UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. LEARFIELD COMMUNICATIONS, LLC, IMG COLLEGE, LLC and A-L TIER I LLC, *Defendants*.	CASE: 1:19-cv-00389-EGS

RESPONSE OF PLAINTIFF UNITED STATES TO
PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

As required by the Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), 15 U.S.C. § 16(b)–(h), the United States hereby responds to the public comment received by the United States regarding the proposed Final Judgment in this case. After careful consideration, the United States continues to believe that the proposed remedy will address the harm alleged in the Complaint and is therefore in the public interest. The proposed Final Judgment will ensure that the Defendants and their employees and agents will not impede competition by agreeing not to compete, entering into joint ventures that reduce competition, or sharing competitively sensitive information with their competitors. The United States will move the Court for entry of the proposed Final Judgment after this response and the public comment have been published in the *Federal Register*, pursuant to 15 U.S.C § 16(d).

I. Procedural History

On October 5, 2017, Learfield Communications, LLC ("Learfield") and IMG College, LLC ("IMG") announced a proposed merger. After investigating whether the merger would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, by substantially lessening competition, the United States did not challenge the transaction. On December 27, 2018, the United States informed the parties of this decision, and the Defendants became free to close their proposed merger.

During the course of the merger investigation, however, the United States discovered evidence of a potential separate violation of the antitrust laws. This evidence indicated that the parties, during a prior period of conduct, had agreed or otherwise coordinated with one another, as well as between themselves and other competitors, in a manner that denied their college customers the benefits of competition in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Following an investigation of that separate conduct, on February 14, 2019, the United States filed a civil antitrust complaint alleging that the Defendants agreed or otherwise coordinated to limit competition, resulting in an unlawful restraint of trade in the multimedia rights ("MMR") management market under Section 1 of the Sherman Act. The Complaint seeks injunctive relief to enjoin the Defendants from engaging in similar conduct in the future. Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment, a Stipulation signed by the parties that consents to entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, and a Competitive Impact Statement describing the events giving rise to the alleged violation and the proposed Final Judgment.

The proposed Final Judgment prohibits sharing of competitively sensitive information, agreeing not to bid or agreeing to jointly bid, and, absent approval from the United States, entering into or extending MMR joint ventures. It also requires the Defendants to implement antitrust compliance training programs.

The United States caused the Complaint, the proposed Final Judgment, and the Competitive Impact Statement to be published in the *Federal Register* on February 28, 2019, *see* 84 Fed. Reg. 6,824, and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in *The Washington Post* for seven days beginning on February 27, 2019 and ending on March 5, 2019. The 60-day period for public comment ended on May 6, 2019. During the public comment period, the United States received the comment described below in Section IV and attached as Exhibit A.

II. Standard of Judicial Review

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
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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); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may "not to make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at

1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

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

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("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.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through

the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

III. The Section 1 Investigation, the Harm Alleged in the Complaint, and the Proposed Final Judgment

The proposed Final Judgment is the culmination of a thorough, comprehensive investigation conducted by the Antitrust Division of the U.S. Department of Justice into the Defendants' conduct involving the Defendants' joint ventures with each other to service specific universities which sought to outsource the management of their MMR as well as the Defendants' similar joint ventures with other competitors.

The Complaint alleges that, under the guise of legitimate business arrangements, these joint ventures denied universities the benefits of competition between the competitors. The Complaint further alleges that the Defendants have used, or attempted to use, joint ventures as a way to co-opt smaller competitors and remove them from submitting competitive bids and that the Defendants' non-compete agreements have had similar effects. By using and enforcing non-compete agreements, for example, Defendant Learfield prevented Defendant IMG from competing on a school's MMR contract when it came up for renewal.

Based on the evidence gathered, the United States concluded that the Defendants' use of joint ventures and non-compete agreements were anticompetitive and violated Section 1 of the Sherman Act, 15 U.S.C. § 1, because they had detrimental effects on competition among MMR providers. The Defendants' use of joint ventures and non-compete agreements harmed the competitive process by suppressing or eliminating competition, reduced the revenues received by universities for licensing their MMR, and caused the quality of MMR management to decrease.

The United States seeks the proposed Final Judgment to restore and protect competition. The Defendants have agreed to abide by the provisions of the proposed Final Judgment during the pendency of the Tunney Act proceedings (Dkt. No. 2.1 at 2).

The proposed Final Judgement provides an effective and appropriate remedy for this competitive harm by enjoining the Defendants from: (1) directly or indirectly communicating competitively sensitive information related to bidding for an MMR contract; and (2) agreeing with any MMR competitor not to bid, or to bid jointly, on an MMR contract. The Defendants, for example, may not discuss their negotiating strategies or proposed prices relating to any particular university's MMR business with any other MMR competitor. Invitations or suggestions to jointly bid are also prohibited.

