IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. VERSO PAPER CORP., and NEWPAGE HOLDINGS INC., Defendants.	Case No. 1:14-cv-2216

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 3, 2014, Defendant Verso Paper Corp. ("Verso") agreed to acquire all of the assets of Defendant NewPage Holdings Inc. ("NewPage"). The United States filed a civil antitrust Complaint on December 31, 2014, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially in the markets for coated publication papers and label paper in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. For each product, this loss of competition likely would result in higher prices, lower output, and fewer services for customers in North America.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, the Defendants must divest two NewPage mills that manufacture the relevant products. Under the terms of the Hold Separate Stipulation and Order, the Defendants will take certain steps to ensure that the assets being divested 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.

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 proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. *The Defendants and the Proposed Transaction*

On January 3, 2014, Verso agreed to acquire NewPage for approximately $1.4 billion. In North America, Verso and NewPage are two of the largest producers of coated paper. Verso and NewPage produce a range of coated papers, including coated publication papers and label paper.

Verso, a corporation headquartered in Memphis, Tennessee, owns and operates two mills, both of which are located in North America.[1] The mills collectively produce a range of coated freesheet web paper, coated groundwood paper, and label paper that is sold to customers throughout North America. In 2013, Verso had approximately $1.4 billion in sales.

NewPage, a corporation headquartered in Miamisburg, Ohio, owns and operates eight mills, all of which are located in North America. The mills collectively produce a range of coated freesheet web paper, coated groundwood paper, and label paper sold to customers throughout North America. Its annual sales for 2013 were approximately $3.1 billion.

B. *The Competitive Effects of the Proposed Acquisition*

1. The Relevant Product Markets are Coated Freesheet Web Paper, Coated Groundwood Paper, and Label Paper

The Complaint alleges three types of coated paper are relevant product markets within the meaning of Section 7 of the Clayton Act: coated freesheet web paper, coated groundwood paper, and label paper. Coated freesheet paper and coated groundwood paper are both used for publications and are typically coated on two sides. Coated freesheet paper is made from pulp that has impurities removed before being made into paper, resulting in bright, high-quality paper. Coated freesheet paper is typically used for annual reports, magazine covers, premium magazines, brochures, and direct mail advertising.

[1] In December 2014, Verso closed its mill in Bucksport, Maine, which produced coated groundwood paper. In the press release announcing the closure, Verso's CEO indicated that the mill has been unprofitable for a number of years and that in today's marketplace the Bucksport mill would be unlikely to become profitable in the future. Press Release, Verso Paper Corp., Verso Announces Closure of Bucksport, Maine Paper Mill (Oct. 1, 2014) (available at http://investor.versopaper.com/releasedetail.cfm?ReleaseID=874161). Verso contemplated closing the mill before it decided to merge with NewPage. The United States does not allege that the closing of the Bucksport Mill is a result of the merger.

Coated freesheet web paper is produced for use in web printing applications. Web printers feed paper rolls through the printing equipment rather than individual sheets of paper, as used in sheet-fed printing applications. Web printing typically involves different equipment and different paper than sheet-fed printing. In particular, coated freesheet paper for use in web printing has lower moisture content so that heat applied in the printing process does not cause the paper to blister. For this reason, coated freesheet paper produced for use in sheet-fed printers is functionally not a substitute for coated freesheet web paper.

For customers who choose coated freesheet paper for their printed material, web printing is often the more cost-effective choice for large print jobs than sheet-fed printing, which typically is more cost-effective for small print jobs. In response to a small but significant increase in the price of coated freesheet web paper, customers who use coated freesheet web paper for their print jobs are unlikely to substitute to sheet-fed printing or other alternatives in sufficient quantity to make the price increase unprofitable. As such, coated freesheet web paper is a relevant product.

Coated groundwood paper is also a relevant product. Coated groundwood paper is typically used for the interior pages of magazines and catalogues, the covers of low-cost magazines, and other similar-quality printing applications. In response to a small but significant increase in the price of coated groundwood paper, purchasers are unlikely to switch to coated freesheet paper in sufficient quantities to make the price increase unprofitable because coated freesheet paper is typically more expensive, heavier, or has other characteristics that are undesirable for coated groundwood applications. Purchasers are also unlikely to switch to lower

quality paper in sufficient quantities to make the price increase unprofitable because lower quality paper produces a less appealing printed page than coated groundwood paper.

Label paper is a relevant product. Label paper is typically made from coated freesheet paper. Label paper is coated on only one side; the other side is treated with an adhesive for placement on an object or surface. Label paper is principally used for two types of applications: cut-and-stack labels such as those that appear on canned food, and the face paper for pressure-sensitive labels such as those that appear on wine bottles. Label paper purchasers require a consistently high-quality label because the label is an important aspect of a product's brand recognition and therefore sales success. The cost of the label, moreover, is typically a small fraction of the cost of the product on which the label appears. Because high-quality labels are critical to a product's marketplace image and are a small part of the product's cost, label paper purchasers are unlikely to substitute from label papers to other forms of printed information on containers in response to a small but significant increase in the price of label paper.

