvii) Fox Sports Sun; (xviii) Fox Sports Tennessee; (xix) Fox Sports West; (xx) Prime Ticket; (xxi) Fox Sports Wisconsin; and (xxii) the YES Network.

The proposed acquisition would combine two of the country's most valuable cable sports properties – Disney's ESPN franchise of networks and Fox's portfolio of twenty-two RSNs. Cable sports television networks compete to be carried in the programming packages that distributors, such as cable companies (e.g., Charter Communications and Comcast), direct broadcast satellite services (e.g., DISH Network and DirecTV), fiber optic networks services (e.g., Verizon's Fios and CenturyLink's Prism TV), and online distributors of linear cable programming (e.g., Hulu Live and DISH's Sling TV) (hereinafter, collectively referred to as "MVPDs") offer to their subscribers. Consequently, Disney's proposed acquisition of Fox's portfolio of RSNs would end the head-to-head competition between them and likely would result in higher prices for cable sports programming in each of the Designated Market Areas ("DMAs") in which Disney and Fox compete.

The United States filed a civil antitrust Complaint on June 27, 2018, seeking to enjoin the proposed Transaction. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially for the licensing of cable sports programming to MVPDs in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, in each of the following twenty-five DMAs: Phoenix, Arizona; Detroit, Michigan; Milwaukee, Wisconsin; Cleveland, Ohio;

Cincinnati, Ohio; Columbus, Ohio; Miami, Florida; Oklahoma City, Oklahoma; Tampa Bay, Florida; Dallas, Texas; St. Louis, Missouri; Atlanta, Georgia; Indianapolis, Indiana; Orlando, Florida; San Antonio, Texas; Minneapolis, Minnesota; Nashville, Tennessee; Memphis, Tennessee; San Diego, California; Raleigh-Durham, North Carolina; New Orleans, Louisiana; Kansas City, Kansas; Charlotte, North Carolina; Los Angeles, California; and New York, New York (collectively, the "DMA Markets"). This loss of competition likely would result in increased MVPD licensing fees in each DMA Market and because licensing fees typically are passed onto consumers, higher subscription fees for MVPD customers.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the likely anticompetitive effects of the Transaction. Under the proposed Final Judgment, which is explained more fully below, Disney is required to divest all of Fox's interests in the Fox RSNs, including all assets necessary for the operation of each Fox RSN as a viable, ongoing cable sports programming network, to one or more buyers acceptable to the United States, in its sole discretion. Under the terms of the Hold Separate Stipulation and Order, Disney and Fox will take certain steps to ensure that each Fox RSN continues to operate as an ongoing, economically viable, competitive cable sports programming network that will remain independent and uninfluenced by the consummation of the Transaction, and that competition is maintained during the pendency of the ordered 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 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. The Defendants and the Proposed Transaction

Disney is a Delaware corporation headquartered in Burbank, California. It reported revenue of $55 billion for fiscal year 2017. Disney owns various television programming assets, including 80% of ESPN—a sports entertainment company that operates several national cable sports programming networks. Disney's other programming assets include: (i) the ABC television network; (ii) eight owned-and-operated ABC broadcast stations; (iii) Disney-branded cable television networks; and (iv) Freeform, a cable television network geared toward teenagers and young adults. Disney licenses its cable programming networks to MVPDs throughout the United States.

Fox is a Delaware corporation headquartered in New York, New York. It reported revenue of $28.5 billion for fiscal year 2017. The Fox Sale Assets, which include several cable television programing networks and all of the Fox RSNs, generated $19 billion in revenue in fiscal year 2017. Fox licenses its cable programming networks to MVPDs throughout the United States. The Fox Sale Assets do not include Fox Business Network, Fox Broadcasting Company, Fox Sports, Fox Television Stations Group, FS1, FS2, Fox Deportes, or the Big Ten Network.

