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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AMCOR LTD., and RIO TINTO PLC, and ALCAN CORPORATION, Defendants.	CASE NO.: Case: 1:10-cv-00973 Assigned To : Kollar-Kotelly, Colleen Assign. Date : 6/10/2010 Description: Antitrust JUDGE: DATE STAMP:

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

Defendants Amcor Ltd. and Rio Tinto plc entered into an asset purchase agreement dated December 21, 2009, pursuant to which Amcor agreed to acquire the Alcan Packaging Medical Flexibles business from Rio Tinto for $65 million.

The United States filed a civil antitrust Complaint against Amcor, Rio Tinto, and Alcan Corporation on June 10, 2010, seeking to enjoin Amcor's acquisition of the Alcan Packaging Medical Flexibles business. The Complaint alleged that the acquisition likely

would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, in the United States for the development, production, and sale of vented bags for medical use. That loss of competition likely would result in higher prices, decreased quality, less favorable supply-chain options, reduced technical support, and lesser innovation in the U.S. market for vented bags for medical use.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of Amcor's acquisition of the Alcan Packaging Medical Flexibles business. Under the proposed Final Judgment, which is explained more fully below, defendants are required to divest Alcan Packaging's facility that produces all of its vented bags for medical use, all of the tangible assets necessary to operate the facility, and all of the intangible assets (*i.e.*, intellectual property and know-how) related to the facility.

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 VIOLATION

A. The Defendants and the Industry

1. The Defendants

Amcor is organized under Australian law and is headquartered in Melbourne, Australia. Amcor is a global packaging manufacturer that had total sales of AUD $9.53

billion for the fiscal year ending in June 2009. That same year, Amcor had approximately $170 million in U.S. sales of flexible packaging for medical use.

Rio Tinto is organized under the laws of and headquartered in the United Kingdom. Its 2009 sales totaled approximately $44 billion. Rio Tinto acquired Alcan Corporation in 2007. Alcan Corporation is a wholly owned subsidiary of Rio Tinto. Alcan Corporation is a Texas corporation headquartered in Chicago, Illinois. Alcan Packaging develops, produces, and sells flexible packaging for medical use in the United States. In 2008, Alcan Packaging sold approximately $115 million of flexible packaging for medical use.

2. Overview of Flexible Packaging for Medical Use

Flexible packaging is any package the shape of which can be readily changed. Flexible packaging is distinguishable from rigid packaging such as trays, bottles, vials, and other hard plastic or glass containers. Flexible packaging for medical use includes bags, pouches, tubing, forming films, rollstock, and lidding, made in different styles and using different materials. Packaged products include items ranging from scalpels, intravenous tubes, and syringes to large surgery trays and kits.

Generally, flexible packaging is produced by a "converter," which makes the flexible packaging according to a common production blueprint. The basic production steps can be described as: (1) the processing of resins into plastic film, either by "casting" or "blowing" (which is the extrusion of resin pellets through a die); (2) the conversion of the film by laminating multiple sheets together, applying coatings, and/or printing on the sheets; and (3) the finishing of the product by slitting and placing it on large rolls, or forming it into bags, pouches or other constructions.

If a converter performs all three of the process steps in-house, it is considered to be vertically integrated. Many converters purchase film that is blown or cast by another company and simply convert and finish the film, however. Also, many large medical device manufacturers have the capability to form the packaging product themselves and, instead of purchasing "converted products" (*e.g.*, bags or pouches), purchase "rollstock," which is film supplied as a roll.

The seeming simplicity of the production process is misleading. A single piece of film – the starting point for the conversion process – itself may contain as many as eleven or more separate layers that have been formed together during the extrusion process. The combination of layers in the film, with each layer extruded from a specific type of resin, provides the finished structure with the particular characteristics needed to properly contain the product for which that flexible package is intended. Furthermore, manufacturing a converted product from these films is difficult because the manufacturer must balance the package's ability to maintain its seal with its ability to open easily.

