UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CLEAR CHANNEL OUTDOOR HOLDINGS, INC., and FAIRWAY MEDIA GROUP, LLC,

Defendants.

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), Plaintiff United States of America ("United States") 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 March 3, 2016, Defendants Clear Channel Outdoor Holdings, Inc. ("Clear Channel") and Fairway Media Group, LLC ("Fairway") entered into an asset exchange pursuant to which Clear Channel would acquire certain Fairway billboards located in Atlanta, Georgia, and Fairway would acquire certain Clear Channel billboards located in Indianapolis, Indiana (collectively Atlanta and Indianapolis are the "Metropolitan Markets"), along with billboards in other metropolitan areas.

The United States filed a civil antitrust Complaint on December 22, 2016, seeking to enjoin the proposed transaction. The Complaint alleges that the proposed transaction likely

would eliminate the substantial head-to-head competition between Clear Channel and Fairway within each of the Metropolitan Markets. Head-to-head competition between Clear Channel and Fairway billboards that are located in close proximity to each other in each of the Metropolitan Markets has benefitted advertisers through lower prices and better services. These likely competitive effects would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States also filed an Asset Preservation Stipulation and Order ("Asset Preservation Order") and proposed Final Judgment, which are designed to eliminate the likely anticompetitive effects of the transaction. The proposed Final Judgment, which is explained more fully below, requires Defendants to divest their interests in 57 identified outdoor billboard assets in the Metropolitan Markets to acquirers approved by the United States in a manner that preserves competition in each of those markets.

The Asset Preservation Order requires Defendants to take certain steps to ensure that each of the divested assets continues to be operated as a competitive, economically viable, and ongoing outdoor advertising asset, uninfluenced by the consummation of the transaction so that competition is maintained until the required divestitures occur.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Transaction

Clear Channel is a Delaware corporation with its headquarters in San Antonio, Texas.

Clear Channel is one of the largest outdoor advertising companies in the United States.

Fairway is a Delaware limited liability company with its headquarters in Duncan, South Carolina. Fairway owns and operates outdoor advertising displays in fifteen states.

Pursuant to an Asset Purchase and Exchange Agreement dated March 3, 2016, Clear Channel and Fairway agreed to exchange billboards in a transaction valued at $150 million. Specifically, the parties agreed that Clear Channel would acquire certain Fairway billboards located in Atlanta and Fairway would acquire certain Clear Channel billboards located in Indianapolis and Sherman/Denison, Texas. Although the Asset Purchase and Exchange Agreement originally provided that Fairway would acquire certain Clear Channel billboards in Rochester, Minnesota, and that Clear Channel would acquire additional Fairway billboards in Atlanta, the parties subsequently amended their agreement to remove the Rochester assets and additional Atlanta assets from the transaction.

The proposed transaction, as agreed to by Defendants, likely would lessen competition substantially within each of the Metropolitan Markets. This transaction is the subject of the Complaint and proposed Final Judgment filed today by the United States.

B. The Transaction's Likely Anticompetitive Effects

1. The Relevant Markets

The Complaint alleges that the sale of outdoor advertising on billboards to advertisers that seek to target consumers located in geographic areas no larger than each of the Metropolitan Markets, and likely smaller areas within each of those market where the parties own and operate billboards in close proximity to each other, constitute relevant markets under Section 7 of the Clayton Act.

Clear Channel and Fairway sell outdoor advertising to local and national businesses that

seek to promote their products and services to consumers in each of the Metropolitan Markets and in certain smaller areas within each of the Metropolitan Markets.

Outdoor advertising possesses a unique combination of attributes that sets it apart from advertising using other types of media, like radio, television, the Internet, newspapers and magazines. Outdoor advertising is suitable for highly visual, limited-information advertising, because consumers are exposed to an outdoor advertisement for only a brief period of time as they travel through specific geographic areas. Outdoor advertisements typically are less expensive and more cost-efficient when compared to other media at reaching an advertiser's target audience. Many advertisers use outdoor advertisements when they want a large number of exposures to consumers at a low cost per exposure. Such advertisers do not view other advertising mediums or platforms as close substitutes.

Outdoor advertising is available in a variety of sizes and forms for advertising campaigns of differing styles and duration. Outdoor advertising sales include selling space on billboards and posters, public transportation, such as subways and buses, and other public spaces, such as bus stops, kiosks, and benches. Advertisers often choose a particular form of outdoor advertising over other outdoor advertising forms based upon the purpose of an advertising campaign, the target demographic group, and the geographic area where that campaign is to occur. For this reason, some outdoor advertising forms compete more closely with each other when compared to other outdoor advertising forms. And certain outdoor advertising forms compete more closely with each other depending upon their specific geographic locations.

With respect to outdoor advertising forms, billboards compete most closely with other billboards located in the same geographic area. Advertisers select billboards over other outdoor advertising forms based upon a number of factors. These include the size and demographic of

the target audience (individuals most likely to purchase the advertiser's products or services), the traffic and commuting patterns of the audience, and other audience characteristics. Additionally, in certain geographic areas, other forms of outdoor advertising are not present.