Collectively, the twenty-two Fox RSNs serve approximately 61 million subscribers in twenty-five separate DMA Markets and license local and regional rights to telecast live games of 44 of 91 (48%) U.S. professional sports teams in three of the four major sports leagues: Major League Baseball ("MLB"), the National Basketball Association ("NBA"), and the National Hockey League ("NHL"). More specifically, the Fox RSNs have the local or regional broadcast rights to 15 of 30 (50%) MLB teams, 17 of 30 (57%) NBA teams, and 12 of 31 (39%) NHL teams.

The proposed Transaction would likely lessen competition substantially in each of the DMA Markets as a result of Disney's acquisition of Fox's RSNs. This Transaction is the subject of the Complaint and proposed Final Judgment filed by the United States on June 27, 2018.

B. The Transaction's Likely Anticompetitive Effects

1. Relevant Markets

The Complaint alleges that licensing of cable sports programming to MVPDs in each DMA Market constitutes a relevant market under Section 7 of the Clayton Act.

Cable sports programming includes cable television networks that devote a substantial portion of their programming time to airing live sporting events, including MLB, NBA, and NHL games. Consumers that view live sporting events are an important customer group for MVPDs. MVPDs could not attract or retain those consumers as subscribers without including cable sports programming in the packages of cable programming networks they offer their subscribers. ESPN and the local Fox RSN generate the highest and second-highest affiliate fees per subscriber of all networks carried by an MVPD in most of the 25 DMAs and they are among the networks that generate the highest affiliate fees per subscriber in every one of the 25 DMAs. The high per-subscriber fees that MVPDs pay to license these networks reflects the importance of these networks to MVPDs and their subscribers.

For MVPDs, sports programming on broadcast television is unlikely a sufficient substitute for cable sports programming. MVPDs do not typically consider broadcast networks as providing the same type of content as cable sports networks like ESPN and the RSNs. Broadcast networks and their affiliates aim to have broad appeal by offering a variety of highly-rated programming content including primetime entertainment shows, syndicated shows, and local and national news and weather, with live sports events making up a small percentage of a broadcast network's airtime. Many MVPD customers demand programming focused on, if not dedicated to, live sporting events, and a broadcast network's occasional programming of live sporting events does not suffice for many customers. For that reason, MVPDs do not typically consider broadcast network programming as a replacement for cable sports programming.

With respect to the licensing of cable sports programming to MVPDs, each DMA Market constitutes a separate relevant geographic market under Section 7 of the Clayton Act. A DMA is a geographic unit for which A.C. Nielsen Company—a firm that surveys television viewers—furnishes MVPDs, among others, with data to aid in evaluating audience size and composition in a particular area. DMAs are widely accepted by MVPDs as the standard geographic area to use in evaluating television audience size and demographic composition. The Federal Communications Commission also uses DMAs as geographic units with respect to its MVPD regulations.

2. Harm to Competition in Each of the DMA Markets

The Complaint alleges that the proposed Transaction likely would substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and have the following effects, among others:

a. substantially lessen competition in the licensing of cable sports programming to MVPDs in each of the DMA Markets;

b. eliminate actual and potential competition among Disney and Fox in the licensing of cable sports programming to MVPDs in each of the DMA Markets; and

c. cause prices for cable sports programming to MVPDs in each of the DMA Markets to increase.

The Transaction, by eliminating the Fox RSNs as separate competitors and combining their operations under common ownership and control with ESPN, would allow Disney to increase its market share of cable sports programming in each DMA Market and likely increase licensing fees to MVPDs for ESPN and/or the Fox RSNs. As a result of the Transaction, Disney's networks would account for at least 60 percent of cable sports programming in 19 of the DMA Markets and over 45 percent in the remaining six DMA Markets.

As alleged in the Complaint, Disney's acquisition of the Fox RSNs would further concentrate already highly concentrated cable sports programming markets in each of the DMA Markets. Using the Herfindahl-Hirschman Index ("HHI"), a standard measure of market concentration, the post-acquisition HHI in each of the DMA Markets would exceed 2,500 and the Transaction would increase each DMA Market's HHI by over 200 points. As a result, the proposed Transaction is presumed to likely enhance market power under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission.