2. The Relevant Geographic Market Is No Larger than Customers Located In North America.

For each relevant product, the Complaint alleges that the relevant geographic market is no larger than North America (defined consistent with industry terminology as the United States and Canada). The market is defined around the location of customers because suppliers typically negotiate prices on a delivered basis with individual customers. As a result, suppliers charge different prices to different customers based on the customers' location. A hypothetical monopolist of each of the three relevant products sold to customers located in North America would likely profit from a small but significant price increase. Customers located in North America would likely not avoid the price increase by engaging in arbitrage. Arbitrage would

entail a customer trying to avoid the price increase by purchasing products from another customer outside the relevant market. Arbitrage is unlikely to occur in sufficient quantities to make the price increase unprofitable because the end customer would need to pay significant incremental shipping costs that would make arbitrage an uneconomical strategy. Arbitrage is also unlikely to occur because a customer purchasing through arbitrage loses valuable services that producers often provide, such as inventory management, just-in-time delivery, warranties, and technical support.

3. The Proposed Acquisition Will Likely Result In Anticompetitive Effects.

The Complaint alleges that the proposed acquisition will likely substantially lessen competition in all three relevant markets. In each market, the Complaint alleges that the acquisition will likely increase concentration substantially and eliminate significant head-to-head competition, leading to higher prices and reduced output. In the coated freesheet web and coated groundwood markets, the Complaint further alleges that the acquisition will likely cause the remaining competitors to accommodate one another's price increases and output reductions.

The proposed acquisition is presumptively unlawful because it will increase concentration significantly in the highly concentrated coated freesheet web and label paper markets. Market concentration is a useful indicator of the level of competitive vigor in a market and the likely competitive effects of a proposed acquisition. The more concentrated a market and the more an acquisition would increase market concentration, the more likely that the acquisition would substantially reduce competition. Courts typically measure concentration in relevant markets using the Herfindahl-Hirschman Index (HHI). Markets in which the post-acquisition HHI is between 1,500 and 2,500 are considered to be moderately concentrated and

markets in which the HHI exceeds 2,500 are considered highly concentrated. Acquisitions that increase the HHI by more than 200 points and result in a highly concentrated market are presumed likely to create or enhance market power.

In the markets for coated freesheet web paper and label paper, the proposed acquisition would significantly increase concentration in highly concentrated markets. In the coated freesheet web market, NewPage had a 30% market share and Verso had a 20% market share at the end of 2013. The post-acquisition HHI would increase by approximately 1,200 to approximately 3,500. In the label paper market, NewPage had a 60% market share and Verso had a 10% market share at the end of 2013. The HHI would increase by approximately 1,500, and the post-acquisition HHI would be approximately 5,300. In the coated groundwood market, NewPage and Verso each had a 20% market share at the end of 2013. The proposed acquisition would increase concentration by approximately 800 and result in a moderately concentrated market, with a post-acquisition HHI of approximately 2,200.

Demand for coated publication papers has declined over the last several years, and this decline is projected to continue for the foreseeable future. Continued declines in demand will likely cause inefficient competitors to exit the markets while only cost-effective competitors will survive. In the coated freesheet web market, the Defendants are two of three firms with cost-effective mills. In the coated groundwood and label markets, the Defendants are two of a small number of firms with cost-effective mills.

Products within each of the relevant product markets are differentiated. Customers have varying preferences for product quality, appearance, and performance. Verso, NewPage, and other producers design products and marketing strategies to cater to these varying preferences.

For many customers of the relevant products, Verso and NewPage competed head-to-head for business and represented the two best alternatives. For these customers, the acquisition would reduce competition because they would lose one of their two best options and a less desirable option would become the customer's best alternative. The proposed acquisition eliminates this head-to-head competition.

In addition, the coated freesheet web and coated groundwood markets are conducive to accommodating conduct by competitors because a small number of producers dominate the industry, and producers regularly obtain information from customers about their options and competitors' prices and product availability. Remaining competitors would likely find it more profitable to follow price increases rather than lower prices and risk a competitive response from other firms.

4. Supply Responses and Creditable, Procompetitive Efficiencies Would Not Likely Prevent Anticompetitive Effects.

The Complaint alleges that supply responses from new competitors or expansion by existing competitors are unlikely to be timely or sufficient in scope to prevent the reduction in competition likely to result from the proposed acquisition. Entry or expansion into each of the relevant markets is costly and time-consuming. A competitive entrant would need a cost-effective mill. Building such a mill would cost billions of dollars, take two or more years to build, and require extensive environmental permits to construct. New competitors also would need to secure major customers, which often involves lengthy and expensive qualification processes.

Non-North American producers are unlikely to increase imports into North America to prevent the likely anticompetitive effects. Overseas producers tend to focus on markets that are

closer to them where they can earn higher margins, rather than selling in the more distant North American markets where they pay higher shipping costs. In addition, customers require timely delivery, as coated paper is an essential input into their final products. Procuring coated paper from overseas adds significant lead time, increases the risk of delivery delays, and makes more difficult quick correction of quality problems. Also, fluctuations in foreign exchange rates pose a challenge to overseas producers competitively selling to customers in North America because they add substantial risk to long-term relationships.

