UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA and STATE OF TEXAS, *Plaintiffs*, v. CINEMARK HOLDINGS, INC., RAVE HOLDINGS, LLC, and ALDER WOOD PARTNERS, L.P., *Defendants*.	Civil Action No.: Judge: Filed:

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

On November 16, 2012, Defendant Cinemark Holdings, Inc. ("Cinemark") agreed to acquire most of the assets of Rave Holdings, LLC ("Rave Cinemas"). Cinemark is a significant

competitor with Rave Cinemas in the exhibition of first-run, commercial movies in parts of New Jersey, Kentucky, and Texas. Another movie theatre company, Movie Tavern, Inc. ("Movie Tavern"), which is controlled by Cinemark's founder and Chairman of the Board and majority owned by Defendant Alder Wood Partners, L.P. ("Alder Wood Partners"), is a significant competitor with Rave Cinemas in the exhibition of first-run, commercial movies in parts of Texas. Plaintiffs filed a civil antitrust complaint on May 20, 2013, seeking to enjoin the proposed acquisition and to obtain equitable relief. The Complaint alleges that the acquisition, if permitted to proceed, would either give Cinemark direct control of its most significant competitor or leave theatres controlled by Cinemark's Chairman as the most significant competitor to the Cinemark-acquired theatre. The likely effect of this acquisition would be to substantially lessen competition in the exhibition of first-run, commercial movies in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the Plaintiffs also filed a Hold Separate Stipulation and Order ("Hold Separate") and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Cinemark and Rave Cinemas are required to divest three theatres located in New Jersey, Kentucky, and Texas to acquirer(s) acceptable to the United States, which will consult with the State of Texas on the purchaser of the Texas theatre. In addition, under the proposed Final Judgment, Alder Wood Partners is required to divest the entire business of Movie Tavern, which includes theatres located in parts of Fort Worth and Denton, Texas, to acquirer(s) acceptable to the United States, which will consult with the State of Texas as appropriate.

Under the terms of the Hold Separate, Defendants will take all steps necessary to ensure that the three theatres to be divested and the whole of the Movie Tavern business are operated as competitively independent, economically viable, and ongoing business concerns, and that competition is maintained and not diminished during the pendency of the ordered divestitures.

The Plaintiffs and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

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

A. The Defendants and the Proposed Transaction

Rave Cinemas is a Delaware limited liability company with its headquarters in Dallas, Texas. Rave Cinemas owns and operates 35 movie theatres containing 518 screens in a dozen states throughout the United States. Rave Cinemas is the seventh-largest theatre exhibitor in the United States and earned domestic box office revenue of approximately $169 million in 2012.

Cinemark is a Delaware corporation with its headquarters in Plano, Texas. It owns and operates 298 theatres with 3,916 screens in various states. Cinemark is the third-largest theatre exhibitor in the United States and earned domestic box office revenues of approximately $1 billion in 2012. Lee Roy Mitchell is a founder, a significant shareholder, and Chairman of the Board of Directors of Cinemark.

Defendant Alder Wood Partners, L.P. (“Alder Wood Partners”) is a Texas limited partnership with its headquarters in Dallas, Texas. Alder Wood Partners owns 100% of the

voting shares of Movie Tavern. Mr. Lee Roy Mitchell and his wife own 99% of Alder Wood Partners. Through Alder Wood Partners, they control Movie Tavern and receive approximately 92% of its profits. The other approximately 8% of Movie Tavern's profits is reserved for the benefit of its management. Movie Tavern is a Texas corporation with its headquarters in Dallas, Texas. In addition to serving as Cinemark's Chairman, Mr. Mitchell serves as a Director of Movie Tavern. Movie Tavern owns and operates 16 movie theatres, with a total of 130 screens in seven states and earned box office revenues of approximately $31 million in 2012.

On November 16, 2012, Cinemark and Rave Cinemas executed a purchase and sale agreement under which Cinemark will acquire, for approximately $220 million, thirty-two of Rave Cinemas' thirty-five movie theatres and will manage the three theatres it is not acquiring until Rave Cinemas has sold them.

The proposed transaction, as initially agreed to by Cinemark and Rave Cinemas on November 16, 2012, would lessen competition substantially as a result of Cinemark's acquisition of Rave Cinemas. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the Plaintiffs on May 20, 2013.

B. The Competitive Effects of the Transaction on the Exhibition of First-Run, Commercial Movies

The exhibition of first-run, commercial movies in parts of New Jersey, Kentucky, and Texas constitute lines of commerce and relevant markets for antitrust purposes.

1. The Relevant Product and Geographic Markets

The exhibition of first-run, commercial movies is a relevant product market under Section 7 of the Clayton Act. The experience of viewing a film in a theatre is an inherently

different experience from live entertainment (*e.g.*, a stage production or attending a sporting event), or viewing a movie in the home (*e.g.*, through streaming video, on a DVD, or via pay-per-view).