The precise geographic location of a particular billboard is also important to advertisers. Many advertisers need to reach consumers in a particular city, part of a city, metropolitan area, or part of a metropolitan area. They also seek to reach certain demographic categories of consumers within a city or metropolitan area. Consequently, many advertisers select billboards that are located on highways, roads and streets where the vehicle and pedestrian traffic of that target audience is high, or where that traffic is close to the advertiser's commercial locations. By selecting billboards in these locations, advertisers can ensure that their target audience will frequently view billboards that contain their advertisements. If different firms own billboards that are located in close proximity to each other that would efficiently reach an advertiser's target audience, the advertiser would benefit from the competition among those billboard firms to offer better prices and services.

At a minimum, billboard companies could profitably impose a small but significant and non-transitory increase in price ("SSNIP") to those advertisers who view billboards in certain geographic locations either as their sole method of advertising or as a necessary advertising complement to other media, including other outdoor advertising forms. Consequently, for many advertisers who want to advertise on billboards in each of the Metropolitan Markets or in certain smaller areas within each of the Metropolitan Markets, the imposition of a SSNIP would not cause these advertisers to switch some of their advertising to other media, other outdoor advertising forms, or to billboards located outside each area.

For all of the above reasons, for purposes of analyzing the competitive effects of the

proposed transaction, the relevant product market is outdoor advertising on billboards and the relevant geographic markets are no larger than each of the Metropolitan Markets, and may consist of considerably smaller areas within each of those Metropolitan Markets where the parties own and operate billboards in close proximity to each other.

2. Harm to Competition within Each of the Metropolitan Markets

The Complaint alleges that the proposed acquisition likely would substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and likely would have the following effects, among others:

a) competition in the sale of outdoor advertising on billboards in each of the Metropolitan Markets and in certain smaller areas within each of the Metropolitan Markets would be substantially lessened;

b) actual and potential competition between Clear Channel and Fairway in the sale of outdoor advertising on billboards in each of the Metropolitan Markets and in certain areas within each of the Metropolitan Markets would be substantially lessened; and

c) prices for outdoor advertising on billboards in each of the Metropolitan Markets and in certain areas within each of the Metropolitan Markets would likely increase, and the quality of services would likely decline.

As alleged in the Complaint, in each of the Metropolitan Markets and in certain areas within each of the Metropolitan Markets, the market for outdoor advertising on billboards is highly concentrated and the proposed transaction would substantially increase that concentration.

Using the Herfindahl-Hirschman Index ("HHI"), a standard measure of market concentration, the proposed transaction between Clear Channel and Fairway would result in HHIs in excess of 2,500 in each of the Metropolitan Markets and in certain areas within each

Metropolitan Market. These post-transaction HHIs reflect increases of more than 200 points in each Metropolitan Market and in certain areas within each Metropolitan Market. As a result, the proposed transaction in those Metropolitan Markets is presumed likely to enhance market power under the *Horizontal Merger Guidelines* issued by the Department of Justice and Federal Trade Commission.

Moreover, in addition to increasing concentration, the proposed transaction will eliminate head-to-head competition between Clear Channel and Fairway by bringing under the control of one firm billboards that are close substitutes, based on their geographic locations, in areas with limited alternatives. In some of the areas within each of the Metropolitan Markets, there are no other competing billboards that would be attractive competitive alternatives to Clear Channel's and Fairway's billboards. In other areas within each of the Metropolitan Markets, there are other competitors present, but the number of billboards or their quality is insufficient to preclude the exercise of market power by Clear Channel or Fairway post-transaction. Because a significant number of advertisers would likely be unable to reach their desired audiences as effectively unless they advertise on billboards that Clear Channel or Fairway would control after the proposed transaction, those advertisers' bargaining positions would be weaker, and the advertising rates they pay would likely increase.

3. Entry

The Complaint alleges that entry or expansion in outdoor advertising on billboards in each of the Metropolitan Markets would not be timely, likely, or sufficient to prevent any anticompetitive effects. In each of the Metropolitan Markets, there are significant barriers to entry including those due to governmental regulations that limit new billboard construction. Therefore, it is unlikely that any new entry or repositioning from existing firms would be

sufficient or timely to defeat Clear Channel or Fairway from profitably imposing a SSNIP on their billboards in the Metropolitan Markets and certain areas within the Metropolitan Markets.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the likely anticompetitive effects of the transaction in each of the Metropolitan Markets by maintaining the Divestiture Assets as independent, economically viable and competitive. The proposed Final Judgment requires Clear Channel and Fairway to divest the Divestiture Assets to the following Acquirers:

- Divestiture Assets located in the Indianapolis Metropolitan Market to Circle City Outdoor, LLC; and
- Divestiture Assets located in the Atlanta Metropolitan Market to Link Media Georgia, LLC.

