UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. CONTINENTAL AG and VEYANCE TECHNOLOGIES, INC. Defendants.	CASE NO.: JUDGE:

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

Pursuant to an Agreement and Plan of Merger dated February 10, 2014, Continental AG ("Continental") has agreed to purchase Veyance Technologies, Inc. ("Veyance") from Carlyle Partners IV, L.P. for $1.8 billion. The merger would combine two of the three leading suppliers of air springs used in commercial vehicles in North America.

The United States filed a civil antitrust Complaint on December 11, 2014, seeking to enjoin the proposed acquisition. The Complaint alleges that the acquisition likely would substantially lessen competition in North America in the development, manufacture and sale of

commercial vehicle air springs, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. That loss of competition likely would result in higher prices and decreased quality of service for customers in the North American market for commercial vehicle air springs.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order 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, the defendants are required to divest the Veyance North America Air Springs Business, which includes Veyance's manufacturing and assembly facilities in San Luis Potosi, Mexico, research and development, engineering and testing operations, and administration assets in Fairlawn, Ohio, and all of the tangible and intangible assets primarily used in or for the business. Under the terms of the Hold Separate Stipulation and Order, defendants will take certain steps to ensure that the Veyance North America Air Springs Business is operated as a competitively independent, economically viable, and ongoing business concern; that it will remain independent and uninfluenced by the consummation of the acquisition; and that competition is maintained during the pendency of the ordered divestiture.

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

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

A. The Defendants

Defendant Continental AG, a corporation organized under the laws of the Federal Republic of Germany, is based in Hanover, Germany. Continental is a leading German automotive manufacturing company, specializing in tires, brake systems, and components, and it is one of the world's largest producers of rubber products. Its annual sales for 2013 were approximately $40 billion. ContiTech North America, Inc., of Montvale, New Jersey, is a part of ContiTech AG, a division of Continental. ContiTech North America produces and sells parts, components and systems, including commercial vehicle air springs, for the automotive engineering industry in North America.

Defendant Veyance Technologies, Inc. is incorporated in Delaware with its headquarters in Fairlawn, Ohio. Veyance manufactures engineered rubber products for heavy-duty industrial, automotive and military applications. Veyance produces and sells automotive and commercial vehicle parts, including commercial vehicle air springs, in North America. In 2013, Veyance had $2.1 billion in sales.

B. The Markets

1. Commercial Vehicle Air Springs

Air springs are load-carrying rubber components constructed of a hollow rubber bellow sealed to metal plates attached at the top and bottom. Through the use of air compression, air springs dampen road shock and vibration. Air springs keep commercial vehicles–such as trucks, trailers and buses–at the same distance from the road irrespective of the weight being carried and also can be used as actuators to raise and lower objects. As commercial vehicle components, air

springs are used in multiple locations in a vehicle: under the driver's seat, between the cab and underlying frame, and in suspensions between axle and frame for truck and trailer. Air springs in suspension systems of trucks, trailers and buses help commercial vehicles save fuel, reduce tire wear, and provide greater reliability. Air springs between the floor of the cabin and the seat provide for driver comfort and reduce driver fatigue. Air springs in the commercial vehicle cabin suspension system, between the frame and the cabin, regulate cabin movement.

The three types of air springs are (1) rolling lobe, which are used for truck, bus and trailer axles; (2) convoluted, or bellows, which serve the same function as rolling lobe, but also are used as actuators to lift axles; and (3) sleeves, which are smaller springs generally used in cabs and seats for driver comfort. The vast majority of air springs for commercial vehicle applications sold in North America are rolling lobe air springs purchased by original equipment manufacturers ("OEMs") for truck, trailer and bus suspension systems.

Commercial vehicle OEMs in North America determine the type of air spring to be used in a particular platform. They can source the air springs directly from the air spring manufacturer or purchase a completed, fully integrated suspension system that includes air springs from a suspension system OEM. Suspension system OEMs source commercial vehicle air springs directly from the air spring manufacturer. All air springs used by commercial vehicle OEMs must be of high quality and durability. Commercial vehicle OEMs require that commercial vehicle air springs meet rigid qualifications to ensure performance, quality, and engineering design fit. The qualification process includes not only qualification of the specific air spring to be used, via laboratory and road tests, but also inspection of the particular production facility where the air spring is to be produced. The rigorous process of qualifying an air spring for commercial vehicle OEMs can take more than two years. Once the air spring is

qualified, commercial vehicle OEMs work closely with the air spring manufacturer to ensure that the air spring is integrated into the overall design of the platform.

