IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:03CV0164
	)	Judge Polster
VILLAGE VOICE MEDIA, LLC, and NT MEDIA, LLC,	)	Filed: 02/03/2003
Defendants.	)	

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b), files this Competitive Impact Statement relating to the Proposed Final Judgment submitted for entry in this civil antitrust proceeding.

On January 27, 2003, the United States filed a civil antitrust Complaint pursuant to Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, against Defendants Village Voice Media, LLC, ("Village Voice Media") and NT Media, LLC, ("New Times"), the nation's two largest chains of alternative newsweeklies. The Complaint alleges that Defendants entered into and engaged in a combination and conspiracy to suppress and eliminate advertising and editorial competition by allocating the markets for advertising in, and readers of, alternative newsweeklies in Cleveland, Ohio and Los Angeles, California. Defendants' market allocation agreement, as the Complaint further alleges, is an unreasonable restraint of interstate trade that is *per se* illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1.

The Complaint seeks an order to terminate Defendants' illegal agreement, to enjoin future conduct in furtherance of any such agreement, and to obtain such other equitable relief necessary to restore competition for the benefit of advertisers and readers in Cleveland and Los Angeles.

The United States filed simultaneously with the Complaint a Proposed Final Judgment and a Hold Separate Stipulation and Order, which constitute the parties' settlement.

This Proposed Final Judgment, as explained more fully below, (i) enjoins Village Voice Media and New Times from taking any actions in furtherance of, or required under, their *per se* illegal market allocation agreement; (ii) requires Defendants to divest all the assets used in connection with the publication of the *New Times Los Angeles* ("*New Times LA*"), New Times's alternative newsweekly in Los Angeles, and the *Cleveland Free Times*, Village Voice Media's alternative newsweekly in Cleveland, for the purpose of establishing a viable competitive alternative newsweekly in both geographic markets; (iii) permits any advertiser that entered into an advertising or promotion contract after October 1, 2002 with Village Voice Media's alternative newsweekly, the *LA Weekly*, or New Times's alternative newsweekly, the *Cleveland Scene*, for a specified time and solely at the advertiser's option, to terminate such contract without penalty or threat of retaliatory action; (iv) requires Village Voice Media and New Times to notify the United States for the next five years of any future acquisitions or sales of alternative newsweeklies; (v) prevents both Defendants from enforcing any non-compete contractual provisions against any current or former employees involved in their Cleveland or Los Angeles alternative newsweeklies; and (vi) prevents each Defendant and its officers, directors, agents, and employees, from entering into, continuing, maintaining, or renewing any market or customer

allocation agreement.

The Hold Separate Stipulation and Order, which were filed with this Court on January 27, 2003, and the Proposed Final Judgment require New Times and Village Voice Media to maintain and preserve the assets to be divested under the Proposed Final Judgment to ensure that the assets remain economically viable until divested.

The United States, New Times, and Village Voice Media have stipulated that the Proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the Proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the Proposed Final Judgment and to punish violations thereof.

I. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. Defendants

1. *Village Voice Media*

Village Voice Media, LLC, is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York. Prior to its agreement with New Times to shut down its *Cleveland Free Times* alternative newsweekly, Village Voice Media owned alternative newsweeklies in New York City, Minneapolis-St. Paul, Cleveland, Seattle, Nashville, Orange County, and Los Angeles. Village Voice Media's revenues in 2001 were approximately $92 million.

Village Voice Media's *Cleveland Free Times*, launched in 1992, grew to become Ohio's largest alternative newsweekly, with an average weekly circulation that tripled in recent years to over 80,000. With a decade of covering news, arts, and music in Northeast Ohio, the *Cleveland*

Free Times was popular with local retailers, concert promoters, clubs, and national advertisers, who sought to reach the weekly's demographic of active, young adults. Until its sudden closing on October 2, 2002, it directly competed against New Times's alternative newsweekly, the *Cleveland Scene*.