The proposed Final Judgment also creates a mechanism for joint ventures involving the Defendants to continue or be created if the collaboration will not reduce the number of competitors bidding on a university's MMR business. Pursuant to the proposed Final Judgment, the Defendants may apply to the United States for authorization to continue a joint venture that is about to expire or create a new joint venture to service a university's MMR needs. The United States will undertake a case-by-case analysis of any such application to determine whether the joint venture is likely to eliminate or enhance competition.

Under some circumstances, joint ventures may be efficient and procompetitive. *See*, *e.g.*, U.S. Dept. of Justice & FTC, *Antitrust Guidelines for Collaborations Among Competitors*, at 6 (2000) ("A collaboration may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration."). However, "labeling an arrangement a 'joint venture' will not protect what is merely a device to raise price or restrict output; the nature of the conduct, not its designation, is

determinative." *Id.* at 9 (internal citations omitted). The United States routinely investigates joint arrangements between competitors to determine whether they violate the antitrust laws. Pursuant to the proposed Final Judgment, the Defendants have consented to the United States making that determination in its sole discretion without requiring the United States to prove to a Court that a proposed new or continuing collaboration involving a Defendant violates Section 1 of the Sherman Act.

Finally, the proposed Final Judgment includes robust mechanisms that will allow the United States and the Court to monitor the effectiveness of the relief and to enforce compliance.

- The proposed Final Judgment requires each Defendant to designate an Antitrust Compliance Officer who will be responsible for implementing training and compliance programs and ensuring compliance with the Final Judgment. Among other duties, the Antitrust Compliance Officer will be required to distribute copies of the Final Judgment and ensure that training on the requirements of the Final Judgment and the antitrust laws is provided to the Defendants' management. Moreover, each Defendant, through its CEO, General Counsel, or Chief Legal Officer, must certify annual compliance with the Final Judgment.
- The proposed Final Judgment requires each Defendant to establish an antitrust whistleblower policy and to remedy and report violations of the Final Judgment.
- The proposed Final Judgment 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. The Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment,

the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that the Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

- The proposed Final Judgment provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face, and as interpreted in light of its procompetitive purpose.
- Should the Court find in an enforcement proceeding that one or more Defendants violated the Final Judgment, the proposed Final Judgment permits the United States to 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, the proposed Final Judgment provides that in any successful effort by the United States to enforce the Final Judgment against one or more Defendants, whether litigated or resolved before litigation, the Defendants agree to reimburse the United States for any

attorneys' fees, experts' fees, or costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

IV. Summary of Public Comment and the United States' Response

The United States received a comment concerning the proposed Final Judgment from JMI Sports, LLC ("JMIS"). JMIS competes against the Defendants to offer MMR services to universities and at times has partnered with the Defendants or their predecessors. JMIS does not claim that the provisions of the proposed Final Judgment are insufficient to enjoin the unlawful restraints of trade alleged in the Complaint. JMIS, however, states that it believes uncertainty exists regarding the scope of the relief the United States secured from the Defendants in ways that affect its position as a competitor. JMIS, therefore, seeks clarification regarding the settlement's scope, particularly "the process through which [the United States] will vet proposed extensions or expansions to existing joint ventures involving" the Defendants. *See* Attachment A at 2. JMIS also requests that the United States fully disclose the settlement's terms, and that any settlement provisions that are not currently part of the proposed Final Judgment be incorporated into it before entry by the Court. It also asks for clarification of terms that are not part of the proposed Final Judgment.

A. The Proposed Final Judgment Appropriately Authorizes the United States to Make Case-by-Case Determinations of Proposed Joint Ventures

JMIS seeks additional guidance on how under the proposed Final Judgment the United States will conduct its analysis of joint ventures proposed by the Defendants. JMIS also asks whether it and other non-parties may seek permission under the proposed Final Judgment to form or continue joint ventures with the Defendants. It also mistakenly complains that the proposed Final Judgment prohibits communications between it and the Defendants that are necessary to form or continue joint ventures. *See* Attachment A at 4.

Additional guidance on how the United States will evaluate joint ventures pursuant to Paragraph IV.C. of the proposed Final Judgment is not necessary. As noted above, the United States routinely investigates joint arrangements between competitors to determine whether those arrangements violate the U.S. antitrust laws and has published guidance on this subject. *See* U.S. DOJ & FTC, *Antitrust Guidelines for Collaborations Among Competitors* (2000). If a proposed joint venture is not the type of agreement that would tend to raise price or to reduce output such that it would be condemned as *per se* illegal, the United States conducts a fact-specific inquiry to determine its legality. By its nature, such an analysis "entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and the market circumstances." *See id.* at 10 (internal citations omitted). Because these analyses require a case-by-case approach, there is no additional guidance that the United States could provide to JMIS at this time. JMIS and others seeking to form joint ventures with the Defendants in order to pursue MMR contracts, however, should consider whether they need to form a joint venture in order to compete for an MMR contract or whether the joint venture would merely eliminate a competitor.