Reflecting the significant differences between viewing a movie in a theatre and other forms of entertainment, ticket prices for movies are generally very different from prices for other forms of entertainment. Live entertainment is typically significantly more expensive than a movie ticket, whereas renting a DVD or ordering a pay-per view movie for home viewing is usually significantly cheaper than viewing a movie in a theatre.

Moviegoers generally do not regard theatres showing "sub-run" movies, art movies, or foreign language movies as adequate substitutes for commercial, first-run movies.

The transaction substantially lessens competition in four relevant geographic markets: one in part of New Jersey, one in part of Kentucky, and two in Texas. Each geographic market contains a number of theatres – the majority of which are owned by the Defendants – at which consumers can view first-run, commercial movies. These relevant geographic markets are, specifically, as follows: the area in and around Voorhees and Somerdale in southern New Jersey ("Voorhees-Somerdale"), the eastern portion of Louisville, Kentucky ("East Louisville"), the western portion of Fort Worth, Texas ("Western Forth Worth"), and the area in and around Denton, Texas ("Greater Denton").

Voorhees-Somerdale

Rave Cinemas' Ritz Center 16 is located in Voorhees Township, New Jersey, and the Cinemark 16 operates in Somerdale, New Jersey. These theatres are located less than 3 miles apart. Two non-party theatres show first-run, commercial movies in the area around these towns.

East Louisville

The eastern portion of Louisville, Kentucky encompasses Rave Cinemas' Stonybrook 20 + IMAX, Cinemark's Tinseltown USA and XD with 19 screens, and the future Cinemark Mall of St. Matthews 10, which will exhibit first-run, commercial movies and is projected to open in July 2013. In this area, one non-party theatre shows a mix of first-run commercial movies, and foreign-language and art/independent films.

Western Fort Worth

The western portion of Fort Worth, Texas, encompasses Rave Cinemas' Ridgmar 13 + Xtreme and three Movie Tavern theatres: the Ridgmar with six screens, the West 7th Street with seven screens, and the Hulen with 13 screens. Three non-party theatres in the area show first-run, commercial movies.

Greater Denton

The area of Greater Denton, Texas, encompasses the Cinemark 14 in Denton, the Denton Movie Tavern with 4 screens, and Rave Cinemas' Hickory Creek 16 in nearby Hickory Creek, Texas. One non-party theatre in this area shows first-run, commercial movies.

The relevant markets in which to assess the competitive effects of this transaction are the first-run, commercial theatres in the above-mentioned geographic areas: Voorhees-Somerdale, East Louisville, Western Fort Worth, and Greater Denton. A hypothetical monopolist controlling the exhibition of all first-run, commercial movies in each of these areas would profitably impose at least a small but significant and non-transitory increase in ticket prices.

2. Competitive Effects in the Relevant Markets

Exhibitors that operate first-run, commercial theatres compete on multiple dimensions. Exhibitors compete on price, knowing that if they charge too much (or do not offer sufficient discounted tickets for matinees, seniors, children, etc.), moviegoers will begin to frequent their rivals. Exhibitors also seek to license the first-run movies that are likely to attract the largest numbers of moviegoers. In addition, they compete over the quality of the viewing experience. They compete to offer the most sophisticated sound systems, largest screens, best picture clarity, best seating (including stadium and reserved seating), and the broadest range and highest quality snacks, food, and drinks at concession stands or cafes in the lobby or served to moviegoers at their seats.

Cinemark and/or Movie Tavern currently compete with Rave Cinemas for moviegoers in the relevant markets at issue. Each of these markets is concentrated, and Cinemark and/or Movie Tavern and Rave Cinemas are each other's most significant competitor, given their close proximity to one another. Their rivalry spurs each to improve the quality of their theatres and keeps ticket prices in check. For various reasons, the other theatres in these markets offer less attractive options for the moviegoers that are served by the Cinemark and/or Movie Tavern and Rave theatres. For example, they are located farther away from these moviegoers, or they are a relatively smaller size or have fewer screens.

In these relevant markets, the acquisition of Rave Cinemas likely will result in a substantial lessening of competition. In the Voorhees-Somerdale, East Louisville, and Greater Denton markets, the transaction will lead to significant increases in concentration and eliminate existing competition between Cinemark and Rave Cinemas. In the Western Fort Worth and

Greater Denton markets, where Rave currently competes closely with Movie Tavern, Cinemark's acquisition of the Rave Cinemas theatres likely will also reduce competition because Cinemark will not have the same incentive that Rave Cinemas has to compete aggressively against Movie Tavern. In those markets, Mr. Mitchell will have both the incentive and ability to dampen competition after Rave Cinemas is acquired by Cinemark. He is the Chairman and a significant shareholder of Cinemark and a Director of Movie Tavern, and, together with his wife, majority owner of Movie Tavern, and has access to competitively-sensitive information at both companies.