Village Voice Media's *LA Weekly* was launched in 1978 with the mission, according to Village Voice Media, to cover political, cultural, and social issues often overlooked by the mainstream daily newspaper, and provide readers with each week's most comprehensive events listing. With a weekly circulation of approximately 215,000 and an average 200 pages per issue, Village Voice Media's *LA Weekly* has the highest page count of any alternative newsweekly in the United States. Until October 3, 2002, its direct competitor was New Times's alternative newsweekly, the *New Times LA.*

2. *New Times*

NT Media, LLC, is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business in Phoenix, Arizona. Prior to its agreement with Village Voice Media to shut down its *New Times LA* alternative newsweekly, New Times published twelve award-winning alternative newsweeklies (nine of which New Times had acquired since 1991) in Phoenix, Cleveland, Los Angeles, San Francisco, Oakland-Berkeley, Broward-Palm Beach, Miami, Denver, St. Louis, Kansas City, Dallas, and Houston. New Times's revenues in 2001 were approximately $104 million.

New Times in the summer of 1996 purchased two established alternative newsweeklies, the *LA Reader* and *LA View*, for approximately $4 million, and consolidated and renamed them the *New Times LA*. To better compete against the *LA Weekly*, New Times grew its newsweekly's

circulation to approximately 120,000 copies, aggressively discounted its advertising rates, and offered award-winning journalism.

In August 1998, New Times acquired the *Cleveland Scene*, a local music publication established in 1970. New Times repositioned and reformatted the *Cleveland Scene* to compete directly and aggressively against Cleveland's other alternative newsweekly, Village Voice Media's *Cleveland Free Times*.

B. <u>The Alternative Newsweekly Industry</u>

As the name suggests, alternative newsweeklies provide an alternative perspective to the established news-gathering organizations. In 1955, Village Voice Media's predecessors launched the first alternative newsweekly, *The Village Voice*, in New York City. Since then, the popularity of alternative newsweeklies has increased dramatically, fueled by the typically "anti-establishment" perspective of these publications which emerged during the 1960's and 1970's. Today over 125 alternative newsweeklies are published throughout the United States. Their popularity with readers continues to be driven largely by a unique editorial mix of politics, investigative reporting, and entertainment issues, often presented with a somewhat controversial or highly opinionated slant, and all of which is focused on decidedly local issues.

The local nature of these alternative newsweeklies, with their in-depth coverage of local happenings in the arts, music, politics, and entertainment fields, makes them particularly attractive to advertisers hoping to reach a young, educated, and urban audience in a cost-effective manner. Between 1990 and 2000, the collective weekly circulation of alternative newsweeklies has more than doubled to 7.8 million. Likewise, advertising expenditures in alternative newsweeklies have jumped, exceeding $500 million in the United States in 2000.

Two major chains dominate the alternative newsweekly industry: Defendants New Times and Village Voice Media. New Times, the leading chain, distributes each week over 1.1 million copies of its various alternative newsweeklies. Village Voice Media operates on a similar scale, with a weekly circulation of over 800,000 for its alternative newsweeklies.

C. The Competition Between Village Voice Media and New Times

Prior to the Defendants' *per se* illegal market allocation agreement, the only two geographic markets in which Defendants competed head-to-head for readers and advertisers were Cleveland, Ohio and Los Angeles, California. This competition between the Defendants' alternative newsweeklies provided both readers and advertisers with better editorial coverage, heavily discounted advertising rates, and higher quality service.

In Cleveland, New Times's alternative newsweekly, the *Cleveland Scene*, fought against the evenly matched Village Voice Media's newsweekly, the *Cleveland Free Times.* From 1998 (when New Times purchased the *Cleveland Scene*) until October 2, 2002, the competition between the *Cleveland Scene* and the *Cleveland Free Times* was fierce. It resulted in steep discounts off the Defendants' published advertising rate cards, better customer service, increased promotions, and a host of value-added services offered at little cost to the advertiser, such as "buy one ad get one free" deals, larger ads for the same price, or free upgrades of ads from black and white to color.

