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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America and the State of Arizona,

Plaintiffs,

v.

Arizona Hospital and Healthcare Association and AzHHA Service Corporation,

Defendants.

CASE NO.CV07-1030-PHX

COMPETITIVE IMPACT STATEMENT

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 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. The Plaintiffs in this case lodged the proposed Final Judgment with this Court on May 22, 2007, for eventual entry in this civil antitrust proceeding, following the parties' compliance with the APPA, and if this Court determines, pursuant to the APPA, that the proposed Final Judgment is in the public interest.

I. Nature and Purpose of the Proceeding

The United States, accompanied by the State of Arizona, filed a civil antitrust complaint on May 22, 2007, alleging that Defendants Arizona Hospital and Healthcare Association and AzHHA Service Corporation (collectively "AzHHA"), by operation of their Registry for hospitals' purchases of temporary nursing services, violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The State of Arizona has also alleged that the Defendants violated Section 44-1402 of Arizona's Uniform State Antitrust Act, A.R.S. § 44-1402. Through the Registry, AzHHA and participating member hospitals agreed to set uniform bill rates and other competitively sensitive contract terms for the purchase of temporary nursing services from nurse staffing agencies.

The United States, the State of Arizona, and AzHHA have stipulated that this Court may enter the proposed Final Judgment after compliance with the APPA. Entry of the proposed Final Judgment would terminate the action, except that this Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations of it.

II. Description of Events Giving Rise to the Alleged Violation

A. The market for temporary nursing services in Arizona

Nurses providing services on a temporary basis generally fall into two categories, per diem nurses and travel nurses. Per diem nurses are local nurses who typically work on short notice to fill the immediate needs of nearby hospitals. Travel nurses work for hospitals for longer periods, usually thirteen weeks, and generally live outside Arizona. They usually receive short-term housing near the hospital where they work. Although all hospitals use temporary nursing services to cover needs created by illness, census fluctuations, and planned absences, Arizona hospitals have a particular need for temporary nursing services because of an annual influx of wintertime tourists and residents into the state.

Hospitals purchase temporary nursing services through nurse staffing agencies, which are the per diem and travel nurses' direct employers. A hospital will convey its needs for temporary nurse staffing to agencies, which in turn try to fill those needs with available nurses.

Besides acting as clearinghouses, agencies recruit nurses, conduct background checks, maintain administrative and employment-related records, and compensate nurses.

Agencies bill hospitals hourly for work done by the agencies' nurses. Agencies pass most of the bill rates directly to their nursing personnel as wages and benefits, and use the remainder for overhead and profit. There is a direct correlation between bill rates and nurse wages: when bill rates change, so do wages.

B. The formation and operation of the AzHHA Registry

AzHHA started the AzHHA Registry in 1988 to help member hospitals impose minimum quality standards on temporary nursing personnel hired from nurse staffing agencies. AzHHA began with the Per Diem Registry, which focused on credentialing per diem nursing personnel in two distinct regions: Northern Arizona (for participating hospitals around Phoenix) and Southern Arizona (for participating hospitals around Tucson). The next year AzHHA began the Travel Registry, which focused on credentialing travel nursing personnel and worked with participating hospitals throughout Arizona.

Hospitals that participate in the AzHHA Registry met once a year or more to discuss its operation and select which nurse staffing agencies would participate. In addition, AzHHA staff have talked with employees of participating hospitals about bill rates and other competitively sensitive contract terms, and shared the results of those conversations with employees of other hospitals. AzHHA employees sought agreement among participating hospitals before changing the Registry's operations or its contract terms.

The Registry focused on quality-assurance and credentialing activities for its first ten years. It required nurse staffing agencies to, among other things, keep updated records of nurses' certifications, perform drug tests, and conduct background checks. AzHHA monitored the agencies' compliance through annual audits performed by AzHHA employees. To pay for these activities, AzHHA has charged agencies participating in the Per Diem Registry a fee of two percent of their sales to participating hospitals. (The Travel Registry has charged a similar fee, but allows for discounts depending on the amount of sales agencies make to participating hospitals.)