Air springs also are sold in the aftermarket, or the market for replacement air springs for commercial vehicles. Commercial vehicle air springs for the aftermarket are purchased by the end user to replace, after time and wear, the air springs originally installed in commercial vehicles. Commercial vehicle air springs for the aftermarket do not have to meet the rigid qualifications that commercial vehicle OEMs require, as replacement commercial vehicle air springs are not designed for a specific commercial vehicle platform.

2. The North American Market for Commercial Vehicle Air Springs for Original Equipment Manufacturers

Rolling lobe, convoluted and sleeve commercial vehicle air springs perform distinct functions and, in general, cannot be substituted for each other. For instance, an air spring used in a trailer suspension is not the same as an air spring used for a truck seat. Accordingly, the three types of commercial vehicle air springs are not interchangeable or substitutable for one another, and demand for each is separate. In the event of a small but significant increase in price for a given type of commercial vehicle air spring, customers would not stop using that air spring in sufficient numbers to defeat the price increase. Thus, the development, manufacture, and sale of each type of commercial vehicle air spring is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

Although narrower product markets of rolling lobe, convoluted and sleeve air springs for commercial vehicles exist, the competitive dynamic for each type is nearly identical. The same firms manufacture and sell each of these products and each type of commercial vehicle air spring is sold in similar competitive conditions. Therefore, the products may be aggregated for

analytical convenience into a single relevant product market for the purpose of assigning market shares and evaluating the competitive impact of the acquisition.

Commercial vehicle OEMs require each air spring to meet rigid qualification standards to ensure performance, quality and engineering design fit. Commercial vehicle air springs sold into the aftermarket for replacement purposes are not of sufficient quality or reliability to be used by commercial vehicle OEMs. Accordingly, commercial vehicle air springs for OEMs are not interchangeable with or substitutable for aftermarket commercial vehicle air springs, and demand for each is separate.

A small but significant increase in the price of commercial vehicle air springs for commercial vehicle OEMs would not cause a sufficient number of OEMs to substitute commercial vehicle air springs manufactured for the aftermarket so as to make such a price increase unprofitable. Thus, the development, manufacture, and sale of commercial vehicle air springs for OEMs is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

Commercial vehicle air springs are bulky but relatively lightweight. Despite the light weight, the cost of transporting commercial vehicle air springs is high compared to the value of the product, because the manufacturers essentially have to pay to ship air. Therefore, while shipping commercial vehicle air springs from overseas is feasible, it adds significant cost–approximately 10 to 15 percent–to the price of the product. Import taxes also add additional costs to commercial vehicle air springs that are shipped from outside North America.

In addition, commercial vehicle OEMs require that the air springs production facility be qualified. The qualification process includes inspection of the production facility by the

customer. Having to inspect and qualify a facility outside of North America adds both time and expense to the process.

Further, commercial vehicle OEMs require timely delivery of air springs, as they are an essential input into the final vehicle platform. Procuring commercial vehicle air springs from overseas adds significant lead time to delivery, increases the risk of shipment delays, and makes more difficult the rapid correction of quality shortcomings in delivered product. Thus, for commercial vehicle OEMs, purchasing air springs from outside North America involves the assumption of an unacceptable level of risk.

Therefore, to successfully sell commercial vehicle air springs for OEM use in North America, an air spring manufacturer must have an air spring production facility in North America. OEM customers for commercial vehicle air springs in North America would be unwilling to switch to commercial vehicle air springs manufactured outside of North America to defeat a small but significant price increase. Accordingly, North America is a relevant geographic market for the development, manufacture, and sale of commercial vehicle air springs for OEMs within the meaning of Section 7 of the Clayton Act.