After New Times reformatted the *Cleveland Scene* to compete directly and aggressively against the *Cleveland Free Times*, the editorial competition between the Defendants' alternative newsweeklies was similarly intense. The *Cleveland Scene* and the *Cleveland Free Times* responded to the other's editorial changes and improvements by introducing new or better

features or increasing investigative journalism to recapture the readers' attention to its publication, both of which were distributed each Wednesday throughout Cleveland.

Likewise, from 1996 until October 3, 2002, advertisers benefitted from the competition between *New Times LA* and Village Voice Media's *LA Weekly* with lower advertising rates, better advertisement placement, and improved service. Even if they did not advertise in the *New Times LA*, advertisers could leverage that alternative newsweekly in their negotiations with the older, entrenched *LA Weekly*. Moreover, the *New Times LA* discounted significantly off of its published rate cards -- which benefitted smaller advertisers that could not afford the *LA Weekly*'s higher advertising rates.

Both the *LA Weekly* and *New Times LA,* which were distributed each Thursday throughout Los Angeles, aggressively competed for readers. The different, and at times opposing, views and positions of the Defendants' competing alternative newsweeklies provided readers with alternative viewpoints of important local events affecting social, political, esthetic, and moral issues. Since 1997, the *New Times LA* garnered numerous journalism awards -- including over thirty awards from the Greater Los Angeles Press Club -- for its investigative and news reporting.

D. The Illegal Market Allocation Agreement

In July 2002, New Times proposed to Village Voice Media to end their competitive war by agreeing to "swap" markets: New Times would close its *New Times LA* publication, making Village Voice Media's *LA Weekly*, in the words of Defendants' executives, the "only alternative weekly in LA." Likewise, Village Voice Media would close its *Cleveland Free Times*, leaving New Times's *Cleveland Scene* "the only alternative weekly in Cleveland." By August 12, 2002,

Defendants agreed in principle to swap markets. Over the next two months, New Times's and Village Voice Media's senior executives and attorneys negotiated the terms of their contracts to effectuate their proposed market swap. As part of this agreement, Village Voice Media would compensate New Times for withdrawing from the larger Los Angeles market by paying New Times $9 million in cash. The proposed deal ended all competition between Defendants, and created an opportunity for the remaining alternative newsweekly in each market to raise advertising rates.

On October 1, 2002, Village Voice Media's and New Times's senior executives signed two written contracts, each expressly contingent on the other, which sealed their *per se* illegal market allocation arrangement. Village Voice Media paid New Times a net amount of $9 million in cash at closing ($11 million to New Times less $2 million paid to Village Voice Media). The Defendants' written contracts did not involve the transfer or integration of any meaningful economic assets associated with those shuttered papers. New Times shifted the *New Times LA*'s accounts receivable, customer lists, and advertising contracts to Village Voice Media, who, in exchange, shifted the *Cleveland Free Times*'s accounts receivable, customer lists, advertising contracts, and street boxes to New Times. These advertisers were already well known to Defendants because each Defendant had attempted in the past to sign up the other's advertisers. Moreover, the net assets (primarily the accounts receivable) actually transferred in Los Angeles accounted, according to the Defendants' calculations, for only seven percent of their $11 million sale price in Los Angeles, and 24 percent of their $2 million sale price in Cleveland.

The Defendants' written contracts specifically excluded from the sale most of the assets

associated with the actual operations and goodwill of the two shuttered newsweeklies, notably: (i) the advertising personnel, writers, editors, and other employees, (ii) leases, offices, and computer equipment, (iii) back issues and archived materials of the closed publications, including editorial articles, photos, and art work, and (iv) the logos, trade names, trademarks, and copyrights associated with the closed publications. New Times specifically retained the rights to its *New Times LA* logo or "flag," and Village Voice Media specifically retained the rights to its *Cleveland Free Times* logo or "flag," but both Defendants were contractually prevented from using, or letting anyone else use, these logos.