Between 1988 and 1997, the AzHHA Registry allowed participating agencies to set their own bill rates, provided that they agreed to offer the same bill rates to every hospital. In 1997, with the approval of participating hospitals, AzHHA restructured the Per Diem Registry to further coordinate bill rates and other contract terms with its member hospitals. Under the new system, the Per Diem Registry and its participating hospitals agreed to require all participating agencies to accept the same maximum bill rate from all participating hospitals, which it established through an annual three-step process. First, AzHHA surveyed the participating agencies' desired rates and averaged their responses. AzHHA then forwarded those averages to the participating hospitals and asked what prices they were willing to pay. Finally, AzHHA averaged the hospitals' responses and imposed those averages as the new bill rates for the Per Diem Registry. In 1998, AzHHA and the participating hospitals extended this new pricing scheme to the Travel Registry.

Between 1998 and 2005, AzHHA attempted to keep participating hospitals and participating agencies from negotiating deals outside the Registry or abandoning the Registry entirely. AzHHA always required participating hospitals to try to purchase nursing services first from participating agencies, and deal with other agencies only after participating agencies failed to meet their needs. But this requirement did not stop some participating hospitals from reaching agreements with agencies outside the Registry; and in 2002, to prevent the Registry's collapse, AzHHA and its participating hospitals agreed to expel any participating hospital that did not use the Per Diem Registry for at least 50 percent of its per diem nursing services needs. At the participating hospitals' request, AzHHA monitored compliance with this rule, including gathering and distributing reports detailing each member hospital's usage. These reports revealed that after 2002 participating hospitals purchased 70 percent of their per diem nursing needs through the Per Diem Registry.

AzHHA's member hospitals may choose to participate in the Per Diem Registry, the Travel Registry, or both. Over time, more hospitals joined the AzHHA Registry: by 2005, 65 hospitals participated in either the Travel or Per Diem Registry, or both. The hospitals participating in the Per Diem Registry that year controlled about 80 percent of the hospital beds

in the Phoenix area and about 84 percent of the hospital beds in the Tucson area. Hospitals participating in the Travel Registry that year controlled about 78 percent of hospital beds statewide. Through the Per Diem Registry, hospitals purchased about 850,000 nursing hours annually, totaling approximately $43 million; through the Travel Registry, hospitals purchased about 2.3 million nursing hours annually, totaling approximately $116 million.

In 2005, after AzHHA and participating hospitals imposed new bill rate structures on agencies participating in the Per Diem Registry, including reduced overtime and weekend shift pay, many of the largest participating agencies left the Per Diem Registry. Finally, in 2006, while under investigation by the United States and the State of Arizona, and facing a private antitrust lawsuit, AzHHA returned the Per Diem Registry to its pre-1997 pricing model. To date, AzHHA has not revised the Travel Registry's pricing model. The Per Diem Registry's current pricing system, like the one in effect until 1997, has allowed some price competition among agencies, but it still has reduced price competition among participating hospitals purchasing temporary nursing services.

C. The relevant markets for temporary nursing personnel

"Per diem nursing" is a relevant service market. Per diem work offered to nurses by nurse staffing agencies is distinct from work offered directly to nurses by hospitals. Because of the distinctive appeal of per diem work, when the Per Diem Registry caused bill rates to be lower, per diem nurses in Phoenix and Tucson accepted the resulting stagnant or lower wages and did not switch to other types of work in sufficient quantities to render such a reduction in wages unprofitable.

There are at least two relevant geographic markets for per diem nursing services in Arizona. Phoenix and Tucson are the centers of two separate geographic markets for per diem nursing services because nurses selling per diem services are commonly hired on short notice, for one or perhaps several days of work, and so will not commute more than about 75 miles.

"Travel nursing" is a relevant service market. Travel work offered to nurses is distinct from all other types of work available. Because of the distinctive nature of travel work, when the Travel Registry caused bill rates to be lower, travel nurses in Arizona accepted the resulting

stagnant or lower wages and did not switch to other types of work in sufficient quantities to render such a reduction in wages unprofitable.

Arizona is the relevant geographic market for travel nursing services. Travel nurse agencies have not been able to defeat AzHHA's collectively imposed bill rates because of the number of travel nurses who strongly prefer Arizona hospitals, whether due to climate, location of friends and family, previous work experience, or other factors. In addition, Arizona, unlike the two other states with the largest demand for travel nurses, California and Florida, is a member of a multistate nurse licensing compact. This compact allows nurses licensed in compact states to accept a thirteen week assignment in Arizona without the licensure hurdles imposed by California and Florida. Travel nurse agencies incur lower margins to contract with participating hospitals through the Travel Registry, and have not been able to steer travel nurses to other states in sufficient numbers to defeat AzHHA's collectively imposed bill rates. One of the nation's largest travel nurse agencies left the Travel Registry in 1998, but was unable over the following two years to redirect sufficient numbers of nurses to assignments outside Arizona to sustain the withdrawal.

