THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. UNILEVER N.V., UNILEVER PLC, CONOPCO, INC., and ALBERTO-CULVER COMPANY, *Defendants*.	CASE NO.: Case: 1:11-cv-00858 Assigned To : Jackson, Amy Berman Assign. Date : 5/6/2011 Description: Antitrust

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

The United States filed a civil antitrust Complaint on May 6, 2011, seeking to enjoin the proposed acquisition of Alberto-Culver Company ("Alberto Culver") by Unilever N.V., Unilever PLC, and Conopco, Inc. (collectively "Unilever"), alleging that it likely would substantially lessen competition in three product markets—value shampoo, value conditioner, and hairspray sold in retail stores—in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The loss of competition from the acquisition likely would result in higher prices for value shampoo, value conditioner, and hairspray sold in retail stores in the United States.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects that would result from Unilever's acquisition of Alberto Culver. Under the proposed Final Judgment, which is explained more fully below, Unilever is required to divest the Alberto VO5 and Rave brands and related assets to one or more acquirers approved by the United States. Pursuant to the Hold Separate, Unilever and Alberto Culver must take certain steps to ensure that the assets being divested continue to be operated in a competitively and economically viable manner and that competition for the products being divested is maintained during the pendency of the divestiture.

The United States and the 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 Final Judgment and to punish violations thereof.

II. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Acquisition

On September 27, 2010, Unilever N.V., Unilever PLC, and Conopco, Inc. agreed to acquire Alberto Culver for approximately $3.7 billion. Unilever N.V. and Unilever PLC are corporations respectively organized under the laws of the Netherlands and England, with headquarters in Rotterdam and London. They wholly own Conopco, Inc., a New York corporation and U.S. subsidiary of Unilever N.V. and Unilever PLC. Unilever sells consumer products in more than 100 countries under brands such as Hellmann's, Lipton, Surf, Dove, Suave, and Vaseline. Unilever has approximately 163,000 employees and had sales of $62 billion in 2010.

Alberto Culver, a Delaware corporation headquartered in Melrose Park, Illinois, sells consumer products in more than 100 countries under brands such as TRESemmé, Alberto VO5, Noxzema, Nexxus, St. Ives, Static Guard, and Mrs. Dash. Alberto Culver has approximately 2,500 employees and had sales of $1.6 billion for the fiscal year ending September 30, 2010.

Unilever's Suave Naturals brand is the most popular U.S. brand of value shampoo and conditioner, accounting for approximately 50 percent of value shampoo and conditioner sales. Unilever's hairspray brands (primarily Suave, Suave Professionals, Rave, and Dove) account for approximately 24 percent of hairspray sold in retail stores in the United States.

Alberto Culver's Alberto VO5 brand is the second most popular U.S. brand of value shampoo and conditioner, accounting for approximately 39 percent of value shampoo and conditioner sales. Alberto Culver's hairspray brands (primarily TRESemmé, Nexxus, and Alberto VO5) account for approximately 22 percent of hairspray sold in retail stores in the United States.

B. The Relevant Markets

1. Value Shampoo and Value Conditioner Are Relevant Product Markets

Shampoo is a hair care product used to clean hair. Conditioner is a hair care product used to moisturize and enhance the appearance of hair.

Value shampoos and conditioners are the lowest priced shampoos and conditioners sold in retail stores, with current retail prices of approximately $1 per bottle for smaller sizes (*e.g.*, 15-18 oz.) and almost always less than $1.65 per bottle for larger family sizes (*e.g.*, 22.5-30 oz.). The parties' business documents and the hair care industry consistently refer to products in this price range as belonging to a "value," "opening-price-point," or "dollar" category. Industry participants, including manufacturers and retailers, widely recognize that shampoo and conditioner products within the value category compete substantially more closely with each other than they do with higher priced shampoos or conditioners. Total annual U.S. retail sales of value shampoo are approximately $177 million. Total annual U.S. retail sales of value conditioner are approximately $106 million.

Several factors considered together, including product ingredients, attributes, industry recognition, and price, indicate that value shampoo and conditioner are not reasonably interchangeable with more expensive shampoo and conditioner. Value shampoo and conditioner generally contain only inexpensive ingredients, such as basic soap and scent. More expensive shampoos and conditioners contain additional, more expensive ingredients, which are intended to provide specialized benefits not provided by value shampoo and conditioner such as smoothing, strengthening, repairing, adding volume, and benefits for different hair types (*e.g.*, curly, fine, frizzy, or color-treated hair).

