UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

Plaintiff,

v.

LUCASFILM LTD.

Defendant.

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

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case. After careful consideration of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

The United States filed a civil antitrust complaint against Lucasfilm on December 21, 2010, seeking injunctive and other relief to remedy the likely anticompetitive effects of a three-part agreement between Lucasfilm and Pixar to forbid cold-calling and to restrict certain other employee recruiting practices. The agreement reduced competition for highly-skilled digital

animators and other employees, diminished potential employment opportunities for those employees, and interfered with the proper functioning of the price-setting mechanism that would otherwise have prevailed.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and Stipulation signed by the plaintiff and Lucasfilm, consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. § 16.[1] Pursuant to those requirements, the United States filed its Competitive Impact Statement ("CIS") with the Court also on December 21, 2010; published the proposed Final Judgment and CIS in the *Federal Register* on December 28, 2010, *see United States, et. al. v. Lucasfilm Ltd.*, 75 Fed. Reg. 81651; and caused to be published in *The Washington Post* summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, for seven days beginning on December 25, 2010, and ending on December 31, 2010. The 60-day period for public comments ended on March 1, 2011; three comments were received as described below and attached hereto.

I. THE INVESTIGATION AND PROPOSED FINAL JUDGMENT

The proposed Final Judgment is the culmination of an investigation of agreements between Lucasfilm and Pixar to restrain employee recruiting and cold-calling practices. As part of its investigation, the Justice Department issued Civil Investigative Demands to Pixar and Lucasfilm. The Department reviewed the documents and other materials from them, and interviewed witnesses to the activity. The investigative staff carefully analyzed the information obtained and thoroughly considered all of the issues presented.

Lucasfilm and Pixar are rival employers of digital animators. Beginning no later than

[1] Pixar was not named as a defendant because Pixar is currently bound by a similar Final Judgment entered in *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D.D.C. entered March 17, 2011).

January 2005, Lucasfilm and Pixar agreed to a three-part protocol that restricted recruiting of each other's employees. First, Lucasfilm and Pixar agreed they would not cold call each other's employees.[2] Second, they agreed to notify each other before making an offer to an employee of the other firm. Third, they agreed that, when offering a position to the other company's employee, neither would counteroffer above the initial offer. The protocol covered all digital animators and other employees of both firms and was not limited by geography, job function, product group, or time period.

Lucasfilm's and Pixar's agreed-upon protocol disrupted the competitive market forces for employee talent. It eliminated a significant form of competition to attract digital animation employees and other employees covered by the agreement. Overall, it substantially diminished competition to the detriment of the affected employees who likely were deprived of information and access to better job opportunities.

After reviewing the investigative materials, the Department determined that the agreement between the two firms was a naked restraint of trade that was per se unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1, as alleged in the Complaint.

The proposed Final Judgment is designed to restore competition for digital animators and other employees. Section IV of the proposed Final Judgment prohibits Lucasfilm, and others in concert with it that have notice of the proposed Final Judgment, from agreeing, or attempting to agree, with another person to refrain from cold calling, soliciting, recruiting, or otherwise competing for employees of the other person. Lucasfilm is also prohibited from requesting or pressuring another person to refrain from cold calling, soliciting, recruiting, or otherwise competing for employees of the other person. These provisions prohibit agreements not to make

[2] Cold calling involves communicating directly in any manner (including orally, in writing, telephonically, or electronically) with another firm's employee who has not otherwise applied for a job opening.

counteroffers and agreements to notify each other when making an offer to each other's employee. In Section V, the proposed Final Judgment states that it does not prohibit "no direct solicitation provisions" when they are reasonably necessary for, and thus ancillary to, legitimate procompetitive collaborations. Such ancillary restraints remain subject to scrutiny under the rule of reason, in accord with antitrust precedents. *See* CIS at 6-8. In this manner, the proposed Final Judgment prohibits anticompetitive conduct while preserving procompetitive collaborations.

II. STANDARD OF JUDICIAL REVIEW

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 in accordance with the statute, the court is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)-(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *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, No. 08-1965 (JR), 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 mechanisms to enforce the Final Judgment are clear and manageable").

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.

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

proposed settlement is in the public interest, the 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). Therefore, 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.

In its 2004 amendments to the Tunney Act,[4] Congress made clear its intent to preserve

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public interest'").

[4] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and 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

the practical benefits of utilizing consent decrees in antitrust enforcement, stating "[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.[5]

III. SUMMARY OF PUBLIC COMMENTS AND THE UNITED STATES' RESPONSE

During the 60-day comment period, the United States received three comments, which are attached hereto in the Appendix to this Response. The United States has carefully reviewed the comments and has determined that the proposed Final Judgment remains in the public interest. We address first the one from Mr. Kent Martin and then together, the two from The Association of Executive Search Consultants ("AESC").

(concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[5] *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.").

A. Kent Martin

Mr. Martin is an employee in the digital film industry. He submitted a comment on February 16, 2011 (attached as Exhibit A). He wrote that he believed the proposed Final Judgment would be unenforceable and that the firms would alter their practices and conspire in other ways to achieve the same result. Mr. Martin also asked that financial penalties be imposed, and in particular, that the penalties be distributed to workers in the industry. He felt this was necessary for the settlement to have an effective impact and to compensate employees industry-wide. Finally, he expressed the view that attempts to control wages are not limited to the Lucasfilm-Pixar recruiting agreement but could involve other studios.

After carefully considering Mr. Martin's comments, the United States believes that the proposed changes are inappropriate and entry of the judgment in its current form is in the public interest. First, the proposed Final Judgment is enforceable. As with any court order, the Final Judgment would be enforceable through civil and criminal contempt proceedings. The proposed Final Judgment gives the Antitrust Division the ability to investigate any possible violations of its terms. If the Antitrust Division learns of any violations, it can pursue a contempt action. In addition, Lucasfilm must disclose to the Antitrust Division any actual or potential violations of the Judgment. Lucasfilm officials must certify that they have read the Final Judgment and understand that violations can result in a civil or criminal contempt action.

Second, the proposed Final Judgment is designed to prevent Lucasfilm from entering into other agreements that limit competition for employees. Although the complaint alleges only that Lucasfilm and Pixar entered into agreements to refrain from cold-calling and counter offering, and to notify each other before making job offers, Section IV of the proposed Final Judgment more broadly enjoins agreements regarding solicitation, cold calling, recruitment, or

other methods of competing for employees to provide prophylactic protection against other activities that could interfere with competition for employees.

Third, Mr. Martin's request for financial penalties is not appropriate. The proposed Final Judgment may not be rejected or modified simply because a different remedy might better serve an individual's interests, including individual employees. The United States represents the public interest. Unless the "decree will result in positive injury to third parties," a district court "should not reject an otherwise adequate remedy simply because a third party claims it could be better treated." *Microsoft*, 56 F.3d at 1461 n.9. Here, the proposed Final Judgment clearly remedies the conduct alleged by the United States and does not result in positive injury to Mr. Martin or other employees in the digital animation industry.

Finally, while Mr. Martin is of the view that others may be involved in similar or related conduct, this case was filed against Lucasfilm for conspiring with Pixar as alleged in the Complaint. Accordingly, the Final Judgment can only reach Lucasfilm and that conduct. As stated above, Pixar is already subject to a similar Final Judgment.[6]

B. AESC

AESC is a worldwide professional association of executive search consulting firms. Its members identify and recruit senior executive talent for organizations in many industries. AESC submitted two comments about the proposed Final Judgment dated February 25, 2011 (attached as Exhibit B), and March 15, 2011 (attached as Exhibit C). Both comments focused on Section V.A.3. which allows Lucasfilm to enter no-direct solicitation agreements that are "reasonably necessary for contracts with . . . recruiting agencies."

AESC's first comment asked that the term "reasonably necessary" be defined in the

[6] Pixar and four other defendants are subject to the Final Judgment entered in *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D.D.C. entered March 17, 2011).

judgment, including enumerating factors, such as the duration and geographic scope of the no-direct solicitation restraint that a court would consider in determining whether the restraint was reasonably necessary to the recruiting engagement. AESC is concerned that without a more precise definition, executive search firms will not know whether their no direct solicitation provisions in agreements with clients violate the law or the proposed Final Judgment. The second comment expanded upon the first. AESC noted that executive search firms may gain exposure to proprietary details about a client's business, and it may be reasonably necessary for the client and executive search firm to agree on a narrowly-tailored no direct solicitation covenant. For example, they may enter a limited-duration agreement restricting the executive search firm from soliciting employees who work in the relevant office or division of the client corporation. By contrast, some clients may request multi-year prohibitions that cover the entire company. AESC expressed the concern that overly broad restrictions could have the effect of placing significant numbers of individuals off limits to recruiters and thus narrow the pool of accessible talent from which to draw when conducting executive searches. AESC feared that the proposed Final Judgment could encourage the use of overly broad agreements. Accordingly, AESC asked that the Judgment be modified to state:

> All no direct solicitation provisions that relate to agreements with recruiting agencies described in Section 5.A.3 shall be narrowly tailored such that the scope of the no direct solicitation provision bears a reasonable relationship to the scope of the recruiting engagement, including with respect to geographic reach, duration, and the number of personnel and business units affected.