Producers of flexible packaging sell their packaging to medical device manufacturers that package their products for wholesale distribution or sale to end-users in the medical industry. End-users include hospitals, doctors' offices, and laboratories.

Sterilizable flexible packaging for medical use ("medical flexibles") is different from other types of flexible packaging for several reasons. First, medical flexibles must be able to withstand the sterilization process because the medical device is sterilized after it has been placed in the package. The most common sterilization process is the forcing of ethylene-oxide gas into and out of the package (known as "EtO sterilization"), which requires a "vented" or "breathable" package that incorporates some porous material. This

porous material must act as a vent for the EtO gas to enter and exit but also must maintain the sterile barrier. The most widely used venting material is Tyvek, a durable, effective, DuPont-patented plastic material.

Second, medical flexibles must conform to strict quality and qualification requirements. Before a medical device manufacturer purchases any medical flexible product, it first must "qualify" the particular product. The product qualification process is meant to guard against the risk of the package's failure. A failure of the package could expose the medical device to microbes, bacteria, or particulates, which could cause a patient's injury, sickness, or even death. The risks associated with packaging failure dictate a rigorous product qualification process, whereby the customer performs numerous tests, including quality testing, sterilization testing, seal strength testing, aging simulations, and shipping and handling simulations.

Sterilization testing during qualification is especially rigorous. The EtO sterilization process is an aggressive process that forces gas into and out of the flexible packaging through the venting material. During this process, the gas may not be able to escape quickly enough through the venting material, bursting the seams of the packaging. In addition, EtO sterilization can weaken the plastic films of the packaging, weaken seals, cause discoloration of the package, and cause other types of harm to the package. Producing medical flexible packaging that can withstand this process is difficult, and even products from large, established suppliers may fail customers' sterilization tests.

3. *Vented Bags for Medical Use*

Vented bags for medical use are formed by sealing two pieces of film rollstock together on three sides, leaving the fourth side open for filling and sealing. There are two different styles of EtO-sterilizable vented bags for medical use: (1) "header bags," which are sealed on one end by a long, thin venting strip running the length of the bag, and (2) "patch bags" or "breather bags," which have one or more circular venting patches on the sides of the bag instead of a strip over the end. Both styles of vented bag perform the same functions for the same end uses, and are generally considered to be interchangeable. As with medical flexibles generally, Tyvek is the leading venting material for vented bags for medical use.

Each manufacturer produces vented bags for medical use with a range of features and characteristics. These include, among others: size, ease of opening, film composition, film gauge, seal strength, venting style, and venting design. Customers decide which vented bag for medical use to purchase by weighing the relative importance of these features.

Despite their generic name, vented bags for medical use are specialized, hard-to-make products. Because Tyvek is expensive, vented bags for medical use incorporate as little Tyvek into their design as possible. Minimizing the use of Tyvek, however, makes it more likely that, during sterilization, the EtO gas may not escape quickly enough through the venting material, bursting the seams of the packaging and breaking the sterile barrier. Designing and producing vented bags for medical use that strike the proper balance between using as little Tyvek as possible and providing sufficient venting for the EtO gas to escape is difficult and requires specialized knowledge and processes.

B. Relevant Market

The development, production, and sale of vented bags for medical use to U.S. customers is a line of commerce and a relevant market within the meaning of Section 7 of the Clayton Act.

Vented bags for medical use have specific end-uses, for which other types of medical flexibles cannot be used. Vented bags for medical use typically are used to accommodate larger and heavier items, such as surgical gowns and surgical kits and trays. Other types of flexible packaging, such as vented pouches for medical use, cannot handle these larger, heavier items because they are designed differently. Therefore, the relevant product is vented bags for medical use.

U.S. customers have unique qualification requirements that allow producers to price discriminate against them without regard to prices of foreign producers. Based on the locations of customers for vented bags for medical use, the relevant geographic market is the United States.

