UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)
	)
and	)
	)
STATE OF TEXAS	)
	)
Plaintiffs,	)
	)
v.	)
	)
MARTIN MARIETTA MATERIALS, INC.	)
	)
and	)
	)
TEXAS INDUSTRIES, INC.	)
	)
Defendants.	)

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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

On January 28, 2014, Martin Marietta Materials, Inc. ("Martin Marietta") and Texas Industries, Inc. ("Texas Industries") announced a definitive merger agreement valued at approximately $2.7 billion. After investigating the competitive impact of that acquisition, the Plaintiffs filed a civil antitrust Complaint on June 26, 2014. The Complaint alleges that the

acquisition likely will substantially lessen competition in the production and sale of aggregate qualified by the Texas Department of Transportation ("Texas DOT") to customers in the Dallas, Texas area, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. As a result of the acquisition, prices for Texas DOT-qualified aggregate likely will increase and customer service likely will be reduced.

At the same time the Complaint was filed, Plaintiffs also filed a Hold Separate Stipulation and Order ("Hold Separate") and a proposed Final Judgment. These filings are designed to eliminate the anticompetitive effects of Martin Marietta's acquisition of Texas Industries. The proposed Final Judgment, which is explained more fully below, requires Defendants, among other things, to divest Martin Marietta's rail yards located in Frisco, Texas and Dallas, Texas, and the quarry located in Mill Creek, Oklahoma. The terms of the Hold Separate ensure that the Divestiture Assets will be operated as a competitively independent, economically viable and ongoing business concern that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

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 Transaction

Defendant Martin Marietta is incorporated in North Carolina with its headquarters in Raleigh, North Carolina. Martin Marietta produces, distributes, and/or markets aggregate for the

construction industry in 29 states. Martin Marietta also produces aggregate in Nova Scotia, Canada, and the Bahamas, for distribution and sale at numerous terminals and yards along the East Coast of the United States. In 2013, Martin Marietta had net sales of $2.1 billion.

Defendant Texas Industries is incorporated in Delaware with its headquarters in Dallas, Texas. Texas Industries produces, distributes, and/or markets aggregate in; Texas, Oklahoma, Louisiana, Arkansas and California. Texas Industries also produces asphalt concrete, ready mix concrete, and cement. In 2013, Texas Industries had net sales of $800 million.

The merger would create the largest aggregate producer in the United States, with annual net sales of nearly $3 billion. The proposed transaction, as initially agreed by Defendants likely will lessen competition substantially. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on June 26, 2014.

B. Industry Background

Aggregate is stone, produced at mines, quarries, and gravel pits, that is used for construction projects and in various industrial processes. The aggregate produced in quarries and mines is predominantly limestone, granite, or trap rock. Different types and sizes of rock are needed to meet different specifications for use in asphalt concrete, ready mix concrete, industrial processes, and other products. Asphalt concrete consists of approximately 95 percent aggregate, and ready mix concrete is made of up of approximately 75 percent aggregate. Aggregate thus is an integral input for road and other construction projects.

The customer on each construction project establishes specifications that the aggregate must meet for each application for which it is used. State Departments of Transportation ("state DOTs"), including the Texas DOT, set specifications for aggregate used to produce asphalt concrete, ready mix concrete, and road base for state DOT projects. State DOTs specify

characteristics such as hardness and durability, size, polish value, and a variety of other characteristics. The specifications are intended to ensure the longevity and safety of the projects that use aggregate.

For Texas DOT projects, the Texas DOT tests the aggregate to ensure that the stone for an application meets proper specifications at the quarry before it is shipped, when the aggregate is sent to the purchaser to produce an end product such as asphalt concrete, and often after the end product has been produced. In addition, the Texas DOT pre-qualifies quarries according to the end uses for the aggregate. Many city, county, and commercial entities in Texas use the Texas DOT aggregate specifications when building roads, bridges, and parking lots to optimize project longevity.

Aggregate is priced by the ton and is a relatively inexpensive product. Prices range from approximately five to twenty dollars per ton. A variety of approaches are used to price aggregate. For small volumes, aggregate often is sold according to a posted price. For larger volumes, customers either negotiate prices for a particular job or seek bids from multiple aggregate suppliers.

In areas where aggregate is locally available, it is transported from quarries to customers by truck. On a per-mile basis, trucking is the most expensive option for transporting aggregate over longer distances. Aggregate is also shipped by rail from quarries to yards. It is then transported by truck from the yards to customers in the area. The rail yards, which typically are supplied by quarries that are 100 to 200 miles away, frequently are large operations that can handle 75- to 100-car unit trains and are served by large quarries located on rail lines that have automated aggregate rail-loading operations. Over longer distances, the cost of transporting aggregate by rail is significantly cheaper, on a per-mile basis, than by truck.