Reflecting this difference in input costs and perceived consumer benefits, a significant price gap exists between value shampoo and conditioner and the next-lowest-priced shampoos and conditioners. For 15-18 oz. bottles, the price differential is generally 100 percent or more; value shampoo and conditioner are priced around $1 and the next-lowest-priced shampoos and conditioners are priced between $2.15 and $2.80. For larger bottles, the price differential is also significant. For example, one large retailer's average price for a 30 oz. value brand bottle of shampoo is $1.67 while the next-lowest-priced shampoo of that same size is, on average, $2.98.

Consumers purchase value shampoo and conditioner almost exclusively through retail food, drug, dollar, and mass merchandise stores (collectively, "retail stores"). Sales of value shampoo and conditioner through salons is de minimis. Purchasers of value shampoo and conditioner are unlikely to reduce their purchases of value shampoo and conditioner in response to a small but significant and non-transitory price increase to an extent that would make such a price increase unprofitable. Value shampoo and value conditioner are, therefore, each a relevant product market and a line of commerce within the meaning of Section 7 of the Clayton Act.

2. *Hairspray Sold In Retail Stores Is a Relevant Product Market*

Hairspray is a product used to set or maintain a hair style after the hair has been dried and styled. Mousses, gels, and other styling aids are not reasonably interchangeable with hairspray because consumers typically use those products in wet or damp hair to give hair form, shape, and style, not to set or maintain a hair style after the hair has been dried and styled. Total annual U.S. retail sales of hairspray sold in retail stores are approximately $809 million.

The vast majority of consumers purchase hairspray in retail stores. Some consumers purchase hairspray through hairdressing salons. Several factors considered together indicate that hairspray sold in salons is not reasonably interchangeable with hairspray sold in retail stores, including (i) purchasing hairspray in salons is less convenient for many consumers who purchase hairspray in retail stores, (ii) many more brands are available in retail stores than are available in salons, (iii) the hair care industry views sales of hairspray in retail stores as separate from sales in salons and uses different marketing strategies in those different sales channels, and (iv) the average price of hairspray sold in salons is at least three times more than the average price of hairspray sold in retail stores.

Purchasers of hairspray sold in retail stores are unlikely to reduce their purchases of hairspray sold in retail stores in response to a small but significant and non-transitory price increase to an extent that would make such a price increase unprofitable. Hairspray sold in retail stores is, therefore, a relevant product market and a line of commerce within the meaning of Section 7 of the Clayton Act.

3. *The Geographic Markets Are the United States*

The Complaint alleges that the United States constitutes a relevant geographic market within the meaning of Section 7 of the Clayton Act for each of the three product markets. Defendants sell value shampoo, value conditioner, and hairspray through retail stores throughout the United States. For several reasons, a small but significant non-transitory price increase in each of these relevant product markets would not cause purchasers to switch to products sold outside of the United States to an extent that would make such a price increase unprofitable. First, brands preferred in the United States differ from brands preferred in foreign countries. Second, shipping relevant products from foreign countries to the United States would increase transportation costs to manufacturers and retailers. Finally, products sold outside the United States may not comply with U.S. regulations or have labeling suitable for the United States such that the product could be sold to consumers in the United States.

C. The Acquisition's Likely Anticompetitive Effects

1. *Value Shampoo and Value Conditioner*

The complaint alleges that the proposed acquisition would substantially lessen competition in the sale of value shampoo and conditioner in the United States, resulting in higher prices for consumers in these markets. Currently, Unilever and Alberto Culver compete in these markets on price and through product innovation and various forms of promotions. The combination would eliminate that significant head-to-head competition and reduce the number of significant competitors in the value shampoo and conditioner markets from three to two. In each market, Unilever's current share (by unit volume) is approximately 50 percent, and Alberto Culver's share is approximately 39 percent. One other competitor accounts for almost all of the remaining sales in each market (approximately 10 percent).

The markets for value shampoo and conditioner are already highly concentrated, and the acquisition would increase concentration significantly, resulting in Unilever controlling approximately 90 percent of both markets. Using a standard concentration measure called the Herfindahl-Herschman Index ("HHI"), the proposed acquisition would produce an HHI increase of approximately 3913 and a post-acquisition HHI of approximately 8602 for value shampoo, and an HHI increase of approximately 3902 and a post-acquisition HHI of approximately 8066 for value conditioner.