The United States has approved each of these Acquirers as suitable divestiture buyers. The United States required Clear Channel and Fairway to identify each Acquirer of a Divestiture Asset in order to provide greater certainty and efficiency in the divestiture process. If, for any reason, Defendants are unable to complete the divestitures to either of these Acquirers, Defendants must divest the remaining Divestiture Assets to one or more alternative Acquirers approved by the United States in its sole discretion.

The Divestiture Assets are defined in Paragraph II.F of the proposed Final Judgment to include all assets set forth in Schedules A and B to the proposed Final Judgment, tangible or intangible, relating to each outdoor advertising display face, including all real property (owned or leased), all licenses, permits and authorizations issued by any governmental organization

relating to the operation of the asset, and all contracts, agreements, leases, licenses, commitments and understandings pertaining to the sale of outdoor advertising on each asset.

To ensure that the Divestiture Assets are operated independently from Clear Channel and Fairway after the divestitures, Section XII of the proposed Final Judgment prohibits Defendants from reacquiring any part of the Divestiture Assets during the term of the Final Judgment and Section VII prohibits Defendants from financing all or any part of the Acquirers' purchase of the Divestiture Assets.

Defendants are required to take all steps reasonably necessary to accomplish the divestitures quickly and to cooperate with prospective purchasers. Pursuant to Paragraph IV.A of the proposed Final Judgment, divestiture of each of the Divestiture Assets must occur within ten calendar days after the Court's signing of the Asset Preservation Order or consummation of the Transaction, whichever is later. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed 60 calendar days in total, and shall notify the Court in such circumstances.

In the event that Defendants do not accomplish all of the divestitures within the periods prescribed in the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court, upon application of the United States, will appoint a trustee selected by the United States to effect any remaining divestitures. If a trustee is appointed, the proposed Final Judgment provides that Clear Channel and Fairway will pay all costs and expenses of the trustee. The trustee's commission will be structured to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States describing his or her efforts to accomplish the divestiture of any remaining

stations. If the divestiture has not been accomplished after 6 months, 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 trust, including extending the trust or the term of the trustee's appointment.

Section XI of the proposed Final Judgment requires Defendants to provide advance notification of certain future proposed acquisitions not otherwise subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a. Specifically, Fairway must provide at least thirty days advance written notice to the United States before it acquires, directly or indirectly, any interest in any outdoor advertising asset in the form of a billboard or any outdoor advertising business that owns billboards in the metropolitan statistical areas associated with Rochester, Minnesota and Indianapolis; and Clear Channel must provide at least thirty days advance written notice to the United States before it (a) acquires any assets located in the Atlanta metropolitan statistical area that were included in, but later removed from, the original transaction agreement between Clear Channel and Fairway; and (b) directly or indirectly acquires any outdoor advertising assets in the form of billboards or any interest, including any financial, security, loan, equity or management interest, in any outdoor advertising business that owns billboards in the Atlanta metropolitan statistical area where the assets or interests acquired have annual revenues for the last twelve months in excess of $5 million. Section XI then provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before acquisitions in these geographic areas may be consummated.

The geographic areas that Section XI applies to include one metropolitan area not subject to divestitures: Rochester, Minnesota. Although, as discussed above, Rochester billboard assets

were ultimately excluded from the Defendants' asset swap transaction, given the highly concentrated market for outdoor advertising on billboards in Rochester and the fact that the Rochester billboard assets originally were part of the transaction, the United States sought to ensure that it would have the opportunity to review future acquisitions in that area so that it can seek effective relief, if necessary.

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, 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, if any, will be filed with the Court. In addition, comments will be posted on the Antitrust Division's website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Owen M. Kendler
Acting Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 5th Street, N.W. Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and Defendants 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 the transaction between Clear Channel and Fairway. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the sale of outdoor advertising on billboards in each of the Metropolitan Markets and the affected smaller areas within each Metropolitan Market. 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. US Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *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.").[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (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.

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[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004) *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

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 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 US Airways*, 38 F. Supp. 3d at 75 (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 *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 US Airways*, 38 F. Supp. 3d at 76 (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

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[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

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 US Airways*, 38 F. Supp. 3d at 75 (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 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 US Airways*,

38 F. Supp. 3d at 76 (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.[3] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *US Airways*, 38 F. Supp. 3d at 76.

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.

[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.*, 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 of briefs and oral arguments, that is the approach that should be utilized.").

Dated: December 22, 2016

Respectfully submitted,

/s/ Mark A. Merva
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CERTIFICATE OF SERVICE

I, Mark A. Merva, of the Antitrust Division of the United States Department of Justice, do hereby certify that true copies of the Complaint, Competitive Impact Statement, Asset Preservation Stipulation and Order, Proposed Final Judgment, and Plaintiff's Explanation of Consent Decree Procedures were served this 22 day of December, 2016, by email, to the following:

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