The proposed Final Judgment permits the Defendants to make an application to the United States for authorization to enter into, renew, or extend a joint venture. *See* Proposed Final Judgment at Paragraph IV.C. This provision will not hinder JMIS's ability to form joint ventures with the Defendants. Because joint ventures are voluntary business arrangements, the Defendants must first be willing to enter into, renew, or extend a joint venture with JMIS or other competitors. As a willing participant, it would be in a Defendant's interest to apply for the required permission from the United States, and it would be unnecessary for the proposed Final Judgment to provide a mechanism for non-parties such as JMIS or others to make the application instead.

Finally, contrary to JMIS's assertation, the proposed Final Judgment already provides an exception to the provisions in Section IV prohibiting the Defendants from directly or indirectly communicating with competitors concerning bids or bidding. To continue or form a joint venture that may enhance competition, the proposed Final Judgment at Paragraph V.D. permits the Defendants, after securing advice of counsel and in consultation with an Antitrust Compliance Officer, to communicate with a competitor concerning the formation of a joint venture. Therefore, the proposed Final Judgment already incorporates the exception to the prohibition on communications between competitors that JMIS seeks.

B. The Proposed Final Judgment Embodies All Relief Obtained to Resolve the Complaint's Obligations and No Amendments Are Warranted

The United States, as requested by JMIS, confirms that the proposed Final Judgment embodies the entirety of its settlement with the Defendants to resolve the allegations in the Complaint, and there are no settlement provisions that are not embodied in the proposed Final Judgment. The United States alleged the Defendants unlawfully restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing or otherwise coordinating to limit competition between themselves and between themselves and smaller competitors. As discussed above in Section III, the proposed Final Judgment effectively enjoins the Defendants from unlawfully restraining trade by prohibiting agreements not to bid or to bid jointly, by barring the sharing of competitive sensitive information, and by prohibiting joint ventures with MMR competitors that reduce competition.

The United States separately investigated whether the merger of IMG and Learfield would violate Section 7 of the Clayton Act. After consideration of the facts, evidence, and chances of prevailing at trial, the United States did not challenge that merger. Near the conclusion of the investigation into that merger, but before the United States had made its

enforcement decision, Defendant Learfield informed the United States that Learfield and IMG had unilaterally implemented several irrevocable changes to certain business practices affecting the contractual rights of their employees and customers that would be implemented upon closing of the merger. *See* Exhibit B.[1] These commitments were presented to the United States. The making of these commitments additionally increased the litigation risk for seeking to enjoin the transaction.

The United States understands that JMIS seeks, through its comment, to incorporate the commitments made in Defendant Learfield's letter into the proposed Final Judgment in this matter. Those commitments, however, do not relate to the allegations in the Complaint that the United States brought in this matter, which challenges the Defendants' agreements between themselves and with other smaller MMR competitors as unlawful restraints of trade in violation of Section 1. The commitments relate to an ease-of-entry defense that the Defendants could have made if the United States had brought a Section 7 challenge to their merger. Because the commitments made in Defendant Learfield's letter, including those relating to employees and early termination of certain customer contracts, are unrelated to the allegations in the Complaint and because the proposed Final Judgment already encompasses all of the relief necessary to remedy the Defendants' Section 1 violations, no amendments to the proposed Final Judgment are warranted or justified.

As noted above, the D.C. Circuit explained in *Microsoft*, 56 F.3d at 1459-60, that the "court's authority to review the decree depends entirely on the government's exercising its

[1] Because Learfield and IMG notified their employees and customers of their new contractual rights resulting from the commitments, all industry participants directly impacted by the commitments were fully informed. JMIS and other MMR competitors were not notified, because they are not customers or employees of Learfield or IMG. Learfield's letter is now being made public. JMIS and other competitors, therefore, will not need to rely on information gathered from other industry participants to learn about the irrevocable changes undertaken by Learfield and IMG.

prosecutorial discretion by bringing a case in the first place." Because the United States did not bring a Section 7 case, the modifications proposed by JMIS fall outside the scope of this Tunney Act review. Expanding the public interest review to encompass relief related to an uncharged allegation, would amount to "effectively redraft[ing] the complaint" to inquire into matters the United States did not pursue. *Id.* The Tunney Act process does not empower the district court "to review the actions or behavior of the Department of Justice; the court is only authorized to review the decree itself." *Id.* It is unnecessary to include the commitments made in Defendant Learfield's letter in the proposed Final Judgment, in part because the commitments are not related to addressing the Defendants' anticompetitive joint ventures and non-compete agreements or preventing future anticompetitive arrangements with their competitors. The commitments, therefore, are not required to remedy the Section 1 violation alleged in the Complaint and consideration of whether to amend the proposed Final Judgment to include them falls outside the scope of the Tunney Act public interest inquiry.

V. Conclusion

After careful consideration of the public comment, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comment and this response are published as required by 15 U.S.C. § 16(d).

Dated: February 3, 2020

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Owen M. Kendler, hereby certify that on February 3, 2020, I caused a copy of the foregoing document to be served upon Defendants Learfield Communications, LLC, IMG College LLC, and A-L Tier I LLC, via the Court's CM/ECF system.

/s/

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