In Voorhees-Somerdale, the proposed acquisition would give the newly-merged entity control of two of the four first-run, commercial theatres, with 32 out of 48 total screens and a 71% share of 2012 box office revenues, which totaled approximately $14.7 million. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI")1, the acquisition would yield a post-acquisition HHI of approximately, 5,861, representing an increase of roughly 2,416 points.

In East Louisville, after the completion of Cinemark's Mall of St. Matthews 10 in July 2013, the proposed acquisition would give the newly merged entity control of three of the four first-run, commercial theatres, with 49 of 53 total screens. As measured by total screens only (since Cinemark's Mall of St. Matthews 10 does not yet have box office revenues), the

1 *See* U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 5.3 (2010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010 html. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

acquisition would result in Cinemark having a market share of approximately 93% in East Louisville. The acquisition would yield a post-acquisition HHI of 8,604, representing an increase of roughly 4,130 points.

In Western Fort Worth, the proposed acquisition would give Cinemark/Movie Tavern control of four of the seven first-run, commercial movie theatres in that area, with 39 out of 71 total screens and approximately 60% of 2012 box office revenues, which totaled almost $17 million. The acquisition would yield a post-acquisition HHI of approximately 4,828, representing an increase of roughly 1,736 points.

In Greater Denton, the proposed acquisition would give Cinemark/Movie Tavern control of three of the four first-run, commercial movie theatres, with 34 out of 46 total screens and an approximately 62% of 2012 box office revenues, which totaled approximately $11 million. The acquisition would yield a post-acquisition HHI of approximately 5,265, representing an increase of roughly 1,640 points.

In the four relevant markets today, were one of Defendants' theatres to increase ticket prices unilaterally, the exhibitor that increased price would likely suffer financially as a substantial number of its customers would patronize the other exhibitor's theatre. The other theatres are smaller and/or more distant than the parties' theatres and unlikely to offer enough of a competitive constraint to prevent such a price increase. After the acquisition, Cinemark or Movie Tavern would recapture such losses, making price increases more profitable than they would have been pre-acquisition. The acquisition is, therefore, likely to lead to higher ticket prices for moviegoers, which could take the form of a higher adult evening ticket price or reduced discounting, *e.g.*, for matinees, children, seniors, and students.

Likewise, the proposed transaction would eliminate competition between Cinemark and/or Movie Tavern and Rave Cinemas over the quality of the viewing experience at their theatres in each of the geographic markets at issue. If no longer required to compete, Cinemark and/or Movie Tavern and Rave Cinemas would have a reduced incentive to maintain, upgrade, and renovate their theatres in the relevant markets, to improve those theatres' amenities and services, and to license the most popular movies, thus reducing the quality of the viewing experience for a moviegoer.

The entry of a first-run, commercial theatre sufficient to deter or counteract an increase in movie ticket prices or a decline in theatre quality is unlikely in all of the relevant markets. Exhibitors are reluctant to locate new first-run, commercial theatres near existing first-run, commercial theatres or near those already under construction, unless the population density, demographics, or the quality of existing theatres makes new entry viable. Over the next two years, demand by moviegoers to see first-run, commercial movies in the geographic markets at issue will likely not be sufficient to support entry of any new first-run, commercial movie theatres that are not already under construction.

For all of these reasons, the proposed transaction would lessen competition substantially in the exhibition of first-run, commercial movies in the Voorhees-Somerdale, East Louisville, Western Fort Worth, and Greater Denton geographic markets, eliminate actual and potential competition between Cinemark and/or Movie Tavern and Rave Cinemas, and likely result in increased ticket prices and lower quality theatres in those markets. The proposed transaction therefore violates Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisitions in each relevant geographic market, establishing new, independent, and economically-viable competitors. The proposed Final Judgment requires Cinemark within ninety (90) calendar days after the filing of the Complaint, or five (5) days after the notice of the entry of the Final Judgment by the Court, whichever is later, to divest as viable, ongoing businesses three theatres in the Voorhees-Somerdale, East Louisville, and Greater Denton geographic markets: the Rave Stonybrook 20 + IMAX (East Louisville), the Rave Ritz Center 16 (Voorhees-Somerdale), and either the Rave Hickory Creek 16 (Greater Denton) or the Cinemark 14 (Greater Denton).