As Defendants acknowledged in their internal documents, the goal of their agreement was to end their competitive war and to give one another a monopoly in each market. Consequently, the Defendants' written contracts were designed to ensure that neither Defendant would face competition in its "protected" market. To further that end, the Defendants' contracts contained:

- essentially identical "Non-Competition" clauses in which each Defendant agreed not to publish an alternative newsweekly in the other Defendant's market for at least ten years;
- commitments by each Defendant not to solicit or attempt to induce any advertiser to advertise in a competing publication over the next decade;
- requirements that each Defendant redirect any traffic on its closed weekly's website to the other Defendant's website for a period of one year, and to prominently state on its website that its alternative newsweekly was no longer in circulation;
- provisions to deter any new competitive entry into each Defendant's protected market. For example, over the next decade, Village Voice Media agreed not to use, and to prevent anyone else from using, the name "*Cleveland Free Times*" in connection with any current or future publication in the greater Cleveland area. Similarly, over the next decade, New Times agreed not to use, and to prevent anyone else from using, the name "*New Times LA*" or any variant containing

"*New Times*" in connection with any current or future publication in the greater Los Angeles area; and

- prohibitions on selling or otherwise making available any of the fixed assets associated with each Defendant's closed publication to any of its former employees, consultants, or independent contractors in the affected markets.

After Defendants executed their written contracts on October 1, 2002, Defendant Village Voice Media closed down its *Cleveland Free Times* alternative newsweekly the next day, leaving New Times's *Cleveland Scene* the only alternative newsweekly in Cleveland, Ohio. Likewise, on October 2, 2002, New Times informed its *New Times LA* staff that it was shutting down immediately, leaving Village Voice Media's *LA Weekly* the only alternative newsweekly distributed throughout the greater Los Angeles area.

E. Competitors' Allocation of Geographic Markets Is an Unreasonable Restraint of Trade That Is *Per Se* Illegal

The Supreme Court has long held that territorial allocation schemes among direct competitors are naked restraints of trade with no purpose except stifling competition. *United States v. Topco Assoc*., 405 U.S. 596, 608 (1972) (citations omitted); *see also Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), *modifying and aff'g* 85 F. 271 (6th Cir. 1898) (Taft, J.); *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139-40 (1969) (applying *per se* standard where defendants' "market control" agreement comported neither with antitrust laws nor with First Amendment). As recently as 1990, the Supreme Court repeated that such market allocation agreements are classic examples of a *per se* violation of the Sherman Act. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990).

Accordingly, these market allocation agreements -- whereby competitors agree to divide or allocate among themselves certain geographic areas -- are condemned as *per se* violations of

Section One of the Sherman Act. Given their pernicious effect on competition and lack of any redeeming virtue, these market allocation agreements are conclusively presumed to be unreasonable, without the need for an elaborate inquiry into the precise harm that they caused or the potential business justification for their use. *Topco*, 405 U.S. at 607 (quoting *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)). Consequently, competitors cannot agree to split or "swap" markets.

This is not a case in which the territorial restraints were ancillary to a lawful business transaction. Such ancillary restraints are not illegal when reasonably necessary to protect the purchaser of the full enjoyment of the legitimate fruits of the contract. *Addyston Pipe & Steel*, 85 F. at 283. The Antitrust Division examines the substance, rather than the form, of the parties' agreement in evaluating its potential effect. When the restraints of trade are reasonably ancillary to the agreement's central pro-competitive purposes, then the Division will analyze the restraints under the rule-of-reason standard. Where the central purpose of the parties' agreement, however, is to unreasonably restrain competition by allocating territories and terminating competition among themselves and by preventing any significant entrant from competing, then the entire agreement will be treated as *per se* illegal. As Judge (later Mr. Chief Justice) Taft noted over 100 years ago, "[t]here is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster." *Id*.