After carefully considering AESC's comments, the United States has determined that the proposed modification is inappropriate, and entry of the proposed Final Judgment in its current form is in the public interest.

As explained in the CIS, naked agreements among horizontal competitors to restrain cold

calling and recruiting of employees are per se unlawful. But agreements, even among horizontal competitors, that are ancillary to a legitimate procompetitive venture may be lawful. Such agreements are evaluated under the rule of reason, which balances a restraint's procompetitive benefits against its anticompetitive effects.

A determination of whether a restraint is ancillary to a legitimate collaboration depends on whether it is "reasonably necessary" to achieve the procompetitive benefits of the collaboration. The "reasonably necessary" standard is well understood in the antitrust case law. [7] The cases demonstrate that the determination of whether the conduct at issue meets the standard is made based on the facts of each individual case. It is not possible to identify every factor a court may choose to consider in every situation in every industry. Rather, the standard is flexible and allows the court discretion to protect legitimate restraints on competition while prohibiting those that are unlawful. The courts must consider each situation's individual facts and determine whether the agreement is "reasonably necessary" for the collaboration.[8]

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[7] *See generally* Department of Justice, Antitrust Division, and Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* § 1.2 (2000) ("*Collaboration Guidelines*"). *See also Major League Baseball v. Salvino*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring) ("a per se or quick look approach may apply . . . where a particular restraint is not reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture and serves only as a naked restraint against competition."); *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, 1121 (9th Cir. 2004), *rev'd on other grounds sub nom. Texaco v. Dagher*, 547 U.S. 1, 8 (2006)*; Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986)*; In re Polygram Holdings., Inc.*, 2003 WL 21770765 (F.T.C. 2003) (parties must prove that the restraint was "reasonably necessary" to permit them to achieve particular alleged efficiency), *aff'd, Polygram Holdings, Inc. v. F.T.C.*, 416 F.3d 29 (D.C. Cir. 2005).

[8] *See, e.g., Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003) (an agreement on a fixed fee was not reasonably necessary for a shared multi-state listing database because it was not a "necessary consequence" of the MLS' activities; organizations had shared databases in past without fixing fees); *Salvino*, 542 F.3d at 337 (Sotomayor, J., concurring) (Major League Baseball teams created a formal joint venture to exclusively license, and share profits for, team trademarks, resulting in "decreased transaction costs, lower enforcement and monitoring costs, and the ability to one-stop shop. . . ." Such benefits "could not exist without the . . . agreements.")*; Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (Agreement between former law partners to ban advertising in certain areas was an illegal horizontal market allocation and not an ancillary restraint. It was not reasonably necessary to the partnership dissolution agreement, as the agreement was of unlimited duration and the firms had split

In the CIS, the United States identified several facts that caused it to conclude that the Lucasfilm-Pixar agreement was not properly ancillary to any legitimate procompetitive collaboration between them. Indeed, the agreement was not tied to any specific collaboration. In addition, the agreement extended to all employees at the firms and was not limited by geography, job function, product group, or time period. *See* CIS at 7-8.

The factors identified by AESC certainly appear to be relevant to assessing the reasonable necessity of a non-solicitation. They are similar to the factors identified in the United States' CIS. However, to enumerate a list of factors courts must consider in determining reasonable necessity is both impractical and unnecessary. Moreover, the agreements AESC is concerned about–agreements between clients and executive search firms–are vertical in nature. They are not horizontal agreements between competitors, like the Lucasfilm-Pixar agreement. Vertical agreements are judged under the rule of reason where the court weighs the potential anticompetitive effects of the activity and its alleged procompetitive virtues.

For these reasons, the United States believes that the modification proposed by AESC is inappropriate. The public interest is well served by entering the Final Judgment as proposed.

IV. CONCLUSION

After carefully reviewing the public comments, the United States has determined that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comments and this

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before the agreement was written); *Rothery Storage & Van Co.*, 792 F.2d at 227 (court determined that national moving network in which the participants shared physical resources, scheduling, training, and advertising resources, could forbid contractors from free riding by using its equipment, uniforms, and trucks for business they were conducting on their own); *Addamax v. Open Software Found.*, 152 F.3d 48 (1st Cir. 1998) (computer manufacturers formed nonprofit joint research and development venture to develop operating system; agreement on price to be paid for security software that was used by joint venture was ancillary to effort to develop a new system).

response are published in the Federal Register.

Dated: April 15, 2010

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Adam Severt, hereby certify that on April 15, 2011, I caused a copy of the Complaint to be served on Defendant Lucasfilm by mailing the document via email to the duly authorized legal representatives of the defendant, as follows:

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