The acquisition would enable the combined firm to profit by unilaterally raising the prices of its products above the pre-merger price level. The parties' documents and diversion of sales caused by past price changes indicate that a significant fraction of customers purchasing Unilever's and Alberto Culver's value shampoos and conditioners view the other merging firm's value shampoo and conditioner as their next best choice. Consequently, a significant fraction of the sales lost due to price increases on Unilever's products would be diverted to products of Alberto Culver, and vice versa. *See* U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines § 6.1 (2010). The pre-merger margins on the parties' value shampoo and conditioner products are sufficiently high that the amount of recaptured lost sales would make the price increases profitable even though such price increases would not have been profitable prior to the merger. *See id.* Consequently, the proposed acquisition would likely cause the combined firm to raise the prices that it charges for value shampoo and conditioner.

2. *Hairspray*

The complaint alleges that the proposed acquisition would substantially lessen competition in the sale of hairspray sold in retail stores in the United States, resulting in higher prices for consumers in this market. Currently, Unilever and Alberto Culver compete in this market on price and through couponing, product innovation, and various forms of promotions. The combination would eliminate that significant head-to-head competition. Unilever's current share (by unit volume) of this market is approximately 24 percent, and Alberto Culver's is approximately 22 percent. The three next largest competitors have shares of approximately 20 percent, nine percent, and eight percent.

If the proposed acquisition is consummated, the market for hairspray sold in retail stores would become substantially more concentrated, resulting in a highly concentrated market. Using the HHI concentration measure, the proposed acquisition would produce an HHI increase of approximately 1034 and a post-acquisition HHI of approximately 2654 for hairspray sold in retail stores.

The acquisition would enable the combined firm to profit by unilaterally raising hairspray prices above the pre-merger price level. The parties' documents and diversion of sales caused by past price changes indicate that a significant fraction of customers purchasing Unilever's and Alberto Culver's brands of hairspray view the other merging firm's brands of hairspray as their next best choice. Consequently, a significant fraction of the sales lost due to price increases on Unilever's products would be diverted to products of Alberto Culver, and vice versa. *See* U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines § 6.1 (2010).

The significant fraction of customers that view Unilever's and Alberto Culver's hairspray brands as their next-best choice does not approach a majority. "However, unless pre-merger margins between price and incremental cost are low, that significant fraction need not approach a majority . . . A merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner." *Id.* The pre-merger margins on the parties' hairspray products are sufficiently high that the amount of recaptured lost sales would make the price increase profitable even though such price increases would not have been profitable prior to the merger.

3. Entry

The Complaint alleges that responses from competitors and new entry likely will not prevent the proposed acquisition's likely anticompetitive effects. Barriers to entering these markets include: (i) the substantial time and expense required to build a brand reputation to overcome existing consumer preferences; (ii) the substantial sunk costs for promotional and advertising activity needed to secure the distribution and placement of a new entrant's product in retail outlets; and (iii) the difficulty of securing shelf-space in retail outlets.

Because of these entry barriers even sophisticated, well-funded entrants have not been able to enter the value shampoo and conditioner markets. For example, one major U.S. manufacturer repositioned an existing brand into the value shampoo and conditioner markets in 2003, but discontinued it in 2004 because of low sales. Similarly, a major U.S. retailer introduced a private label value shampoo and conditioner in 2009, but also discontinued the product because of low sales.

Entry has been similarly difficult for hairspray sold in retail stores. In the last two years, no hairspray company has increased its unit sales by three percentage points or more.

Therefore, entry by new firms or the threat of entry by new firms would not defeat the substantial lessening of competition in the manufacture and sale of value shampoo, value conditioner, or hairspray in the United States that likely would result from Unilever's acquisition of Alberto Culver.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment requires significant divestitures that will preserve competition in the markets for value shampoo, value conditioner, and hairspray sold in retail stores. Within 90 calendar days after filing of the proposed Final Judgment or five calendar days after entry of a Final Judgment by the Court, whichever is later, the Defendants are required to divest the Alberto VO5 and Rave brands and associated assets to an acquirer or acquirers that has or have the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the business of value shampoo, value conditioner, and/or hairspray products.

The Alberto VO5 brand consists of value shampoo, value conditioner, hairspray, and other hair styling products. The Rave brand consists of hairspray and mousse products. The divestiture of the Alberto VO5 brand and associated assets is limited to the United States because a U.S.-only divestiture of Alberto VO5 is sufficient to address the competitive harm that the acquisition would produce in the United States. Alberto Culver has substantial sales of Alberto VO5 products in other countries. Sales of Rave outside of the United States are de minimis. Accordingly, the proposed Final Judgment requires divestiture of the worldwide rights to Rave because it is the most efficient way to divest the brand.