Finally, the Complaint alleges that Defendants cannot demonstrate cognizable, merger-specific efficiencies that Verso would pass through to consumers in the form of lower prices, higher quality, or better service to counteract the likely anticompetitive effects.

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 North American market for coated publication papers and label paper by establishing a new, independent, and economically-viable competitor. The proposed Final Judgment requires the Defendants, within ten (10) days after the Court enters the Hold Separate Stipulation and Order in this matter to divest, as a viable ongoing business, NewPage's Rumford, Maine, and Biron, Wisconsin, mills, and all associated mill assets (the "Divestiture Mills"). The Divestiture Mills must be divested in such a way as to satisfy the United States in its sole discretion that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the coated freesheet web, coated

groundwood, and label paper markets. The Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

The Defendants must sell the Divestiture Mills to Catalyst Paper Corporation ("Catalyst"). Catalyst is a forest-products company headquartered in British Columbia, Canada. Catalyst operates three paper mills, all located in British Columbia. Catalyst makes a variety of paper grades across its mill system. At its Port Alberni mill, Catalyst produces coated groundwood paper and small quantities of coated freesheet web paper. Catalyst does not produce label paper. If, for some reason, Defendants are unable to complete the sale to Catalyst, they must sell the Divestiture Mills to an alternative purchaser who must be approved by the United States.

The proposed Final Judgment provides that the United States may appoint a Monitoring Trustee with the power and authority to investigate and report on the Defendants' compliance with the terms of the Final Judgment and the Hold Separate Stipulation and Order. The Monitoring Trustee would not have any responsibility or obligation for the operation of the Defendants' businesses. The Monitoring Trustee would serve at the Defendants' expense, on such terms and conditions as the United States approves, and the Defendants would be required to assist the trustee in fulfilling its obligations. The Monitoring Trustee would serve for two years. The United States may, in its sole discretion, extend the Monitoring Trustee's term for an additional year. The Monitoring Trustee would file monthly reports for the first year and annual reports for each year thereafter, or more frequently as needed.

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 the Defendants will pay all costs and expenses of the trustee. The trustee's commission would 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 would file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee and the United States would 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 preserve the competition that would be lost if the proposed acquisition occurred without the divestiture. The divestiture will largely maintain the existing structure of the relevant markets. The mills to be divested produced approximately 940,000 tons of coated publication papers, label paper, and other papers, which is approximately the same amount of production as Verso currently operates. In addition, the divestiture will provide the purchaser of the divested assets with a market presence comparable to Verso's current market presence in the relevant markets. The purchaser will also obtain production assets that have a track record of competitively producing a range of coated publication papers and label paper.

The proposed Final Judgment provides that the purchaser of the Biron mill will have the option to procure softwood kraft pulp from Verso's Wisconsin Rapids mill through a pulp supply contract. Price will be set using a methodology consistent with the methodology that Defendants

historically have used in setting transfer prices for bleached softwood kraft pulp provided to the Biron mill, with appropriate overhead costs removed. The Biron mill has a semi-integrated pulp supply. The mill produces its own mechanical pulp and receives softwood kraft pulp from NewPage's Wisconsin Rapids mill, which is approximately four miles away, through a pipeline and by truck. The supply contract under the proposed Final Judgment will enable the Biron mill to sell coated groundwood products at competitive prices.

The proposed Final Judgment also provides that the purchaser of the Biron mill will have the option to procure waste and wastewater disposal services from Verso. Price will be set using a methodology consistent with the methodology that Defendants historically have used in setting transfer prices for waste and wastewater disposal services provided to the Biron mill, with appropriate overhead costs removed. The Biron mill currently shares waste and wastewater disposal service with other mills owned by NewPage. The waste and wastewater services contract under the proposed Final Judgment will enable the Biron mill to sell coated groundwood products at competitive prices.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act,

15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Peter J. Mucchetti
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
450 5th 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 preliminary and permanent injunctions against Verso's acquisition of NewPage. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of coated freesheet web paper, coated groundwood paper, and label paper in the relevant market identified by 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
>
> (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).[2] 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.

[2] 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).

2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. U.S. Airways Group, Inc.*, No. 13-cv-1236 (CKK), 2014-1Trade Cas. (CCH) ¶ 78, 748, 2014 U.S. Dist. LEXIS 57801, at *7 (D.D.C. Apr. 25, 2014) (noting the court has broad discretion of the adequacy of the relief at issue); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").

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

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting

> to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *16 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting

[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

United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *8 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461)); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC*

'reaches of the public interest'").

Communications, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[4] A court can make its public interest determination based on the competitive

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

impact statement and response to public comments alone. *U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9.

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: December 31, 2014

Respectfully submitted,

/s/ Karl Knutsen
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of briefs and oral arguments, that is the approach that should be utilized.").