UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. UNITED TECHNOLOGIES CORPORATION and ROCKWELL COLLINS, INC., Defendants.	Case No.: 1:18-cv-02279-RC JUDGE: Rudolph Contreras Deck Type: Antitrust

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

On September 4, 2017, Defendants United Technologies Corporation ("UTC") and Rockwell Collins, Inc. ("Rockwell Collins") entered into an agreement whereby UTC proposes to acquire Rockwell Collins for approximately $30 billion. The United States filed a civil antitrust Complaint against UTC and Rockwell Collins on October 1, 2018, seeking to enjoin the proposed acquisition. The Complaint alleges that the proposed acquisition likely would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, in the worldwide markets for the development, manufacture, and sale of pneumatic ice protection

systems for fixed-wing aircraft ("aircraft") and trimmable horizontal stabilizer actuators ("THSAs") for large aircraft. That loss of competition likely would result in increased prices, less favorable contractual terms, and decreased innovation in the markets for these products.

Concurrent with the filing of the Complaint, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects that would have resulted from UTC's acquisition of Rockwell Collins. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest assets relating to Rockwell Collins' pneumatic ice protection systems business and its THSA business. Under the Hold Separate, Defendants will take certain steps to ensure that the businesses will operate as competitively independent, economically viable and ongoing business concerns, that will remain independent and uninfluenced by the consummation of the acquisition, 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 Final Judgment and to punish violations thereof.

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

A. The Defendants

UTC is incorporated in Delaware and has its headquarters in Farmington, Connecticut. UTC produces a wide range of products for the aerospace industry and other industries,

including, among other products, pneumatic ice protection systems for aircraft and THSAs for large aircraft. In 2017, UTC had sales of approximately $59.8 billion.

Rockwell Collins is incorporated in Delaware and is headquartered in Cedar Rapids, Iowa. Rockwell Collins is a major provider of aerospace and defense electronics systems. Rockwell Collins produces, among other products, pneumatic ice protection systems for aircraft and THSAs for large aircraft. In fiscal year 2017, Rockwell Collins had sales of approximately $6.8 billion.

B. Pneumatic Ice Protection Systems for Aircraft

1. Background

During flight, ice can accumulate on an aircraft's leading edge surfaces, such as the part of the aircraft's wings that first contact the air during flight. Surface ice accumulation affects an aircraft's maneuverability, increases drag, and decreases lift. If it remains untreated, surface ice accumulation can lead to a catastrophic flight event.

A pneumatic ice protection system is engineered to remove accumulated ice on an aircraft's wings. Such a system consists of two main elements, a de-icing boot, which is inflated to crack ice off an aircraft leading edge, and pneumatic system hardware. The pneumatic system hardware consists of equipment designed to control the flow of air into the de-icing boot.

Pneumatic ice protection systems are one form of ice protection technology. The specific design features of an aircraft, such as the availability of electrical power, determine which type of ice protection system will be used on the aircraft. Once an aircraft manufacturer has selected a particular pneumatic ice protection system, that system is certified as an Original Equipment Manufacturer ("OEM") part for flight worthiness as a part of the aircraft's manufacturing design.

Aircraft manufacturers generally only certify one supplier for ice protection systems for a particular aircraft model.

Pneumatic ice protection systems, and components thereof, are also sold in the aftermarket, as their components require repair or replacement after significant use. Most of the revenues related to pneumatic ice protection systems are derived from aftermarket sales. Although generally only one particular pneumatic ice protection system is certified with the aircraft model as original equipment, pneumatic ice protection system suppliers often procure additional certifications that allow their pneumatic ice protection system components to replace their competitors' OEM pneumatic ice protection system in the aftermarket.

Because surface ice accumulation may lead to a catastrophic flight event, pneumatic ice protection systems are considered critical flight components. An aircraft manufacturer or aftermarket purchaser is therefore likely to prefer proven suppliers of pneumatic ice protection systems.