A small but significant increase in the price of vented bags for medical use to U.S. customers would not cause those customers to turn to other types of flexible packaging or to engage in arbitrage by purchasing through customers located outside of the United States, or otherwise to reduce purchases of vented bags for medical use, in volumes sufficient to make such a price increase unprofitable.

C. Market Participants

Amcor, Alcan Packaging, and one other competitor are the only significant competitors in the U.S. market for vented bags for medical use. Smaller suppliers are not significant competitors in the U.S. market for vented bags for medical use because their

products generally serve niche applications, such as low-volume products, non-standard sizes, and small customers, and are not price competitive. Foreign suppliers are not significant competitors in the U.S. market for vented bags for medical use because currently they do not sell into the United States, and they would not do so in the event of a small but significant increase in price because of the qualification barriers they would face. Thus, there are no other providers of vented bags for medical use to which a medical device manufacturer could turn if faced with a small but significant increase in the price of vented bags for medical use.

D. Competitive Effects

1. How Competition Occurs in the U.S. Market for Vented Bags for Medical Use

Producers of vented bags for medical use must work closely with medical device manufacturers to ensure that their packaging material meets their customers' qualifications, that they meet the promised lead times, and that they continuously find ways to cut the customers' costs. Producers also must engage in research and development to deliver better packaging products in order to compete effectively.

Prices for vented bags for medical uses are customer-specific and based on, among other things, an individual customer's unique requirements and specifications. The price charged to one customer likely will be different from the price charged to another customer. Additionally, arbitrage is unlikely because customer-specific printing, branding, and labeling on vented bags for medical use prevents sales among customers.

Price competition in the market for vented bags for medical use occurs in two ways. First, customers may issue a request for proposal, through which they invite potential suppliers to bid on supplying packaging that meets the customers'

specifications. Customers evaluate the competing bids on the basis of, among other things, compliance with their specifications, price, delivery times, and the services provided by each producer. Second, price competition may also occur less formally if a customer seeks or receives an offer from an alternative supplier and the incumbent is given a chance to respond.

Because of the risk-averse nature of medical device manufacturers, the time-consuming and difficult qualification process, and the high quality requirements, switching suppliers can involve significant time and expense. Consequently, competition tends to take the form of competition for a stream of new business, which the winner expects to keep for some years.

2. *Likely Anticompetitive Effects in the U.S. Market for Vented Bags for Medical Use*

The proposed acquisition of Alcan Packaging by Amcor likely would substantially lessen competition in the U.S. market for vented bags for medical use. Amcor, Alcan Packaging, and one other company are the three primary competitors in the U.S. market for vented bags for medical use. Currently, Amcor and Alcan Packaging account for 27 percent and 33 percent, respectively, of U.S. sales in the market for vented bags for medical use. If the transaction is not enjoined, three firms collectively would account for approximately 95 percent of sales of vented bags for medical use in the United States. Using a measure called the Herfindahl-Hirschman Index ("HHI"), the HHI would increase by more than 1,790 points, resulting in a post-acquisition HHI of more than 4,830 points.

Due to Amcor and Alcan Packaging's collective overall expertise in meeting the needs of customers and other technical and commercial factors for vented bags for

medical use, including, among other things, price, quality, ability to pass the customer's rigorous qualification procedures, delivery times, service, and technical support, Amcor and Alcan Packaging frequently are perceived by each other, by other bidders, and by customers as two of the three most significant competitors in the market.

Amcor's and Alcan Packaging's bidding behavior often has been constrained by the possibility of losing business to the other. For significant customers of vented bags for medical use, Amcor and Alcan Packaging are their two best substitutes. By eliminating Alcan Packaging, Amcor likely would gain the incentive and ability to profitably increase its bid prices, reduce quality, offer fewer and less attractive supply-chain options, reduce technical support, and reduce innovation below what it would have been absent the acquisition.

Customers have benefited from competition between Amcor and Alcan Packaging through lower prices, higher quality, better supply-chain options (including delivery times and volume-purchase requirements), technical support, and numerous innovations. The combination of Amcor and Alcan Packaging would eliminate this competition and future benefits to customers, and likely would result in harmful unilateral price effects.

