UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*

Plaintiffs,

v.

CVS HEALTH CORPORATION

and

AETNA INC.

Defendants.

COMPETITIVE IMPACT STATEMENT

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

I. Nature and Purpose of the Proceeding

On December 3, 2017, CVS Health Corporation agreed to acquire Aetna Inc. for approximately $69 billion. The United States filed a civil antitrust Complaint on October 10, 2018, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially for the sale of standalone individual Medicare Part D prescription drug plans ("individual PDPs"), resulting in increased premiums and increased out-of-pocket costs paid by Medicare beneficiaries, higher subsidies paid by the

federal government (and ultimately, taxpayers), and a lessening of service quality and innovation, all in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time that it filed the Complaint, the United States also filed a proposed Final Judgment and Asset Preservation Stipulation and Order, which are designed to prevent the merger's likely anticompetitive effects. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest Aetna's individual PDP business. Until the divestiture is complete, the Asset Preservation Order requires Defendants to take certain steps to ensure that, while the required divestitures are pending, all of the divestiture assets will be preserved.

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. *Defendants and the Proposed Transaction*

CVS, based in Woonsocket, Rhode Island, is involved in numerous areas of the healthcare delivery chain. CVS operates the nation's largest retail pharmacy chain; owns Caremark, a large pharmacy benefit manager, which, among other things, connects health plans or employers to pharmacies and drug manufacturers in the pharmacy services supply chain; and sells Medicare Part D prescription drug plans to individuals and groups under the brand name SilverScript. SilverScript plans are available in all 50 states and the District of Columbia, and have the second-largest enrollment in individual PDPs nationwide. CVS's overall 2017 revenues were approximately $185 billion.

Aetna is based in Hartford, Connecticut, and is the nation's third-largest health insurance company, providing commercial health insurance; plans under the Medicare Advantage, Medicare Supplement, and Medicaid programs; Medicare Part D prescription drug plans; and pharmacy benefit management services. Like CVS, Aetna offers individual PDPs in all 50 states and the District of Columbia. Aetna is the fourth-largest provider of individual PDPs nationwide. Aetna's 2017 revenues were approximately $60 billion.

On December 3, 2017, CVS agreed to acquire Aetna for approximately $69 billion. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on October 10, 2018. The proposed transaction would lessen competition substantially in markets for the sale of individual PDPs. In recognition of the significant competitive concerns raised by the proposed merger, Defendants have agreed to divest Aetna's individual PDP business.

B. *The Competitive Effects of the Transaction on Individual PDP Markets*

1. Relevant Markets

As alleged in the Complaint, individual PDPs are a relevant product market under Section 7 of the Clayton Act. For the vast majority of Medicare beneficiaries, prescription drug coverage is determined by how they obtain medical coverage: beneficiaries who have chosen Original Medicare can enroll in an individual PDP, and beneficiaries enrolled in Medicare Advantage, a private insurance option that replaces Original Medicare, can enroll in a plan that includes drug coverage.

Once beneficiaries have chosen between Original Medicare and Medicare Advantage, they are very unlikely to switch between the two programs. *See United States v. Aetna*, 240 F. Supp. 3d 1, 27-29 (D.D.C. 2017). As the Complaint alleges, only about two percent of

individual PDP members convert to Medicare Advantage plans each year during open enrollment, and an even smaller percentage of individuals convert from Medicare Advantage plans to individual PDPs. As a result, a hypothetical monopolist of individual PDPs could profitably raise prices by a small but significant amount on individual PDPs without risking loss of substantial membership to Medicare Advantage plans.

The Complaint alleges that the relevant geographic markets under Section 7 of the Clayton Act for individual PDPs are Medicare Part D regions. The Centers for Medicare & Medicaid Services ("CMS"), a component of the Department of Health and Human Services, has divided the country into 34 Part D regions, none of which is smaller than a single state. CMS requires the companies that sell individual PDPs, also known as Part D plan sponsors, to offer the same plans at the same price across the entire Part D region. Individuals can only purchase PDPs that are offered in the region where they reside. Thus, a prospective purchaser of an individual PDP would be unable to turn to plan sponsors outside of the Part D region in response to a price increase.

2. Competitive Effects

Competition is an essential element of individual PDP markets. Congress designed the Medicare Part D program to rely on competition among multiple private plan sponsors to keep annual bids—which form the basis for federal government subsidies and beneficiary premiums—low.

The proposed merger is likely to cause a significant increase in concentration and result in highly concentrated markets in 12 of the regions identified in the Complaint: Arkansas, California, Florida, Georgia, Hawaii, Kansas, Louisiana, Mississippi, Missouri, New Mexico, Ohio, and South Carolina. In each of these regions, the merger would eliminate significant head-

to-head competition between CVS and Aetna. As alleged in the Complaint, CVS's and Aetna's individual PDPs are among the fastest growing plans in the country, and competition between them has led not only to lower premiums and out-of-pocket expenses but also improved drug formularies (lists of drugs that govern an enrollee's coverage and required copayments), more attractive pharmacy networks, enhanced benefits, and innovative product features. Following the proposed transaction, the merged firm would control at least 35% of the individual PDP market in each region, with a high of 53.5% in Hawaii. In each of these regions, the combination of CVS and Aetna would surpass the thresholds necessary to establish a presumption of enhanced market power and a substantial lessening of competition. *See United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) (holding that market concentration can establish a presumption of anticompetitive effects).