D. The competitive effects of the AzHHA Registry

Because most Arizona hospitals participated in the AzHHA Registry, it has been able, by acting collectively, to exercise market power in both the per diem and travel nurse markets. The Per Diem Registry has accounted for about 70 percent of participating hospitals' purchases of per diem nursing services, and the Travel Registry has accounted for about 90 percent of travel nurse agency sales of travel nursing services to hospitals in Arizona. The Registry and its participating hospitals have imposed on nurse staffing agencies contract terms, including but not limited to lower bill rates, that those agencies would otherwise have been able to successfully resist.

AzHHA has lowered bill rates for temporary nursing services below competitive levels and allowed participating hospitals to impose lower bill rates on participating agencies than the hospitals would have been able to negotiate on their own. AzHHA has recognized and promoted these reduced bill rates as a benefit of participating in the Registry. Participating hospitals have

recognized and viewed these reduced bill rates as a reason to join or stay in the Registry, in addition to the benefits they claim to receive from the Registry's quality-assurance process. As an immediate consequence of reducing bill rates below the competitive level, AzHHA has also caused the wages paid to temporary nurses to decrease below competitive levels.

AzHHA has enforced participation in the price-setting function of the Registry. It tried initially to do so through its "first use" policy, which required participating hospitals to deal with participating agencies before non-participating ones. This met with limited success, but ultimately proved inadequate to restrain some participating hospitals' purchases outside the Per Diem Registry. As a result, the Registry then adopted a rule that each participating hospital had to use the Per Diem Registry for at least 50 percent of its per diem nurse purchases. Thus, hospitals cannot freely make additional purchases outside the Registry because they must maintain a 50-percent usage rate – for every purchase outside the Registry they must make another purchase within it. Finally, AzHHA expels hospitals that fail to meet and maintain the 50-percent usage level, thus depriving the hospitals of access to the reduced rates negotiated with the agencies and also of participation in the Registry's quality-assurance process, which the hospitals assert they value. Two years after one of the nation's largest travel nurse agencies left the Travel Registry in 1998, it rejoined the Travel Registry when it found that it lost significant market share in Arizona and was hurt in its national efforts to recruit travel nurses because it could not offer sufficient opportunities for those nurses to work in Arizona.

The absence of efficiencies corroborates the anticompetitive nature of this suppression of bill rates for temporary nursing services. "Volume discounts" do not explain the lower prices the AzHHA Registry has commanded because it has not created any substantial volume-related efficiencies that allow agencies to significantly reduce their per unit (or per nurse-hour) costs. Participating agencies have not generated significant cost savings related to the volume of services they have provided through the Registry.

Nor do the efficiencies AzHHA has claimed for the AzHHA Registry generally explain or justify the rate reductions it has imposed on agencies. To the extent there are savings from

negotiating and administering contract terms that are not competitively sensitive, such savings are minor. Moreover, any savings agencies have accrued from their participation in AzHHA's quality-assurance process do not justify the anticompetitive rate agreements: AzHHA's operations in both the Per Diem and Travel Registry before 1997, and the Per Diem Registry since November 2006, have demonstrated that agreements on competitively sensitive terms, including bill rates, are not reasonably necessary for AzHHA, participating hospitals, or participating agencies to create quality assurance savings. In addition to evidence showing that these various specific efficiencies do not justify the reduction in bill rates, there is generally no evidence of any increase in the availability of temporary nurse services in the relevant markets as a result of the Registry. All relevant evidence has pointed in the opposite direction.

In short, the cost savings accruing to participating agencies have not accounted for the reduction in bill rates imposed by the concerted action of the Registry and its participating hospitals, nor for the reduction in the wages paid to temporary nurses.

E. The antitrust laws apply to agreements among buyers

Buyers as well as sellers may violate the antitrust laws. "Conceptually, monopsony power is the mirror image of monopoly power." Department of Justice Antitrust Division & Federal Trade Commission, Improving Health Care: A Dose of Competition, ch. 6, at 13 (2004). As Judge Posner has explained, "[j]ust as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charging of monopsony prices; and monopoly and monopsony are symmetrical distortions of competition from an economic standpoint." *Vogel v. American Soc. of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984). And as the Supreme Court has recently recognized, similar legal standards apply to these same basic economic principles. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. —, 127 S.Ct. 1069, 1076 (2007) (noting the "close theoretical connection between monopoly and monopsony" and that "[t]he kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization"); *see also North Jackson*

Pharmacy, Inc. v. Caremark RX, Inc., 385 F. Supp. 2d 740, 747 (N.D. Ill. 2005); Blair & Harrison, *Antitrust Policy and Monopsony*, 76 Cornell Law Rev. 297, 300 (1991).