In addition, by reducing the number of significant competitors in the U.S. market for vented bags for medical use from three to two, Amcor and the one other competitor would gain the incentive and likely ability to raise prices through coordinated interaction. The fringe competitors would be unable to render the coordination unprofitable by repositioning or expansion. Coordination would be more likely because, for example, the merger would make customer allocation easier. Each competitor could be reasonably certain as to the identity of the other's customers, making cheating easier to detect and

discipline and, because each competitor is at or near capacity, the ability of each profitably to expand sales and steal business from the other would be limited.

Customers have benefited from competition between Amcor, Alcan Packaging, and the other significant competitor through lower prices, higher quality, better supply-chain options (including delivery times and volume-purchase requirements), technical support, and numerous innovations. The combination of Amcor and Alcan Packaging would eliminate this competition and future benefits to customers, and likely would result in harmful coordinated price effects.

The proposed acquisition, therefore, likely would substantially lessen competition in the United States for the development, production, and sale of vented bags for medical use, which likely would lead to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation, in violation of Section 7 of the Clayton Act.

E. Entry/Expansion

In order to compete effectively in the U.S. market for vented bags for medical use, a competitor must be vertically integrated. Other converters produce vented bags for medical use similar to those produced by Amcor and Alcan Packaging. Unlike Amcor, Alcan Packaging, and the other leading competitor, however, those companies are not vertically integrated (*i.e.*, they do not make their own films) and do not benefit from similar economies of scale or scope, and they therefore operate at a cost disadvantage.

Amcor and Alcan Packaging, as a consequence of the efficiencies they possess due to vertical integration, are able to offer vented bags for medical use to customers at lower prices and higher volumes than are the non-vertically integrated competitors. In

order to compete effectively with Amcor and Alcan Packaging, other converters must begin producing their own films and expand production to capture similar scale and scope benefits. Expanding to compete with the vertically integrated converters would require a significant capital investment and would take years, as the expanding company still would have to qualify each of its products at each new customer. These suppliers likely would not be able to expand to meet customers' required specifications or quality requirements cost-effectively within a commercially reasonable amount of time, and therefore would be deterred from attempting to expand.

Likewise, de novo entry into the market for vented bags for medical use would not be timely, likely, or sufficient to deter anticompetitive post-merger pricing. A new supplier would need to construct production lines capable of producing vented bags for medical use that meet the rigorous standards set forth by major buyers of such films. Construction of manufacturing facilities would require a significant capital investment and the entrant would have to be committed to research and development. In addition, the technical know-how necessary to design and successfully manufacture packaging that is able to pass customers' qualification tests is difficult to obtain and is learned through a time-consuming trial-and-error process.

Even after a new entrant has developed the capability to supply vented bags for medical use, the entrant's product must be qualified by potential customers, demonstrating that its products can meet rigorous quality and performance standards. For example, because the qualifying process for vented bags for medical use typically requires a simulated aging test, where sample products are packaged in the vented bag, sterilized, and then stored in an accelerated aging room for extended periods of time, the

process can take many months. Further, initial attempts to qualify are not guaranteed to be successful, and even current market participants have had to repeat the process multiple times. In such cases, the qualification process can take several years with no guarantee of success. Moreover, because customer specifications are unique, qualification with one customer does not guarantee qualification with another.

Even if a new entrant were to develop the capability to supply vented bags for medical use and can pass qualification tests, the new entrant still would face the same barriers to expansion as those faced by converters currently producing vented bags for medical use. In addition, in the medical industry, where the costs of packaging failure are high, medical device manufacturers are reluctant to work with suppliers that have not established reputations for quality, the establishment of which occurs gradually over many years.