3. The North American Market for Commercial Vehicle Air Springs for the Aftermarket

Commercial vehicle air springs for the aftermarket are sold for replacement purposes. The targeted customer is the commercial vehicle owner. Because commercial vehicle air springs for the aftermarket are not designed for a specific commercial vehicle platform, they do not have to meet the rigid qualifications that commercial vehicle OEMs require. Commercial vehicle air springs for the aftermarket are of lower quality and lesser durability than commercial vehicle air springs made for OEMs. Accordingly, commercial vehicle air springs for the aftermarket are not

interchangeable or substitutable for commercial vehicle air springs sold to OEMs. Demand for commercial vehicle air springs used by OEMs is separate from demand for commercial vehicle air springs for the aftermarket.

A small but significant increase in the price of commercial vehicle air springs for the aftermarket would not cause customers to substitute commercial vehicle air springs for OEMs in sufficient numbers so as to make such a price increase unprofitable. Thus, the development, manufacture, and sale of commercial vehicle air springs for the aftermarket is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

For commercial vehicle air springs sold in the aftermarket, purchases are based on price, brand or reputation, and availability. As with commercial vehicle air springs for OEMs, the cost of shipping commercial vehicle air springs for the aftermarket, individually or in small quantities, from outside North America would make them more expensive than those sold in North America. Further, the additional lead time to ship commercial vehicle air springs for individual demand makes direct purchase from overseas unattractive to potential purchasers, who want their vehicles repaired in a timely manner. Therefore, a customer typically would not directly purchase commercial vehicle air springs for the aftermarket from outside of North America.

Customers would be unwilling to switch to commercial vehicle air springs manufactured outside of North America to defeat a small but significant price increase. Accordingly, North America is a relevant geographic market for the development, manufacture, and sale of commercial vehicle air springs for the aftermarket within the meaning of Section 7 of the Clayton Act.

4. Anticompetitive Effects

a. Commercial Vehicle Air Springs for OEMs

In North America, the market for the development, manufacture, and sale of commercial vehicle air springs for OEMs is highly concentrated and would become substantially more concentrated as a result of the proposed transaction. Continental and Veyance each have approximately 30 percent of the North American market for commercial vehicle air springs sold for OEMs. The only other competitor has approximately 40 percent of the North American market, so the acquisition would result in two firms holding 100 percent of the market.

As articulated in the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission, and discussed in Appendix A of the Complaint, the Herfindahl-Hirschman Index ("HHI") is a measure of market concentration. Market concentration is often one useful indicator of the level of competitive vigor in a market and the likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition, harming consumers. Markets in which the HHI is between 1,500 and 2,500 points are considered to be moderately concentrated and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. Transactions that increase the HHI by more than 200 points in highly concentrated markets are presumed likely to enhance market power.

In the North American market for the development, manufacture, and sale of commercial vehicle air springs for OEMs, the pre-merger HHI is 3,388; the post-merger HHI is 5,224, with an increase in the HHI of 1,836. Consistent with the Horizontal Merger Guidelines, this market

is highly concentrated and would become substantially more concentrated as a result of the proposed acquisition.

A combined Continental and Veyance would have the ability to increase prices of commercial vehicle air springs sold to OEMs and to reduce the quality of service for these customers by limiting availability or delivery options. In addition, Continental's elimination of Veyance as a strong, independent competitor in the development, manufacture, and sale of commercial vehicle air springs for OEMs likely would facilitate anticompetitive coordination between the remaining two suppliers. The two suppliers would be able to estimate each other's output, capacity, reserves, and costs, making coordinated interaction easier. The transaction would substantially lessen competition in the development, manufacture, and sale of commercial vehicle air springs for OEMs in North America and lead to higher prices and decreased quality of service in violation of Section 7 of the Clayton Act.

b. Commercial Vehicle Air Springs for the Aftermarket

In North America, the market for the development, manufacture, and sale of commercial vehicle air springs sold in the aftermarket is highly concentrated and would become substantially more concentrated as a result of the proposed transaction. Veyance has approximately 33 percent of the market, Continental has approximately 17 percent of the market, and one other competitor has approximately 45 percent. Were the acquisition to proceed, the two firms each would have close to a 50 percent share of the market.

For the North American market for the development, manufacture, and sale of commercial vehicle air springs sold in the aftermarket, the premerger HHI is 3,403, the post-acquisition HHI is 4,525, and the acquisition would produce an increase of 1,122 in the HHI. Consistent with the Horizontal Merger Guidelines, this market is highly concentrated and would

become substantially more concentrated as a result of the proposed acquisition. The proposed transaction likely would substantially lessen competition in the North American market for the development, manufacture, and sale of commercial vehicle air springs for the aftermarket and lead to higher prices and decreased quality of service in violation of Section 7 of the Clayton Act.