The Supreme Court has also recognized that agreements among buyers do not necessarily violate the antitrust laws, and, in some cases, they may promote consumer welfare. In *Northwest Wholesale Stationers*, in the context of reviewing a non-price agreement among buyers, the Court recognized that the agreement could help create economies of scale in purchasing and logistics, and help smaller buyers compete more effectively with larger stores by ensuring access to inventory that otherwise might not be available when it was needed. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 295 (1985).

Some group purchasing agreements may lower the price participating buyers pay for goods and services without creating deadweight losses. For example, the purchasing agreement may guarantee a specific volume of purchases that allows sellers to realize economies of scale and lower their average cost of production. Because the sellers' costs are lower, they can accept a lower price from the buyers taking part in the group purchasing agreement without reducing production. Thus both the buyers and sellers may benefit from the buyers' agreement, or at least be no worse off than they were previously. *Cf. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 21 (1979) (noting that the substantially lowered costs created by blanket licensing is "potentially beneficial to both buyers and sellers"); *see also* Blair & Harrison, *Public Policy: Cooperative Buying, Monopsony Power, and Antitrust Policy*, 86 Nw. U. Law Rev. 331, 338 (1992) (concluding that both buyers and sellers should benefit from an efficiency-enhancing buying cooperative).

On the other hand, a buyers' cartel forces sellers to accept prices below what those sellers would receive in a competitive market, or are otherwise not explained by sellers' efficiencies, because the cartel members collectively exercise market power. *See, e.g., Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F.3d 1124, 1134-36 (10th Cir. 2002) Just as the collective exercise of seller-side market power absent sufficient countervailing

efficiencies will violate section 1 of the Sherman Act, the Act prohibits the collective exercise of buyer-side monopsony power.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment will prohibit AzHHA and persons with notice of the Final Judgment acting in concert with AzHHA, including hospitals, from reaching agreement on bill rates and other competitively sensitive contract terms. It will also prohibit AzHHA and such persons acting in concert with AzHHA from boycotting, discriminating against, or excluding hospitals or agencies that choose not to participate in the Registry, or from boycotting or discriminating against hospitals based on the extent of their participation in the Registry. While accomplishing these goals, the proposed Final Judgment will allow AzHHA to continue its quality-assurance activities.

Sections III - VII of the proposed Final Judgment prescribe what conduct by AzHHA and others is prohibited, and what is permitted.

Section III applies the proposed Final Judgment, when entered, to AzHHA and the AzHHA Service Corporation. The language found in Section III tracks that found in Federal Rule of Civil Procedure 65(d), which governs the scope of injunctions entered by this Court. It confirms that the applicability of the proposed Final Judgment extends to the limits of this Court's jurisdiction, and includes in its reach any person or company not a party, with notice of the Final Judgment, who acts in concert with AzHHA to violate the terms of the proposed Final Judgment.

Section IV(A) prohibits AzHHA from including in the Registry contracts any competitively sensitive contract terms, including those relating to bill rates, rate structures, payment terms between hospitals and agencies, cancellation policies, bonuses paid to nurses, and "first use" policies. These prohibitions will prevent AzHHA and its participating hospitals from jointly negotiating bill rates or other competitively sensitive contract terms.

Section IV(B), prohibits AzHHA and those acting in concert with AzHHA from circumventing the proposed Final Judgment, engaging in other anticompetitive activity, or

exercising market power through the Registry. Section IV(B) prohibits exclusionary behavior or boycotts and stops AzHHA from establishing minimum usage levels for the Registry. It also prohibits AzHHA from collecting competitively sensitive information, except to the extent that such information is required to operate the Registry, and flatly prohibits AzHHA from sharing a Registry participant's competitively sensitive information with any hospital, agency, or other third party. Finally, Section IV(B) requires that AzHHA select participating agencies on the basis of their compliance with the quality-assurance activities and not on the basis of any competitively sensitive information, like bill rates.