C. Texas DOT-Qualified Aggregate is a Relevant Product Market

Within the broad category of aggregate, different types of stone are used for different purposes. For instance, aggregate used as road base is not the same as aggregate used in asphalt concrete. Accordingly, they are not interchangeable or substitutable for one another and demand for each is separate. Thus, each type of aggregate likely is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

Texas DOT-qualified aggregate is aggregate qualified by Texas DOT for use in road construction. Aggregate that meets the standards for Texas DOT qualification differs from other aggregate in its size, physical composition, functional characteristics, customary uses, consistent availability, and pricing. A customer whose job specifies Texas DOT-qualified aggregate cannot substitute non-Texas DOT-qualified aggregate or other materials.

Although numerous narrower product markets exist, the competitive dynamic for each type of Texas DOT-qualified aggregate is nearly identical. Therefore, they all may be combined for analytical convenience into a single relevant product market for the purpose of evaluating the competitive impact of the acquisition.

A small but significant increase in the price of Texas DOT-qualified aggregate would not cause a sufficient number of customers to substitute to another type of aggregate or another material so as to make such a price increase unprofitable. Accordingly, the production and sale of Texas DOT-qualified aggregate is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

D. Dallas, Texas is a Relevant Geographic Market

Aggregate is a relatively low-cost product that is bulky and heavy. As a result, the cost of transporting aggregate is high compared to the value of the product.

When customers seek price quotes or bids, the distance from the project site or plant location will have a considerable impact on the selection of a supplier, due to the high cost of transporting aggregate relative to the low value of the product. Suppliers know the importance of transportation cost to a potential customer's selection of an aggregate supplier; they know the locations of their competitors; and they often will factor the cost of transportation from other suppliers into the price or bid that they submit.

The primary factor that determines the area a supplier can serve is the location of competing quarries and rail yards. When quoting prices or submitting bids, aggregate suppliers will account for the location of the project site or plant, the cost of transporting aggregate to the project site or plant, and the locations of the competitors that might bid on a job. Therefore, depending on the location of the project site or plant, suppliers are able to adjust their bids to account for the distance other competitors are from a job.

The size of a geographic market also can depend on whether aggregate is being transported in an urban or rural setting and on specific characteristics of the road network. Where there are multiple quarries in a region, urban traffic congestion may greatly reduce the distance aggregate can be economically transported. In such cases, geographic markets can be very small. The closest quarry or rail yard to a customer also may have higher delivery costs than a more distant quarry because of local traffic patterns that increase fuel costs. Consequently, in large cities, local markets can be small and multiple geographic markets may exist.

Martin Marietta owns and operates two rail yards that serve Dallas County and portions of surrounding counties (hereinafter referred to as the "Dallas area"). Customers with plants or jobs in the Dallas area may, depending on the location of their plant or job sites, also

economically procure Texas DOT-qualified aggregate from two rail yards operated by Texas Industries and from one competitor's quarry located in Bridgeport, Texas. Other quarries cannot compete successfully on a regular basis for customers with plants or jobs in the Dallas area because they are too far away and transportation costs are too great.

Customers likely would be unable to switch to suppliers outside the Dallas area to defeat a small but significant price increase. Accordingly, the Dallas area is a relevant geographic market for the production and sale of Texas DOT-qualified aggregate within the meaning of Section 7 of the Clayton Act.

E. The Competitive Effects of Martin Marietta's Acquisition of Texas Industries

Customers in the Dallas area have benefited from vigorous competition between Martin Marietta and Texas Industries on price and customer service in the production and sale of Texas DOT-qualified aggregate.

The competitors that could constrain Martin Marietta and Texas Industries from raising prices on Texas DOT-qualified aggregate in the Dallas area are limited to those who are qualified by the Texas DOT to supply aggregate and can economically rail or truck the aggregate into the Dallas area. Currently only one other supplier of Texas DOT-qualified aggregate consistently can sell aggregate into the Dallas area on a cost-competitive basis with Martin Marietta or Texas Industries.

The proposed acquisition will eliminate the competition between Martin Marietta and Texas Industries and reduce from three to two the number of suppliers of Texas DOT-qualified aggregate in the Dallas area. Further, the proposed acquisition will substantially increase the likelihood that Martin Marietta will unilaterally increase the price of Texas DOT-qualified

aggregate to a significant number of customers in the Dallas area. The response of other suppliers of Texas DOT-qualified aggregate will not be sufficient to constrain a unilateral exercise of market power by Martin Marietta after the acquisition.

For certain customers, a combined Martin Marietta and Texas Industries will have the ability to increase prices for Texas DOT-qualified aggregate. The combined firm could also decrease service for these same customers by limiting availability or delivery options. Texas DOT-qualified aggregate producers know the distance from their own quarries or yards and their competitors' yards or quarries to a customer's job site. Generally, because of transportation costs, the farther a supplier's closest competitor is from a job site, the higher the price and margin that supplier can expect for that project. Post-acquisition, in instances where Martin Marietta and Texas Industries quarries or yards are the closest locations to a customer's project, the combined firm, using the knowledge of its competitors' locations, will be able to charge such customers higher prices or decrease the level of customer service.