The assets must be divested in such a way as to satisfy the Plaintiffs that the theatres can and will be operated by the purchaser as viable, ongoing businesses that can compete effectively in the relevant markets as first-run, commercial theatres. To that end, the proposed Final Judgment provides the acquirer(s) of the theatres with an option to enter into a transitional supply agreement with Cinemark of up to 120 days in length, with the possibility of one or more extensions not to exceed six months in total, for the supply of any goods, services, support, including software service and support, and reasonable use of the name Cinemark, the name Rave, and any registered service marks of Cinemark, for use in operating those theatres during the period of transition. This ensures the acquirer(s) of the theatres can operate without interruption while long-term supply agreements are arranged and the theatres rebranded. Without the option to enter into a transitional supply agreement, the acquirer(s) might find itself temporarily without provisions, including concessions, necessary to operate the theatres.

The proposed Final Judgment also requires Alder Wood Partners within ninety (90) calendar days after the filing of the Complaint, or five (5) days after the notice of the entry of the Final Judgment by the Court, whichever is later, to divest the entire business of Movie Tavern, including the Movie Tavern theatres in the Western Fort Worth and the Greater Denton geographic markets. The assets must be divested in such a way as to satisfy the Plaintiffs that the sale will remedy the competitive harm alleged in the Complaint.

Until the divestitures take place, Cinemark, Alder Wood Partners, and Rave Cinemas must maintain the sales and marketing of the theatres, and maintain the theatres in operable condition at current capacity configurations. In addition, Cinemark, Alder Wood Partners, and Rave Cinemas must not transfer or reassign to other areas within the company their employees with primary responsibility for the operation of the theatres, except for transfer bids initiated by employees pursuant to Defendants' regular, established job posting policies. In the event that Cinemark and/or Alder Wood Partners do not accomplish the divestitures within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures.

If Cinemark is unable to effect any of the divestitures required herein due to its inability to obtain the consent of the landlord from whom a theatre is leased, Section VI.A of the proposed Final Judgment requires it to divest alternative theatre assets that compete effectively with the theatres for which the landlord consent was not obtained. If Alder Wood Partners is unable to effect the divestitures of any of the three Movie Tavern theatres, defined as the Western Fort Worth, Texas Movie Tavern Theatres in the proposed Final Judgment, due to the inability to obtain the landlords' consent, Section VI.B of the proposed Final Judgment requires Cinemark to

divest the Ridgmar 13 + Xtreme theatre assets located at 2300 Green Oaks Road, Fort Worth, Texas that it will be acquiring from Rave Cinemas. These provisions will insure that any failure by Cinemark and/or Alder Wood Partners to obtain landlord consent does not thwart the relief obtained in the proposed Final Judgment. In addition, pursuant to Section V.G of the proposed Final Judgment, if a trustee has been appointed to effect the divestiture of the Movie Tavern Divestiture Assets and that trustee is unable for any reason to accomplish the divestiture of the portion of those assets that includes any of the Western Fort Worth, Texas Movie Tavern Theatres, the trustee will then divest the Ridgmar 13 + Xtreme theatre assets.

The proposed Final Judgment also prohibits Cinemark, without providing at least thirty (30) days notice to the United States Department of Justice, from acquiring any other theatres in the following counties: Tarrant County, Texas; Denton County, Texas; Camden County, New Jersey; and Jefferson County, Kentucky. These counties correspond to the relevant geographic markets in this case. The proposed Final Judgment also prohibits Alder Wood Partners, without providing at least thirty (30) days notice to the United States Department of Justice, from acquiring any theatres in any county in which Cinemark owns or operates a theatre exhibiting first-run, commercial movies in any state; however this requirement will terminate in the event that no one serving as a limited partner of Alder Wood Partners as of May 13, 2013 serves as an officer or director of Cinemark. Such acquisitions could raise competitive concerns but might be too small to be reported under the Hart-Scott-Rodino ("HSR") premerger notification statute. However, neither company is required to provide advance notification when making an acquisition of not more than two percent of the outstanding voting securities of a publicly-traded company, or comparable non-corporate interest in an unincorporated entity, with theatres

exhibiting first-run, commercial movies where such investment is made solely for the purpose of investment.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of Cinemark's acquisition of Rave Cinemas.

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 Plaintiffs and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in

the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

John R. Read
Chief, Litigation III
Antitrust Division
United States Department of Justice
450 5th Street, N.W. Suite 4000
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 Plaintiffs considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The Plaintiffs could have continued the litigation and sought preliminary and permanent injunctions against Cinemark's acquisition of Rave Cinemas. The Plaintiffs are satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of exhibition of first-run, commercial movies in the relevant markets identified by the United States. Thus, the proposed Final

Judgment would achieve all or substantially all of the relief the Plaintiffs 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.")[2]

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 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.

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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] 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. 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

[3] *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'").

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 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

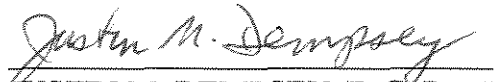
settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[4]

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 20, 2013

Respectfully submitted,



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[4] *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.").

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