Section V requires AzHHA to comply with the proposed Final Judgment upon entry by this Court, except for Section IV(A)(1)-(6). The proposed Final Judgment grants AzHHA ninety (90) days from entry of the proposed Final Judgment to comply with Section IV(A)(1)-(6) by amending the Registry's contract to remove competitively sensitive contract terms. The 90-day setback will allow AzHHA to make an orderly transition to a compliant contracting system while still enabling relief much more reliably, quickly, and inexpensively than would result from litigation.

Section VI of the proposed Final Judgment clarifies the scope of the prohibitions in Sections IV and V by identifying specified activities that those sections do not prohibit. Section VI(A) lists terms that AzHHA may include in the Registry contracts, and Section VI(B) describes actions AzHHA may take to operate the Registry. Section VI(A) and (B) are not intended to be exclusive lists of actions permitted to AzHHA.

Section VII of the proposed Final Judgment establishes an antitrust compliance and notification scheme. It requires AzHHA to appoint an Antitrust Compliance Officer, and ensure that AzHHA's officers and employees, as well as participating hospitals and agencies, receive copies of the proposed Final Judgment after it has been entered.

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 the Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States, the State of Arizona, and Defendants have stipulated that the proposed Final Judgment may be entered by this Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon this 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 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 Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to this Court's entry of judgment. The comments and the United States' response to them will be filed with this Court and published in the Federal Register.

Written comments should be submitted to:

Joseph M. Miller
Acting Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street NW, Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that this Court retains jurisdiction over this action, and the parties may apply to this 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 continuing investigation and potential full trial on the merits. The United States could also have sought preliminary and permanent injunctions against the operation of the entire Registry. The United States is satisfied, however, that the prohibitions and requirements required by the proposed Final Judgment will reestablish competition in the markets for temporary nursing services.

The United States also considered, as an alternative to the proposed Final Judgment, continuing the investigation and naming the participating hospitals as defendants. The United States is satisfied, however, that the proposed Final Judgment, including Section III, will adequately reestablish competition in the relevant markets for temporary nursing services.

The United States also considered requiring the Defendants comply with Section IV(A) of the proposed Final Judgment within sixty (60) days. Ultimately, the United States concluded that it was reasonable to allow the Defendants 90 days to make an orderly transition to a new Program Contract, and that giving immediate effect to the prohibitions on cartel maintenance found in Section IV(B) was adequate immediate relief.

Entry of the proposed Final Judgment will avoid the time, expense, and uncertainty of litigation or a full trial on the merits.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

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 shall 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 2004, Congress amended the APPA to ensure that courts take into account the above-quoted list of relevant factors when making a public interest determination. *Compare* 15 U.S.C. § 16(e) (2004) *with* 15 U.S.C. § 16(e)(1) (2006) (substituting "shall" for "may" in directing relevant factors for court to consider and amending list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms). On the points next discussed, the 2004 amendments did not alter the substance of the Tunney Act, and the pre-2004 precedents cited below remain applicable.

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 United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

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. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted); *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'"). In making its public interest determination, 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 views of the nature of the case. *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003).

Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[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. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

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. 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. *Id.* at 1459-60.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction "[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). This language codified the intent of the original 1974 statute, expressed by Senator Tunney in the legislative history: "[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:

> [a]bsent 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.

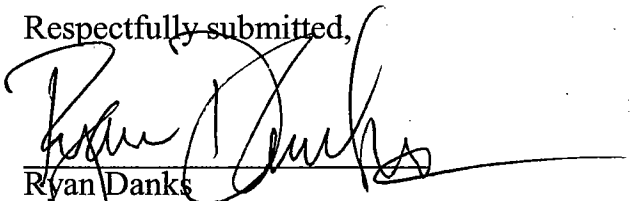
United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977); *see also United States v. SBC Commc'ns, Inc.*, Nos. 05-2102 and 05-2103, 2007 WL 1020746, at *9 (D.D.C. Mar. 29, 2007) (confirming that 2004 amendments to the APPA "effected minimal changes[] and that th[e] Court's scope of review remains sharply proscribed by precedent and the nature of [APPA] proceedings.").

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: May 22, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2007, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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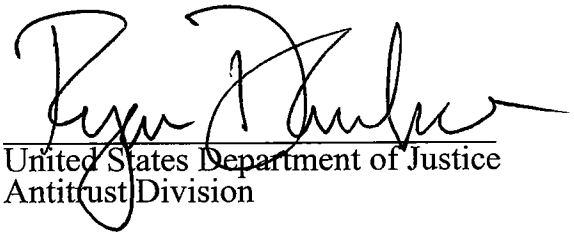

United States Department of Justice
Antitrust Division