That is the case, here, where the central purpose and effect of the Defendants' agreement were to unreasonably restrain competition, by allocating the only two markets in which they

compete, so that after swapping these markets, Defendants would face no significant direct competitor. Five factors support this conclusion.

First, this was not a case where the underlying agreement created a distinctive product, and thereby increased competition in the alternative newsweekly industry generally, or in Cleveland or Los Angeles, specifically.[1] The Defendants' restraints on competition were not essential for, or even beneficial to, the products, which in this case are alternative newsweeklies, to be made available in the first place. After all, before their market allocation agreement, Defendants vigorously competed through their own alternative newsweeklies. As a direct result of the Defendants' agreement to withdraw from each other's market, advertisers and readers were left with fewer meaningful options and the prospect of higher advertising rates. Consequently, the Defendants' agreement on its face did not promote enterprise and productivity at the time it was adopted.

Second, the clear intent and explicit design of the Defendants' contractual provisions were to eliminate competition in these markets and prevent others from meaningfully entering. Village Voice Media agreed to shut down its Cleveland alternative newsweekly, solely on the condition that New Times shuts down its newsweekly in Los Angeles. The contracts' essentially identical "Non-Competition" clauses prevented each Defendant from publishing an alternative newsweekly in the other Defendant's market for at least ten years. Each Defendant also agreed not to solicit or attempt to induce any advertiser to advertise in a competing publication over the next decade. Defendants restrained each other from meaningfully using the closed papers' logos

[1] *See, e.g., Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (challenged agreement created distinctive product of access to vast musical repertoire).

and prevented anyone else from using these valuable assets in connection with any current or future publication in the Los Angeles or Cleveland areas. Furthermore, each Defendant agreed not to sell or otherwise make available the fixed assets associated with its closed publication to any of its former employees, consultants or independent contractors, who might seek to rejuvenate the closed alternative newsweekly, and restore competition in the marketplace.

Third, the anticompetitive restraints at issue cannot be said to be ancillary to the sale of assets, given that so few assets were actually transferred. None of the assets associated with the actual operations and goodwill of the Defendants' two shuttered newsweeklies were sold or integrated into the other Defendant's newsweekly. The assets Defendants actually transferred (which were mainly the accounts receivable of the shuttered paper) were of little value, even by Defendants' own calculations.

Fourth, the anticompetitive purpose of the Defendants' agreements is evident from the Defendants' documents, which confirm that they entered into this agreement to end their competitive war, and grant each another a monopoly in the respective markets. The Defendants' documents are replete with evidence that shows -- and the testimony of the Defendants' former employees and current advertisers confirms -- that the Defendants' market allocation agreement will end all meaningful competition, and enable each remaining alternative newsweekly, as the "only game in town," to raise advertising rates by a significant, non-cost based, amount.

Fifth, the fact that Defendants planned to, and in some cases did, implement such rate hikes after allocating markets on October 2, 2002 confirms that the Defendants' agreement was formed for the purpose, and with the effect, of raising advertising rates.

II. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The Proposed Final Judgment requires divestitures that will restore the editorial and advertising competition in alternative newsweeklies published and distributed in Cleveland, Ohio and Los Angeles, California. Within thirty calendar days after January 27, 2003, the date the Complaint was filed, Defendants must divest the assets used in the publication of New Times's alternative newsweekly, the *New Times LA*, and Village Voice Media's alternative newsweekly, the *Cleveland Free Times*, to an acquirer or acquirers that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the alternative newsweekly business.[2] This relief has been tailored to ensure that the ordered divestitures restore the competition that has been eliminated as a result of the Defendants' market allocation agreement and further prevent either Defendant from exercising market power in the Cleveland or Los Angeles markets.