2. Relevant Markets

Pneumatic ice protection systems for aircraft are a relevant product market and line of commerce under Section 7 of the Clayton Act. Ice protection systems are selected at the aircraft design stage based on the characteristics of the aircraft. Pneumatic ice protection systems have numerous attributes (light weight, low cost, and low power requirements) that make them an attractive option for aircraft manufacturers of aircraft with certain design requirements. Certain aircraft models can use only pneumatic ice protection systems. For these customers that produce those models, pneumatic ice protection systems are the best option, as such customers cannot effectively use other types of ice protection systems such as an electrothermal or bleed air ice protection system.

Once an aircraft is certified, switching the ice protection system on a particular model of aircraft to a different type of ice protection system, even if technologically feasible, would require some re-design of the ice protection portion of the aircraft and recertification of the aircraft. Such re-design and recertification may cost millions of dollars, require additional flight testing, and consume multiple years of time. Therefore, a small but significant increase in the price of pneumatic ice protection systems would not cause customers of those ice protection systems to substitute an alternative type of ice protection system for the original aircraft or in the aftermarket in volumes sufficient to make such a price increase unprofitable.

Although the pneumatic ice protection system installed on each type of aircraft may be deemed a separate product market, in each such market there are few competitors. The proposed acquisition of Rockwell Collins by UTC would affect competition for each aircraft pneumatic ice protection system in the same manner. It is therefore appropriate to aggregate pneumatic ice protection markets for purposes of analyzing the effects of the acquisition.

The relevant geographic market for pneumatic ice protection systems for aircraft is worldwide. Pneumatic ice protection systems are marketed internationally and may be sourced economically from suppliers globally. Transportation costs are a small proportion of the cost of the finished product and thus are not a major factor in supplier selection.

3. Anticompetitive Effects

There are only three competitors in the market for the development, manufacture, and sale of pneumatic ice protection systems for aircraft. These three firms are the only sources for both OEM systems and aftermarket systems and parts. Based on historical sales results, a combined UTC-Rockwell Collins would control a majority share of OEM and aftermarket sales.

Therefore, UTC's acquisition of Rockwell Collins would significantly increase concentration in an already highly concentrated market.

UTC and Rockwell Collins compete directly on price. In some cases, one of the companies has replaced the other's pneumatic ice protection system or components thereof on a particular aircraft.

Customers have benefited from the competition between UTC and Rockwell Collins for sales of pneumatic ice protection systems by receiving lower prices, more favorable contractual terms, and shorter delivery times. The combination of UTC and Rockwell Collins would eliminate this competition and its future benefits to customers. Therefore, post-acquisition, UTC likely would have the incentive and the ability to increase prices profitably and offer less favorable contractual terms, resulting in significant harm to aircraft manufacturers and aftermarket customers that require pneumatic ice protection systems.

4. Difficulty of Entry

Sufficient, timely entry of additional competitors into the markets for pneumatic ice protection systems is unlikely to prevent the harm to competition that is likely to result if the proposed acquisition is consummated. The small size of the market makes it difficult for new entrants to recover the cost of entry, which is high in part due to the costs of obtaining certification for new equipment. In addition, opportunities to enter are rare, as new aircraft designs are themselves quite infrequent. Moreover, aircraft manufacturers, operators, and servicers are hesitant to purchase aircraft components from newer suppliers, particularly for critical flight components like ice protection systems.

Pneumatic ice protection systems generally are not built by aircraft manufacturers, in part because pneumatic technology tends to be complicated and technically different from other

aircraft systems. As a result, aircraft manufacturers are unlikely to move production of such systems in-house in response to a price increase.

C. Trimmable Horizontal Stabilizer Actuators for Large Aircraft

1. Background

Actuators are responsible for the proper in-flight positions of an aircraft by manipulating the "control surfaces" on its wings and tail section. A trimmable horizontal stabilizer actuator ("THSA") helps an aircraft maintain the proper altitude during flight by adjusting ("trimming") the angle of the horizontal stabilizer, the control surface of the aircraft's tail responsible for aircraft pitch.