5. Difficulty of Entry

a. Commercial Vehicle Air Springs for OEMs

Choosing an appropriate factory location, ordering the necessary equipment and setting up the factory for production of commercial vehicle air springs likely would take two or more years and would require a substantial investment. Once a location is chosen and the factory is producing, the OEM qualification process can take two or more additional years. Qualification requires a number of steps, and both the factory and the particular air springs to be used by the commercial vehicle OEM must be qualified.

Because of the cost and difficulty of establishing a production facility in North America and gaining requisite OEM qualification, entry into the North American market for the development, manufacture, and sale of commercial vehicle air springs for OEMs would not be timely, likely or sufficient to mitigate the anticompetitive effects of Continental's proposed acquisition of Veyance.

b. Commercial Vehicle Air Springs for the Aftermarket

The impact of the acquisition in the North American market for the development, manufacture, and sale of commercial vehicle air springs for the aftermarket would not be remedied quickly by the response of foreign suppliers. These suppliers lack a recognized brand and reputation in North America, and most lack the broad product portfolio, to supply

commercial vehicle air springs that would be accepted by most OEMs. Foreign firms are not present in the North American market for the development, manufacture, and sale of commercial vehicle air springs for OEMs, so they do not have established reputations that would contribute to their acceptance in the aftermarket. Therefore, entry would not be timely, likely, or sufficient to mitigate the anticompetitive effects of Continental's proposed acquisition of Veyance.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the North American market for commercial vehicle air springs by establishing a new, independent, and economically viable competitor. Paragraph IV.A of the proposed Final Judgment requires defendants, within ninety (90) days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest the Veyance North America Air Springs Business. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the Veyance North America Air Springs Business can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the development, manufacture, and sale of commercial vehicle air springs. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

The Divestiture Assets include the Veyance North America Air Springs Business, including its manufacturing facility and its assembly facility, both located in San Luis Potosi, Mexico, and its research and development, engineering and testing operations, and administration assets located in Fairlawn, Ohio ("Fairlawn Facility"). The Veyance North America Air Springs Business produces commercial vehicle air springs sold to customers in North America. It is an established, high-quality manufacturer with product offerings that have

been qualified by its customers and sufficient capacity to meet current and future demand for its product.

The proposed Final Judgment requires the divestiture of all tangible and intangible assets primarily used in or for the Veyance North America Air Springs Business. These assets will provide the Acquirer not only with physical assets, but also with intellectual property and rights, specifically including all U.S. patents and other intellectual property used by the Veyance North America Air Springs Business in the development, manufacture and sale of air springs, and a non-exclusive, perpetual, worldwide, royalty-free license for all non-U.S. patents and pending patent applications for use in the design, development, manufacture, marketing, servicing and/or sale of air springs produced for customers located outside of North America.

Paragraph IV.C of the proposed Final Judgment prohibits defendants from interfering with the Acquirer's ability to hire defendants' employees whose primary responsibility is the development, manufacture and sale of air springs. The proposed Final Judgment explicitly includes in this provision four categories of employees critical to the Veyance North America Air Springs Business: (1) Head of Air Springs Business, (2) Head of Sales and Marketing, (3) a Chief Chemist for Air Springs, and (4) aftermarket sales personnel. The proposed Final Judgment proscribes defendants' interference with negotiations by the Acquirer to hire these employees.

The Veyance North America Air Springs Business currently sources critical inputs—compounds and calendered materials—from a Veyance facility that is not being divested. The Acquirer initially may require a ready supply of such inputs for the manufacture of air springs. Therefore, Paragraph IV.G of the proposed Final Judgment provides that, at the option of the Acquirer, Continental shall enter into a supply contract for compounds and calendered materials

sufficient to meet all or part of the Acquirer's needs for a period of up to one (1) year. The United States, in its sole discretion, may approve an extension of the term for a period totaling not more than one (1) additional year. The Acquirer also may require a transition services agreement for back office and technical support to ensure the continuity of the operations of the Veyance North America Air Springs Business. The proposed Final Judgment, in Paragraph IV.H, provides the Acquirer with the option for a transition services agreement for six (6) months, with a possible extension of the term for another six (6) months.