Given that Defendants had closed the *Cleveland Free Times* and *New Times LA* in October 2002, a quick and effective remedy was necessary to reestablish competition. Consequently, Defendants must use their best efforts to divest these assets within 30 days. The Proposed Final Judgment provides that the assets must be divested in such a way as to satisfy the

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[2] The assets to be divested are defined and described in Section II of the Proposed Final Judgment as the "*New Times LA* Assets" and "*Cleveland Free Times* Assets." Defendants in essence must divest all assets that were formerly employed in the publication of the *New Times LA* and *Cleveland Free Times* alternative newsweeklies, including, but not limited to, all rights to the *New Times LA*, *LA Reader, LA View* and *Cleveland Free Times* names (including any derivations thereof); all rights to the *New Times LA* and *Cleveland Free Times* website; all rights to the print and electronic archives of *New Times LA* and *Cleveland Free Times* publications and articles on a non-exclusive basis; and all other tangible and intangible assets used in the publication of the *New Times LA* and *Cleveland Free Times.*

United States, in its sole discretion, that the acquirer can and will use the assets as part of a viable, ongoing business engaged in the publication of an alternative newsweekly in Cleveland, Ohio and Los Angeles, California. Until the ordered divestitures take place, Defendants must cooperate with any prospective purchasers.

If Defendants do not accomplish the ordered divestitures within the prescribed 30-day time period, then Section VII of the Proposed Final Judgment provides that this 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 divestiture and the speed with which it is accomplished. After the trustee's appointment becomes effective, the trustee will file monthly reports with the United States, the State Attorneys General of Ohio and California, and this Court setting forth the trustee's efforts to accomplish the required divestiture. If at the end of three months after that appointment, the divestiture has not been accomplished, then the trustee, the United States, and the State Attorneys General of Ohio and California will make recommendations to this Court, which shall enter such orders as appropriate to carry out the purpose of the Final Judgment.

In addition to ordering the divestiture of the assets used in the publication of the *Cleveland Free Times* and *New Times LA*, the Proposed Final Judgment places several additional requirements on Defendants.

First, Village Voice Media and New Times are enjoined under the Proposed Final Judgment from taking any actions in furtherance of, or required under, both their written and oral

market allocation agreements.

Second, for a period of two years commencing from January 27, 2003, Village Voice Media and New Times must allow advertisers that entered into certain written or oral contracts to advertise in, or engage in a promotion with, the *LA Weekly* or *Cleveland Scene*, solely at the advertiser's option, the right to terminate such contract without penalty, retaliatory action, or threat of retaliatory action. The advertising or promotion contracts that may be terminated are those entered into beginning October 1, 2002, and for the Cleveland advertisers, ending 30 days after the assets of the *Cleveland Free Times* are sold, and for the Los Angeles advertisers, 30 days after the assets of the *New Times LA* are sold.

Third, for a period of five years commencing from January 27, 2003, each Defendant cannot directly or indirectly enter into any merger, sale, or joint venture involving any of its alternative newsweeklies or national advertising networks or acquire any assets of any alternative newsweekly without first notifying the United States 30 days in advance. If within this 30-day period, the United States requests additional information, Defendants cannot consummate the proposed transaction or agreement until 20 days after submitting all such additional information.

Fourth, for any employee who was involved in the publication of the *Cleveland Free Times* or the *New Times LA* as of October 1, 2002, any non-compete provision imposed by Defendants on such employee shall be null and void. Moreover, from the date the Complaint was filed, January 27, 2003, to one year from the divestiture of the *Cleveland Free Times* assets, neither Village Voice Media nor New Times can enforce any other non-compete contractual provisions against any of their former or current employees in the greater Cleveland area.

Likewise, from January 27, 2003 to one year from the divestiture of the *New Times LA* assets, Defendants cannot enforce any other non-compete contractual provisions against any of their former or current employees in the greater Los Angeles area.

Fifth, the Final Judgment enjoins each Defendant, and its officers, directors, agents, and employees from entering into, continuing, maintaining, or renewing this, or any other, market or customer allocation agreement, or from engaging in any other conspiracy, agreement, or understanding having a similar purpose or effect, and from adopting or following any practice having a similar purpose or effect.