THSAs vary based on the size and type of the aircraft on which they are used. Because large aircraft encounter significantly higher aerodynamic loads than smaller aircraft, THSAs for large aircraft are considerably larger, more complex, and more expensive than those used on smaller aircraft. Large aircraft primarily include commercial aircraft that seat at least six passengers abreast, such as the Airbus A320 and A350 and the Boeing 737 and 787, and military transport aircraft.

2. Relevant Markets

THSAs for large aircraft do not have technical substitutes. Large aircraft manufacturers cannot switch to THSAs for smaller aircraft, or actuators for other aircraft control surfaces, because those products cannot adequately control the lift and manage the load encountered by the horizontal stabilizer of a large aircraft. A small but significant increase in the price of THSAs for large aircraft would not cause aircraft manufacturers to substitute THSAs designed for smaller aircraft or actuators for other control surfaces in volumes sufficient to make such a

price increase unprofitable. Accordingly, THSAs for large aircraft are a relevant product market and line of commerce under Section 7 of the Clayton Act.

The relevant geographic market for THSAs for large aircraft is worldwide. THSAs for large aircraft are marketed internationally and may be sourced economically from suppliers globally. Transportation costs are a small proportion of the cost of the finished product and thus are not a major factor in supplier selection.

3. Anticompetitive Effects

UTC and Rockwell Collins are each other's closest competitors for THSAs for large aircraft. UTC and Rockwell Collins have won two of the most significant recent contract awards for THSAs for large aircraft: the Boeing 777X and the Airbus A350. Boeing and Airbus are the world's largest manufacturers of passenger aircraft, and these aircraft represent two of the only three THSA awards by these manufacturers in this century. While there are other producers of THSAs for large aircraft, those firms tend to concentrate most of their THSA business on smaller aircraft, such as business jets or regional jets, or focus on products for other aircraft control surfaces.

UTC and Rockwell Collins each view the other firm as the most significant competitive threat for THSAs for large aircraft. The two companies are among the few that have demonstrated experience in designing and producing THSAs for large aircraft. Each firm considers the other company's offering when planning bids.

Customers have benefitted from the competition between UTC and Rockwell Collins for sales of THSAs for large aircraft by receiving lower prices, more favorable contractual terms, more innovative products, and shorter delivery times. The combination of UTC and Rockwell Collins would eliminate this competition and its future benefits to customers. Post-acquisition,

UTC likely would have the incentive and the ability to increase prices profitably and offer less favorable contractual terms.

UTC and Rockwell Collins also invest significantly to remain leading suppliers of new THSAs for large aircraft, and customers expect them to remain leading suppliers of new products in the future. The combination of UTC and Rockwell Collins would likely eliminate this competition, depriving large aircraft customers of the benefit of future innovation and product development.

4. Difficulty of Entry

Sufficient, timely entry of additional competitors into the market for THSAs for large aircraft is unlikely to prevent the harm to competition that is likely to result if the proposed transaction is consummated. Opportunities to enter are limited. Because certification of a THSA is expensive and time-consuming, once a THSA is certified for a particular aircraft type it is rarely replaced in the aftermarket by a different THSA. Accordingly, competition between suppliers of THSAs generally occurs only when an aircraft manufacturer is designing a new aircraft or an upgraded version of an existing aircraft. New designs for large aircraft are infrequent, as development costs for such aircraft can amount to tens of billions of dollars. As a result, several years usually pass between contract awards for THSAs for a new aircraft design.

Potential entrants face several additional obstacles. First, manufacturers of large aircraft are more likely to purchase THSAs from those firms already supplying THSAs for other large aircraft. The important connection between THSAs and aircraft safety drives aircraft manufacturers toward suppliers experienced with production of THSAs of the relevant type and size. While some companies may have demonstrated experience in THSAs for smaller aircraft or in other actuators, such experience is not considered by customers to be as relevant as

experience in THSAs for large aircraft. A new entrant would face significant costs and time to be considered as a potential alternative to the existing suppliers.