Moreover, the Transaction combines networks that are at least partial substitutes and therefore competitors in a product market with limited alternatives. The Transaction would provide Disney with the ability to threaten MVPDs in each of the DMA Markets with the simultaneous blackout of at least two major cable sports programming networks: the ESPN networks and the local Fox RSN, thereby diminishing competition in the negotiation of licensing agreements with MVPDs in each of the DMA markets.

The threatened loss of cable sports programming, and the resulting diminution of an MVPD's subscribers and profits, would significantly strengthen Disney's bargaining position. Prior to the Transaction, an MVPD's failure to reach a licensing agreement with Disney would result in the blackout of Disney's networks, including ESPN, and threaten some subscriber loss for the MVPD, including those subscribers that value ESPN's content. But because the MVPD still would be able to offer its subscribers the local Fox RSN, many MVPD subscribers simply would watch the local RSN instead of cancelling their MVPD subscriptions. In the event of a Fox RSN blackout, many subscribers likely would switch to watching ESPN. After the

Transaction, an MVPD negotiating with Disney would be faced with the prospect of a dual blackout of significant cable sports programming, a result more likely to cause the MVPD to lose incremental subscribers (that it would not have lost in a pre-transaction blackout of only ESPN or the Fox RSN) and therefore accede to Disney's demand for higher licensing fees. For these reasons, the loss of competition between ESPN and the Fox RSN in each DMA Market would likely lead to an increase in MVPD licensing fees in those markets. Some of these increased programming costs likely would be passed onto consumers, resulting in higher MVPD subscription fees for millions of U.S. households.

3. Entry

The Complaint alleges that entry or expansion into cable sports programming would not be timely, likely, or sufficient to prevent the Transaction's anticompetitive effects. With respect to RSN sports programming, there are a limited number of professional sports teams in a given DMA, and these teams auction the exclusive local rights to telecast their games under long-term contracts. Because these contracts typically last many years, there are infrequent opportunities to bid for these licensing rights to expand an existing RSN or create a new RSN. Moreover, non-local RSNs cannot enter because their licenses typically are limited to the DMAs that comprise the "home" territory of the team or teams that the RSN carries; and local MVPD subscribers would not generally have demand for extensive coverage of another DMA's home team. Thus, an MVPD cannot substitute an RSN from another DMA for the local RSN in response to an anticompetitive price increase.

Entry or expansion into national cable sports programming also is difficult. For a national sports network to compete effectively, it needs to obtain the national broadcast rights from professional sports leagues (i.e., MLB, NBA, and NHL), which are expensive and infrequently available. Although both Fox and NBCUniversal have national cable sports programming networks (FS1 and NBC Sports, respectively), neither company has been able to replicate ESPN's competitive position (as evidenced by their lower MVPD licensing fees and viewership ratings).

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the likely anticompetitive effects of the Transaction in each DMA Market by establishing an independent and economically viable competitor. The proposed Final Judgment requires Disney, within 90 days after the closing of the Transaction, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest all of Fox's interests in the Fox RSNs, including all assets necessary for the operation of the Fox RSNs as viable, ongoing video networks or programming assets. The 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 viable, ongoing businesses that can compete effectively in the relevant markets. Disney must use its best efforts to divest the Fox RSNs as expeditiously as possible and shall cooperate with prospective purchasers.

In the event that Disney does not accomplish the divestiture within the period prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Disney 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 or the term of the trustee's appointment.

The proposed Final Judgment also 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, 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 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 all competition that would otherwise be harmed by the merger. 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 further provides that, should the Court find in an enforcement proceeding that 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, in order to compensate American taxpayers for any costs associated with the investigation and enforcement of 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 prior to litigation, that Defendant agrees to reimburse the United States for attorneys' fees, experts' fees, and costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

Finally, Section XIV of the proposed Final Judgment provides that the Final Judgment shall expire seven years from the date of its entry, except that the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestitures have been completed and that the continuation of the Final Judgment is no longer necessary.