III. 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 district court to recover three times the damages the person has suffered, as well as the costs of bringing a lawsuit 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 effect as *prima facie* evidence in any subsequent private lawsuit that may be brought against Defendants.

IV. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least 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 60 days of the date of publication of this Competitive Impact Statement in the *Federal Register*. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the Proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with this Court and published in the *Federal Register*. Written comments should be submitted to:

James R. Wade
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
325 Seventh Street, N.W., Suite 300
Washington, D.C. 20530

The Proposed Final Judgment provides that this Court retains jurisdiction over this action, and the parties may apply to this Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

V. 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. Given the inherent delays of a full trial and the appeals process, the United States is satisfied that the prompt divestiture of the *Cleveland Free Times* assets and *New Times LA* assets, coupled with the other relief contained in the Proposed Final Judgment, will quickly establish, preserve and ensure a viable competitor in the publication of alternative newsweeklies in Cleveland, Ohio and Los Angeles, California. Thus, the United States is convinced that the Proposed Final Judgment, once implemented by the Court, will

prevent Defendants from illegally benefitting from their market allocation agreement.

VI. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the Proposed Final Judgment is "in the public interest." In making that determination, the court "*may* consider"--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment 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) (emphasis added). As the Court of Appeals for the District of Columbia has held, the APPA permits a court to consider, 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 United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the 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."[3] Rather,

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[3] 119 CONG. REC. 24,598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the

> 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.[4]

Accordingly, 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.), *cert. denied*, 454 U.S. 1083 (1981)); *see also Microsoft,* 56 F.3d at 1458. "Indeed, the district court is without authority to 'reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made.'" *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 154 (D.D.C. 2002) (quoting *Microsoft*, 56 F.3d at 1459). Precedent requires that:

> the 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.[5]

Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538-39.

[4] *United States v. Mid-America Dairymen, Inc.,* 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977); *see also United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

[5] *United States v. Bechtel Corp.,* 648 F.2d at 666 (emphasis added); *see also United States v. BNS, Inc.,* 858 F.2d at 462-63 (district court may not base its public interest determination on

The Proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. 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."[6]

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. Since 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 might have but did not pursue. *Microsoft*, 56 F.3d at 1459-60.

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antitrust concerns in markets other than those alleged in government's complaint); *United States v. Gillette Co.,* 406 F. Supp. at 716 (court will not look at settlement "hypercritically, nor with a microscope"); *United States v. National Broad. Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978) (same).

[6] *Microsoft*, 231 F. Supp. 2d at 153 (quoting *United States v. American Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citation omitted), *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) (standard is not whether decree is one that will best serve society, but whether it is within the reaches of the public interest); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978) (standard is not whether decree is the best of all possible settlements, but whether decree falls within the reaches of the public interest).

VII. DETERMINATIVE DOCUMENTS

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

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Respectfully submitted,

/s/
MAURICE E. STUCKE

/s/
CAROL A. BELL

/s/
MATTHEW J. BESTER

Attorneys for the United States
U.S. Department of Justice
Antitrust Division, Litigation III Section
325 7th Street, N.W., Suite 300
Washington, D.C. 20530
(202) 305-1489 (telephone)
(202) 514-1517 (facsimile)
Maurice.Stucke@usdoj.gov

/s/
JON SMIBERT

Attorney for the United States
U.S. Department of Justice, Antitrust Division
Cleveland Field Office
55 Erieview Plaza, Suite 700
Cleveland, OH 44114-1816

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Competitive Impact Statement via First Class United States Mail, this 3rd day of February, 2003, on:

Melanie Sabo
Preston Gates Ellis & Rouvelas Meeds LLP
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006-5209
Counsel for Defendant Village Voice Media, LLC

Joseph Kattan, P.C.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Defendant NT Media, LLC

__________/s/_____________________
Matthew Bester
Attorney for the United States
U.S. Department of Justice
Antitrust Division
325 Seventh Street, N.W., Suite 300
Washington, D.C. 20530
(202) 353-3491