In addition, in five of the Part D regions discussed above (Arkansas, Georgia, Kansas, Mississippi, and Missouri), as well as four additional regions (North Carolina, Oklahoma, Wisconsin, and the multistate region of Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wyoming), the merged company will account for between 35% and 55% of all low-income-subsidy-eligible beneficiaries, including those who enroll in Medicare Advantage plans with prescription drug benefits. When combined with other market factors, these increases in the share of low-income subsidy beneficiaries suggests that the merger would likely result in further loss of competition.

Specifically, the merger would likely increase the merged company's ability to influence a critical feature of the Medicare Part D program called the low-income subsidy ("LIS") benchmark, which in turn would increase premiums and out-of-pocket expenses for basic individual PDPs—those plans that provide an equivalent to the minimum coverage set forth in 42

U.S.C. § 1395w-102 and in which LIS beneficiaries can enroll (or be auto-enrolled) for free. As explained in the Complaint, plan sponsors submit bids for their basic plans each year, and CMS calculates a region-by-region, LIS enrollment-weighted average of these bids to determine the low-income benchmark and low-income subsidy. When bids are higher, the low-income subsidy—paid by the federal government—is higher, as are the premiums paid by those who do not receive a low-income subsidy.

The LIS benchmark also, as a practical matter, encourages plan sponsors to offer lower bids. If plan sponsor bids above the low-income benchmark, it risks not only losing thousands of new enrollees but also risks having CMS transfer tens or even hundreds of thousands of current enrollees to a below-benchmark competitor. The uncertainty and risk associated with missing the low-income benchmark, especially by more than a de minimis amount, contribute to keeping bids low.

3. Entry and Expansion

Neither entry nor expansion is likely to solve the competitive problems created by the merger between CVS and Aetna. Recent entrants into individual PDP markets have been largely unsuccessful, with many subsequently exiting the market or shrinking their geographic footprint. Effective entry into the sale of individual PDPs requires years of planning, millions of dollars, access to qualified personnel, and competitive contracts with retail pharmacies and pharmaceutical manufacturers, and companies must establish sufficient scale quickly to keep their plans' costs down. Because of these barriers to entry, entry or expansion into the sale of individual PDPs is unlikely to be timely or sufficient to remedy the anticompetitive effects from this merger.

III. Explanation of the Proposed Final Judgment

The divestiture mandated by the proposed Final Judgment will resolve the United States' concerns about the likely anticompetitive effects of the acquisition by requiring CVS to divest Aetna's individual PDP business nationwide. To ensure that the acquirer of Aetna's business will replace Aetna as an effective competitor and innovator in each of the 16 markets in which the Complaint alleges that the proposed merger would harm competition, the United States carefully scrutinized Defendants' businesses to identify a comprehensive package of assets for divestiture.

A. *Scope of the Divestiture*

In evaluating a remedy, the United States' fundamental goal is to preserve competition. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 324 (1961) ("The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition."). This goal is most directly accomplished through a divestiture of the overlapping products. Because the goal of a divestiture is to create a viable entity that will effectively preserve competition, in certain cases, the divestiture must include assets that are beyond the affected relevant market.

Guided by these principles, the United States identified a divestiture package that remedies the various dimensions of harm threatened by the proposed merger:

- First, the proposed Final Judgment requires CVS to divest both of Aetna's individual PDP contracts with CMS, which is the portion of Aetna's business that vigorously competes head-to-head with CVS today. Divestiture of Aetna's nationwide individual PDP business—and not just Aetna's business in the regions identified in the Complaint—will provide the acquirer with the scale and ability to implement a national strategy comparable to Aetna's current strategy. That is because contracts with pharmacy benefit managers, retail pharmacy networks, and pharmaceutical companies are almost all negotiated on a national basis, with the number of Medicare beneficiaries covered by the plan sponsor being a key factor

in the rates that the plan sponsor receives. Thus, a national divestiture helps provide the acquirer with the ability to replicate Aetna's cost structure and approach to the market.

- Defendants are also required to transfer data relating to Aetna's individual PDP business, information regarding the amount that Aetna pays to retail pharmacies in exchange for filling prescriptions for Aetna members, and any contracts with brokers that currently sell Aetna's individual PDPs, including information regarding how much Aetna currently pays these brokers. The transfer of this data and information will help ensure that the acquirer has sufficient knowledge and supporting information that it can use to negotiate comparable retail-pharmacy rates and contracts with brokers moving forward.

- The divestiture buyer also will have the opportunity to interview and hire Aetna's current employees with expertise related to the individual PDP business, and Defendants have agreed to waive any non-compete, confidentiality, or non-disclosure employment provisions that would otherwise prevent these employees from accepting positions with the individual PDP business of the acquirer. These employees and their knowledge of drug-manufacturer rebates (volume-based discounts on the price of brand name drugs) will provide the acquirer with the option of continuing Aetna's approach to the market.