The divestiture provisions of the proposed Final Judgment will eliminate the likely anticompetitive effects of the acquisition in the provision of cable sports programming in the DMA Markets.

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:

Owen M. Kendler
Chief, Media, Entertainment & Professional Services Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 4000
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 Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Disney's acquisition of the Fox RSNs. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of cable sports programming in the DMA Markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, 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); *see also United States v. Int'l Bus. Mach. Corp.*, 163 F.3d 737, 740 (2d Cir. 1998). 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); *see generally United States v. Keyspan*, 763 F. Supp. 2d 633, 637-38 (S.D.N.Y. 2011) (discussing Tunney Act standards); *United States v. Morgan Stanley*, 881 F. Supp. 2d 563, 567 (S.D.N.Y. 2012) (similar). 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); *accord United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235, 238 (S.D.N.Y. 1997) (quoting *Microsoft*, 56 F.3d at 1460, *aff'd sub nom. United States v. Bleznak*, 153 F.3d 16 (2d Cir. 1998)); *Keyspan*, 763 F. Supp. 2d at 637 (same).

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, "[t]he Court's function is not to determine whether the proposed [d]ecree results in the balance of rights and liabilities that is the one that will *best* serve society, but only to ensure that the resulting settlement is within the reaches of the public interest." *Morgan Stanley*, 881 F. Supp. 2d at 567 (quoting *Alex. Brown & Sons,* 963 F. Supp. at 238) (internal quotations omitted) (emphasis in original). In making this determination, "[t]he [c]ourt is not permitted to reject the proposed remedies merely because the court believes other remedies are preferable. [Rather], the relevant inquiry is whether there is a factual foundation for the government's decision such that its conclusions regarding the proposed settlement are reasonable." *Morgan Stanley*, 881 F. Supp. 2d at 563 (quoting *United States v. Abitibi-Consolidated Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008)); *see also United States v. Apple,* *Inc.*, 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012); *Alex. Brown & Sons*, 963 F. Supp. at 238.[1] The government's predictions about the efficacy of its remedies are entitled to deference. *Apple*, 889 F. Supp. 2d at 631 (citation omitted).[2]

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) (citation 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. US Airways Grp., Inc.*, 38 F. Supp. 3d 69, 74 (D.D.C. 2014) (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); *Morgan Stanley*, 881 F. Supp. 2d at 568 (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." *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 17 (D.D.C. 2007).

---

[1] *See also United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981) ("The 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."); *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'").

[2] *See 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).

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 Morgan Stanley*, 881 F. Supp. 2d at 567 ("A court must limit its review to the issues in the complaint and 'give due respect to the [Government's] perception of . . . its case.'") (quoting *Microsoft*, 56 F.3d at 1461); *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 *20, (D.D.C. Aug. 11, 2009) ("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. Courts cannot look beyond the complaint in making the public interest determination "unless the complaint underlying the decree is drafted so narrowly such that its entry would appear 'to make a mockery of judicial power.'" *Apple*, 889 F. Supp. 2d at 631 (S.D.N.Y. 2012) (citing *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; *see also Apple*, 889 F. Supp. 2d at 632 ("[P]rosecutorial functions vested solely in the executive branch could be undermined by the improper use of the APPA as an antitrust oversight provision.") (citation omitted). 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.[3]

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.

[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 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.").

Dated: August 7, 2018

Respectfully submitted,

Lowell R. Stern
United States Department of Justice
Antitrust Division
Media, Entertainment &
Professional Services Section
450 Fifth Street, N.W., Suite 4000
Washington, DC 20530
Telephone: (202) 514-3676
Facsimile: (202) 514-7308
E-mail: lowell.stern@usdoj.gov

Attorney for Plaintiff United States