The research and development, engineering and testing operations, and administration assets included in the Divestiture Assets are housed on the first and third floors of the Fairlawn Facility, which is also Veyance's world headquarters. The proposed Final Judgment, in Paragraph IV.J, provides that, at the option of the Acquirer, defendants shall enter into a sublease for the first and third floors of the Fairlawn Facility for a period of six (6) months. The United States, in its sole discretion, may approve one or more extensions for a total of up to an additional six (6) months. Should the Acquirer exercise its option to sublease space in the Fairlawn Facility, the proposed Final Judgment, in Paragraph IV.K, requires defendants to create physical barriers that segregate the air spring operations from the portions of the Fairlawn Facility that will remain occupied by defendants.

Veyance has a lab and testing equipment located on the second floor of the Fairlawn Facility that supports various Veyance businesses, including its air springs business. In Paragraph IV.L, the proposed Final Judgment provides that, at the option of the Acquirer, defendants will provide the Acquirer with complete and sole access to the laboratory and all the equipment located on the second floor of the Fairlawn Facility for a continuous pre-scheduled, 48-hour period each week. To maintain the confidentiality of the Acquirer's operations,

Paragraph IV.M of the proposed Final Judgment, requires defendants to program the equipment on the second floor of the Fairlawn Facility to ensure that no results related to air springs testing are stored on the equipment and that such results instead will be routed only to a server designated by the Acquirer.

Veyance utilizes for its various businesses, including its air springs business, three warehouses located, respectively, in San Luis Potosi, Mexico; Moberly, Missouri; and Mississauga, Ontario, Canada. Paragraph IV.N of the proposed Final Judgment provides that, at the option of the Acquirer, defendants shall enter into a sublease with the Acquirer for space at any or all of the warehouses. Should the Acquirer exercise this option, the proposed Final Judgment, in Paragraph IV.O, requires defendants to create physical barriers segregating the air springs areas at each of the warehouses from the portions of each warehouse that will remain occupied by defendants.

By providing for the possibility of a supply contract for compounds and calendered materials, a transition services agreement, and the physical segregation of the Fairlawn Facility and the warehouses, the proposed Final Judgment contemplates an ongoing relationship between defendants and the Acquirer for a period of time. Should the United States conclude that it would benefit from the assistance of a Monitoring Trustee to oversee the negotiation of the agreements and the segregation of the shared facilities, Section X of the proposed Final Judgment provides for the appointment of a Monitoring Trustee with the power and authority to investigate and report on the parties' compliance with the terms of the Final Judgment and the Hold Separate Stipulation and Order during the pendency of the divestiture, including the terms of the supply agreement, the transition services agreement, and the physical segregation of the shared facilities. The Monitoring Trustee would not have any responsibility or obligation for the

operation of the parties' businesses. The Monitoring Trustee would serve at defendants' expense, on such terms and conditions as the United States approves, and defendants must assist the trustee in fulfilling its obligations. The Monitoring Trustee would file monthly reports and would serve until the divestiture of the Divestiture Assets is finalized pursuant to either Section IV or Section V of the proposed Final Judgment and the expiration of any transition services agreement between defendants and the Acquirer.

In the event that defendants do not accomplish the divestiture within the prescribed period, Section V of the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects that likely would result if Continental acquired Veyance because the Acquirer will have the ability to develop, manufacture and sell commercial vehicle air springs to customers in North America in competition with Continental.

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. 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:

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 Continental's acquisition of Veyance. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the development, manufacture and sale of commercial vehicle air springs in North America. 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. U.S. Airways Group, Inc.*, No. 13-cv-1236 (CKK), 2014-1 Trade Cas. (CCH) ¶ 78, 748, 2014 U.S. Dist. LEXIS 57801, at *7 (D.D.C. Apr. 25, 2014) (noting the court has broad discretion of the adequacy of the relief at issue); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[1]

[1] 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

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) (quoting *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc*., 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

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

2004 amendments "effected minimal changes" to Tunney Act review).

[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

also U.S. Airways, 2014 U.S. Dist. LEXIS 57801, at *16 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *8 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not

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'reaches of the public interest'").

authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. 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); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less

costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9.

[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

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Respectfully submitted,

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