Taken together, these assets constitute the entirety of Aetna's individual PDP business and will provide the acquirer with a similar ability and incentive to compete as Aetna has today.

Because the divested assets will be separated from Aetna and incorporated into the acquirer's business, the proposed Final Judgment includes provisions to foster the seamless and efficient transition of the assets. At the acquirer's option, Defendants are required to enter into an administrative services agreement to provide the acquirer all services required to manage the divestiture assets through the remainder of the 2018 plan year and through the 2019 plan year, which ends on December 31, 2019. This provision of the proposed Final Judgment provides continuity to members who purchase an Aetna individual PDP during the open-enrollment period running from October through December 2018. Because CMS has already reviewed and approved Aetna's proposed 2019 plans, requiring Aetna to continue to provide the requisite support and services for these plans will ensure that members receive the products that they have

chosen. Among other things, the proposed Final Judgment allows the acquirer to rely on Aetna to assemble and contract with pharmacy networks, administer the plans' formularies, and provide back-office support and claims administration functions in 2019. Additionally, CVS and Aetna must allow the acquirer to use the Aetna brand for the divestiture assets through at least December 31, 2019, and CVS and Aetna are prohibited, through 2020, from using the Aetna brand for the CVS individual PDP business that they are retaining. This will provide the acquirer with a window to establish a relationship with current Aetna individual PDP beneficiaries which will help avoid consumer confusion.

B. *The Divestiture Process*

The proposed Final Judgment requires CVS and Aetna, within 30 days of the filing of the Complaint, to divest, as a viable ongoing business, Aetna's individual PDP business. The proposed Final Judgment also requires CVS and Aetna expeditiously to obtain all regulatory approvals necessary to complete the divestiture, specifying that they must apply for these approvals within five calendar days of the United States' approval of a divestiture buyer. CVS and Aetna have already entered into an agreement to sell the divestiture assets to WellCare, a health insurance company, and the United States has determined that WellCare is a suitable buyer for the divestiture assets. WellCare already has experience providing individual PDPs throughout the United States. The divestiture assets, when combined with WellCare's existing business, will allow WellCare to become more competitive for both low-income subsidy and non-low-income subsidy Medicare beneficiaries by providing WellCare with increased scale and the opportunity to incorporate and build upon Aetna's existing strategy by hiring current Aetna employees.

Should the sale of the divestiture assets to WellCare not be completed, the assets must be divested in a way that satisfies the United States in its sole discretion that the assets can and will be operated by another company as a viable, ongoing business that can compete effectively in the relevant markets. CVS and Aetna must take all reasonable steps necessary to accomplish the divestiture quickly and to cooperate with prospective buyers.

If Defendants do not accomplish the divestiture within the 30 days prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a Divestiture Trustee, selected by the United States and paid for by CVS and Aetna, to effect the divestiture. After the Divestiture Trustee is appointed, the Trustee will file monthly reports with the United States and, as appropriate, the Court, 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 under the circumstances.

C. *Provisions to Ensure Compliance*

To ensure a smooth transition process for the divestiture assets, particularly during the temporary period when they will be managed by CVS, the proposed Final Judgment provides that the United States may appoint a Monitoring Trustee with the power and authority to investigate and report on Defendants' compliance with the terms of the Final Judgment and the Asset Preservation Stipulation and Order during the pendency of the divestiture. The Monitoring Trustee would not have any responsibility or obligation for the operation of Defendants' businesses. The Monitoring Trustee would serve at Defendants' expense, on such terms and conditions as the United States approves, and Defendants must assist the Trustee in fulfilling his or her obligations. The Monitoring Trustee would file reports with the United States and, as

appropriate, the Court, every 90 days and would serve until the later of January 1, 2020 or the expiration of the administrative services agreement described in Paragraph IV(H) of the Final Judgment.

The proposed Final Judgment also contains provisions designed to promote compliance and make the enforcement of Division consent decrees as effective as possible. The proposed Final Judgment provides the United States with the ability to investigate Defendants' compliance with the Final Judgment and expressly retains and reserves all rights for the United States to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. 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 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.

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 Final Judgment, Defendants agree to reimburse the United States for attorneys' fees, experts' fees, and costs, including fees and costs relating to the investigation of the potential violation, incurred in connection with any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation.

The Final Judgment will expire ten years from the date of its entry. After five years, however, the United States may request that the Court terminate the Final Judgment if the divestitures have been completed and the continuation of the Final Judgment is no longer necessary or in the public interest.

IV. Remedies Available To Potential 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 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. 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:

Peter Mucchetti
Chief, Healthcare and Consumer Products Section
Antitrust Division
United States Department of Justice
450 Fifth Street NW, Suite 4100
Washington, DC 20530

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

VI. Alternatives to the Proposed Final Judgment

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 CVS's acquisition of Aetna. The United

States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the sale of individual PDPs in the relevant 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 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

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

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see 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").[1]

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 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*

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

> *of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

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

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

room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461)); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 74 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[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. 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.[3] 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] *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.").

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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