Developing a THSA for large aircraft is technically difficult. Manufacturers of THSAs for smaller aircraft face significant technical hurdles in designing and developing THSAs for large aircraft. As aerodynamic loads are a major design consideration for THSAs, and such loads are tightly correlated with the size of the aircraft, THSAs for large aircraft present more demanding technical challenges than those for smaller aircraft.

Substantial time and significant financial investment would be required for a company to design and develop a THSA for large aircraft. Companies that already make other types of THSAs would require years of effort and an investment of many millions of dollars to develop a product that is competitive with those offered by existing large aircraft THSA suppliers.

As a result of these barriers, entry into the market for THSAs for large aircraft would not be timely, likely, or sufficient to defeat the substantial lessening of competition that likely would result from UTC's acquisition of Rockwell Collins.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestitures required by the proposed Final Judgment will eliminate the anticompetitive effects that likely would result from UTC's acquisition of Rockwell Collins. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the assets can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

A. Divestitures

1. Pneumatic Ice Protection Systems for Aircraft

a. The Divestiture

The proposed Final Judgment requires Defendants to divest Rockwell Collins' SMR Technologies division, including Rockwell Collins' business in the development, manufacture, and sale of pneumatic ice protection systems and other ice protection products (the "Ice Protection Divestiture Assets") to an Acquirer acceptable to the United States, in its sole discretion.[1] The assets to be divested include Rockwell Collins' facility located in Fenwick, West Virginia, and all tangible and intangible assets primarily related to the ice protection business. The divestiture of the ice protection business will provide the Acquirer with all the assets it needs to successfully develop, manufacture, and sell pneumatic ice protection systems for aircraft.

Paragraph IV(A) of the proposed Final Judgment requires Defendants to divest the Ice Protection Divestiture Assets as a viable ongoing business within the later of five (5) calendar days after notice of entry of this Final Judgment by the Court or fifteen (15) calendar days after Required Regulatory Approvals have been received.

b. Transition Services Agreement

To facilitate the Acquirer's immediate use of the Ice Protection Divestiture Assets, the proposed Final Judgment provides the Acquirer with the option to enter into a transition services agreement with Defendants to obtain back office and information technology services and support for the Ice Protection Divestiture Assets for a period of up to twelve (12) months. The

[1] In addition to pneumatic ice protection systems, the Ice Protection Divestiture Assets include other ice protection products, fueling systems and other industrial products, hovercraft skirts, composites, and commercial aviation products.

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.

2. THSAs for Large Aircraft

a. The Divestiture

The proposed Final Judgment requires Defendants to divest Rockwell Collins' business in the design, development, manufacture, sale, service, or distribution of THSAs (the "THSA Divestiture Assets") to an Acquirer acceptable to the United States, in its sole discretion.[2] Because the assets are distributed among multiple sites in two countries, the United States required an upfront buyer to provide additional certainty that the transition can be accomplished without disruption to the business. The United States has approved Safran S.A. as the Acquirer. Safran S.A. is an established aerospace industry supplier.

The assets to be divested include two Rockwell Collins' facilities (Building 518 in Irvine, California and Building 1 in Mexicali, Mexico), and, at the option of the Acquirer, three additional facilities (Building 517 in Irvine, Building 2 in Mexicali, and Building 213 in Melbourne, Florida). The option of acquiring the latter three facilities is designed to allow the Acquirer to consolidate facilities if needed. The THSA Divestiture Assets also include all tangible and intangible assets primarily related to or necessary for the operation of the THSA business. Regardless of whether particular assets have been primarily used for the THSA business, all assets necessary to successfully develop, manufacture, and sell THSAs must be conveyed with the divestiture.

[2] In addition to THSAs for large aircraft, the THSA Divestiture Assets also include legacy flap actuation, nose wheel steering gear boxes, and pilot control systems, including center yokes, rudder brake pedal units, throttle quadrant assemblies, auto-throttles, and control stand modules.

The proposed Final Judgment provides that, at the option of the Acquirer of the THSA Divestiture Assets, and subject to the review and approval of the United States, Building 518 may be transferred via a sublease in lieu of a divestiture. Rockwell Collins currently holds a single lease on Buildings 517 and 518, and this provision allows the Acquirer to use Building 518 without assuming responsibility for both properties.