The divestiture of Alberto VO5, which accounts for 39 percent of the value shampoo and conditioner markets, will preserve the pre-merger competition in the value shampoo and conditioner markets by maintaining Alberto VO5 as a competitor to Suave Naturals. In particular, the United States' analysis of the proposed merger indicated that the merged company was likely to raise prices on Suave Naturals and Alberto VO5 because lost sales on one would be diverted to the other. Divestiture of the Alberto VO5 brand eliminates the merged firm's ability to raise prices on Alberto VO5 and preserves a competitor to Suave Naturals.

The divestitures of Rave and Alberto VO5, which together account for 8 percent of hairspray sold in retail stores, will reduce the merged firm's post-merger market share from approximately 46 percent to approximately 38 percent. These divestitures are sufficient to prevent an increase in the merged firm's incentives and ability to raise hairspray prices because the divestitures will significantly increase the amount of sales that would be diverted to products of non-merging firms.

In particular, the United States' analysis of the proposed merger indicated that the merged company was especially likely to raise prices on Suave, Suave Professionals, and Rave hairspray products because lost sales would be diverted to former Alberto Culver products (e.g., TRESemmé and Alberto VO5 hairspray). Divestiture of the Rave brand eliminates the merged firm's ability to raise prices on Rave hairspray products. Additionally, the United States' analysis indicated that Rave is a close substitute to Suave and Suave Professionals. Because Rave is a close substitute to Suave and Suave Professionals, Rave's divestiture will create a competitor that will significantly decrease the merged firm's incentive to raise prices on Suave and Suave Professionals products.

In addition to divestiture of the Alberto VO5 and Rave brands, the proposed Final Judgment requires divestiture of other related intangible assets and certain related tangible assets. The other intangible assets include the rights to trade dress, trade secrets, and other intellectual property used in the research, development, production, marketing, servicing, distribution, or sale of the Alberto VO5 and Rave brands. The tangible assets include equipment used primarily to manufacture the divested brands, and records, contracts, permits, customer information, inventory, molds, packaging, artwork, and other assets related to the divested brands. The proposed Final Judgment does not require divestiture of any manufacturing plants or real property because many contract manufacturers have the available capacity, plants, and ability to manufacture the Alberto VO5 and Rave products. Requiring the Defendants to divest one or more manufacturing facilities is unnecessary where independent capacity is readily available or can be quickly built.

The proposed Final Judgment provides that, at the purchaser's option, the Defendants must divest any equipment primarily used by the parties to manufacture the Alberto VO5 and Rave products. Potential buyers of the divested assets may not want to purchase this equipment because they will use contract manufacturers to make the divested products or because they already own equipment that is capable of efficiently making the divested products. The equipment is also widely available from others. However, due primarily to lead times of up to nine months for ordering and receiving new equipment, establishing a new manufacturing line can take up to a year. The option to purchase this equipment may, therefore, allow some potential purchasers to be ready to produce the divested products sooner than if this equipment were not available.

Defendants must use their best efforts to divest the assets as expeditiously as possible. The proposed Final Judgment provides that the assets must be divested in such a way as to satisfy the United States, in its sole discretion, that an acquirer can and will use the assets as part of a viable, ongoing business engaged in the sale of value shampoo, value conditioner, and/or hairspray in retail stores in the United States.

If Defendants do not accomplish the ordered divestitures within the prescribed time period, then Section V of the proposed Final Judgment provides that the Court will appoint a trustee, selected by the United States, to complete the divestitures. If a trustee is appointed, the proposed Final Judgment provides that Defendants must cooperate fully with the trustee and pay all of the trustee's costs and expenses. The trustee's compensation will be structured to provide an incentive for the trustee based on the price and terms of the divestitures and the speed with which they are accomplished. After the trustee's appointment becomes effective, the trustee will file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the required divestitures. At the end of six months, if the divestitures have not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the Final Judgment, including extending the trust or the term of the trustee's appointment.

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, Unilever, and Alberto Culver 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 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Joshua H. Soven
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 4100
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 a judicial order enjoining Unilever's acquisition of Alberto-Culver. The United States is satisfied, however, that divestiture of the assets described in the proposed Final Judgment will preserve competition for the sale of value shampoo, value conditioner, and hairspray in the

United States. 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
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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 mechanisms 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, a court considers under the APPA, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' 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; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). 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

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[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts 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*

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 that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20

Microsoft, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

("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 the United States District Court for the District of Columbia 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 using 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). This language effectuates 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]

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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

VIII. DETERMINATIVE DOCUMENTS

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

Dated: May 6, 2011

Respectfully submitted,

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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.").