Further, Martin Marietta's elimination of Texas Industries as an independent competitor in the production and sale of Texas DOT-qualified aggregate in the Dallas area likely will facilitate anticompetitive coordination among the remaining suppliers. Texas DOT-qualified aggregate that meets a specific standard is relatively standard and homogenous, and producers often estimate competitors' output, capacity, reserves, and costs. Given these market conditions, eliminating one of the few Texas DOT-qualified aggregate suppliers is likely to further increase the ability of the remaining competitors to coordinate successfully.

The transaction will substantially lessen competition in the market for Texas DOT-qualified aggregate in the Dallas area, which is likely to lead to higher prices and reduced customer service for consumers of such products, in violation of Section 7 of the Clayton Act.

The likely anticompetitive effects of the transaction in the Dallas area will not be mitigated by entry, given the substantial time and cost required to open a quarry or rail yard. Quarries are particularly difficult to locate and permit. Locating a quarry may take as long as four years, particularly when seeking suitable sites with rail access. Once a location is chosen, obtaining a permit to open a new quarry in Texas is difficult and time-consuming. Aggregate producers have spent over two years successfully obtaining permits and also have failed to obtain quarry permits on multiple occasions.

Location is also essential for a rail-served quarry, so that the aggregate can be directly loaded on the trains for transportation to the rail yard. If the quarry is not located on a rail line, the aggregate must be transported by truck, which can eliminate the transportation cost advantage of using rail. Additionally, if the haul from the quarry to the rail yard is not a "single line" haul, with only one railroad carrier, the cost of the multi-line haul can diminish some of the cost advantage associated with moving aggregate by rail.

Establishing a rail yard is difficult and may take several years in addition to the time necessary to locate, permit and open a quarry. To achieve the economies necessary to be competitive in the Dallas area, rail yards must be large and able to handle large amounts of aggregate. Obtaining the large parcels of land and permits necessary to locate a rail yard in the Dallas area is difficult, and the cost of obtaining the land and building the rail yard would be considerable. The combined cost of permitting and opening both a new rail-served quarry and a new rail yard in the Dallas area could exceed $50 million.

Because of the cost and difficulty of establishing a quarry and a rail yard, entry will not be timely, likely or sufficient to counteract the anticompetitive effects of Martin Marietta's proposed acquisition of Texas Industries.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the Dallas, Texas area by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires Defendants, within 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 Martin Marietta's rail yards located in Dallas, Texas and Frisco, Texas as well as its North Troy Quarry located in Mill Creek, Oklahoma (the "Divestiture Assets"). The Dallas yard primarily serves downtown Dallas, while the Frisco yard serves northern Dallas County and portions of the surrounding counties. The North Troy quarry serves as a source for aggregate that is distributed through the two rail yards. These assets constitute all of the assets that Martin Marietta currently uses to supply aggregate to the Dallas area, so the acquirer of these assets will be able to compete with Defendants.

While Defendants must make all of the Divestiture Assets available for purchase, Paragraph IV(B) of the proposed Final Judgment allows the acquirer to exclude from the Divestiture Assets any portion that the acquirer elects not to acquire, subject to the written approval of the United States, in its sole discretion, after consultation with the State of Texas. In this case, the rail yards are the source of direct competition between Defendants in the Dallas area; however, the rail yards cannot operate as an aggregate distribution facility without a source of aggregate, which the acquirer of the Divestiture Assets may not currently own. Paragraph IV(B) allows the acquirer of the Divestiture Assets not to purchase the North Troy quarry if it already owns or operates an aggregate source that could ship aggregate to the divested rail yards. The assets must be divested in such a way as to satisfy the United States in its sole discretion,

after consultation with Texas, that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

The terms of the proposed Final Judgment require Defendants to divest the Divestiture Assets within 90 days. If Defendants are unable to accomplish the divestiture within this period the United States, in its sole discretion, may grant Defendants one or more extensions of this time period not to exceed 90 days in total. The 90-day potential extension will permit the proposed acquirer to complete any testing and drilling that it may choose to conduct as part of its due diligence process. In the event that Defendants do not accomplish the divestiture 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 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 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 of the acquisition in the production and sale of Texas DOT-qualified aggregate in the Dallas area.

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:

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 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 Martin Marietta's acquisition of Texas Industries. The Plaintiffs are satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the production and sale Texas DOT-qualified aggregate in the Dallas area. 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
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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, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether

the mechanism to enforce the final judgment are clear and manageable.").[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc*., 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the 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

[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 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

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 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

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'reaches of the public interest'").

that case." *Microsoft*, 56 F.3d at 1459; see also *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply

proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

VIII. DETERMINATIVE DOCUMENTS

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

Dated: June 26, 2014

Respectfully submitted,

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