As a result of these barriers, expansion by non-vertically integrated vented bag converters or entry by new firms into the market for the development, production, and sale of vented bags for medical use would not be timely, likely, or sufficient to prevent a likely exercise of market power by Amcor after the acquisition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects that otherwise likely would result from Amcor's acquisition of the Alcan Packaging Medical Flexibles business. This divestiture will preserve competition in the U.S. market for vented bags for medical use by establishing a new, independent, and economically viable competitor.

The proposed Final Judgment requires the divestiture of the entire business that currently produces Alcan Packaging's vented bags for medical use, which includes the one plant currently producing vented bags for medical use, as well as all of the tangible and intangible assets associated with the plant. The goal of the proposed Final Judgment is to provide the acquirer of the Divestiture Assets with everything needed to replace the competition that would otherwise be lost as a result of the transaction. In addition, because vertical integration is important to being able to compete effectively in the U.S. market for vented bags for medical use, the Divestiture Assets include sufficient film extrusion assets and capabilities to support current and future demand for vented bags for medical use.

To that end, the Divestiture Assets include the entirety of Alcan Packaging's facility located at 100 Kenpack Lane, Marshall, North Carolina 28753 ("Marshall Facility"). The Marshall Facility produces all of Alcan Packaging's vented bags for medical use. The Marshall Facility is vertically integrated, meaning that it both produces its own films and converts those films into vented bags for medical use. In addition, the Marshall Facility has an established record as a high-quality, efficient production facility with product offerings that have been qualified by its customers and sufficient capacity to meet current and future demand for its products.

The Marshall Facility also produces forming films and plastic liners, which are not products of concern. Nevertheless, rather than removing these product lines from the integrated facility, the entire facility will be divested. Moreover, their inclusion will ensure that the Marshall Facility can be operated as a profitable, stand-alone entity.

The proposed Final Judgment also requires divestiture of tangible and intangible assets associated with the production of vented bags for medical use. These assets will provide the acquirer with the physical tools (*e.g.*, equipment, inventory, business records, etc.), and the bank of knowledge and rights (*e.g.*, manufacturing know-how, contractual rights, etc.) needed to create an independent producer of vented bags for medical use equivalent to Alcan Packaging's current operations. The Divestiture Assets also include: (1) all intangible assets used exclusively or primarily by the Marshall Facility in the design, development, production, marketing, servicing, distribution or sale of any product produced at the Marshall Facility; and (2) with respect to any intangible assets not included in (1) above, and that prior to the filing of the Complaint in this matter were used in connection with the design, development, production, marketing, servicing, distribution, or sale of any product produced at the Marshall Facility, a non-exclusive, non-transferable license for such intangible assets to be used for the design, development, production, marketing, servicing, distribution, or sale of any product produced at the Marshall Facility. These assets are to be divested regardless of whether they are currently used at the Marshall Facility.

Another necessary requirement to compete effectively in the U.S. market for vented bags for medical use is access to DuPont's patented Tyvek venting material in order to manufacture vented bags for medical use incorporating that material. Therefore, the proposed Final Judgment requires that the acquirer of the Divestiture Assets must have a readily available supply of Tyvek; thus, it must be able to purchase Tyvek directly from DuPont or have a Tyvek supply agreement with a company, other than Amcor, that is able to purchase Tyvek directly from DuPont.

The proposed Final Judgment requires that Amcor must give advance notice of future acquisitions in the U.S. market for vented bags for medical use. This requirement is necessary because an acquisition of certain competitors in the U.S. market for vented bags for medical use would likely not be reportable under the requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects that likely would result if Amcor acquired the Alcan Packaging Medical Flexibles business because the acquirer will have the ability to develop, produce, and sell vented bags for medical use in the United States in competition with Amcor.

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 and published in the Federal Register. Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8700
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 Amcor's acquisition

of the Alcan Packaging Medical Flexibles business. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the development, production, and sale of vented bags for medical use in the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). 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. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), 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 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) (citing *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

[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.(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).

> 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).[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 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 United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky.

[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'").

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 *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). 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 Senator 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]

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.

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Respectfully submitted,

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[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.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (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, 93d Cong., 1st Sess., 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.").