In addition, Defendants are required to use reasonable best efforts to obtain approvals required from United States government customers for the transfer of certain proprietary contracts. If the necessary approvals cannot be obtained, Defendants may retain those contracts and portions thereof that cannot be subcontracted to the Acquirer, as well as those tangible and intangible assets that have been used exclusively in the performance of those contracts.

Paragraph V(A) of the proposed Final Judgment requires Defendants to divest the THSA Divestiture Assets as a viable ongoing business within the later of five (5) calendar days after notice of entry of this Final Judgment by the Court or fifteen (15) calendar days after Required Regulatory Approvals have been received.

b. Transition Services Agreement and Transition Obligation

To facilitate the transfer of the divestiture assets between facilities without a supply interruption, the proposed Final Judgment provides the Acquirer of the THSA Divestiture Assets with the option to enter into a transition services agreement with Defendants to obtain services related to facility management and upkeep, facility and asset transition, government compliance, accounting and finance, information technology and human resources for the THSA Divestiture Assets 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. Defendants must use their best efforts to assist the Acquirer

with the transition of the THSA Divestiture Assets to locations of the Acquirer's choosing and to not impede that transition.

c. Supply Agreement

Under the proposed Final Judgment, the Acquirer of the THSA Divestiture Assets has the option to obtain a supply agreement from Defendants to provide services related to the manufacture of THSA components in Melbourne, Florida and Cedar Rapids, Iowa sufficient to meet all or part of the Acquirer's needs for a period of up to twelve 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. This supply agreement may be necessary to permit the Acquirer to fill existing orders during the time period that manufacturing is being transitioned to other facilities. This is necessary due to the extended manufacturing process and the long lead time required for many components, and acceptable given that these assets will be dedicated to filling existing contracts that are unlikely to be subject to competition during the pendency of this supply agreement.

B. Other Provisions

1. Use of Divestiture Trustee

In the event that Defendants do not accomplish the divestitures within the specified time periods, Section VI 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 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 are appropriate to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

2. Prohibition on Reacquisition

Section XIII of the proposed Final Judgment prohibits Defendants from reacquiring any part of the Divestiture Assets during the term of the Final Judgment. In addition, this section prohibits an Acquirer from acquiring from Defendants during the term of the Final Judgment any assets or businesses that compete with the assets acquired by that Acquirer.

3. Notification

Section XII of the proposed Final Judgment requires Defendants to provide notification to the Antitrust Division of certain proposed acquisitions not otherwise subject to filing under the Hart-Scott-Rodino Act, 15 U.S.C. 18a (the "HSR Act") in the format and pursuant to the instructions provided under that statute for notification. The notification requirement applies in the case of any direct or indirect acquisitions of any assets of or interest in any entity engaged in the development, manufacture, or sale of pneumatic ice protection systems valued over $25 million. Section XII further provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before such acquisitions can be consummated.

4. Compliance and Enforcement Provisions

The proposed Final Judgment also contains provisions designed to promote compliance and make the enforcement of Division consent decrees as effective as possible. Paragraph

XV(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 that 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 XV(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 XV(C) 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, 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, or costs incurred in connection with any enforcement

effort, including the investigation of the potential violation.

Finally, Section XVI provides that the Final Judgment shall 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 Defendants that the divestitures have 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 Fifth Street, N.W., Suite 8700
Washington, D.C. 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions preventing UTC's acquisition of Rockwell Collins. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will preserve competition for the development, manufacture, and sale of pneumatic ice protection systems for aircraft and THSAs for large aircraft. 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). 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
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> (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 court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[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

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

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[obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

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 this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

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

Dated: October 10, 2018

Respectfully submitted,

/s/

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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.").

CERTIFICATE OF SERVICE

I, Soyoung Choe, hereby certify that on October 10, 2018, the Competitive Impact Statement was filed using the Court's CM/ECF system, which shall send notice to all counsel of record.

/s/

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