UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ODYSSEY INVESTMENT PARTNERS FUND V, LP,

COMMUNICATIONS & POWER INDUSTRIES LLC,

and

GENERAL DYNAMICS CORPORATION,

Defendants.

COMPETITIVE IMPACT STATEMENT

The United States of America, under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "APPA" or "Tunney Act"), 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 July 22, 2019, Communications and Power Industries LLC ("CPI") agreed to acquire General Dynamics SATCOM Technologies, Inc. ("GD SATCOM") from its parent company, General Dynamics Corporation ("General Dynamics"), for approximately $175 million. The United States filed a civil antitrust Complaint on May 28, 2020 seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to

substantially lessen competition for the design, manufacture, and sale of large ground station antennas for geostationary satellites ("large geostationary satellite antennas") 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 filed a Hold Separate Stipulation and Order ("Stipulation and Order") and proposed Final Judgment, which are designed to address the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, CPI is required to divest its subsidiary CPI ASC Signal Division Inc. ("ASC Signal"), which houses the entirety of CPI's business that competes in the design, manufacture, and sale of large geostationary satellite antennas. Under the terms of the Stipulation and Order, CPI will take certain steps to ensure that ASC Signal is operated as a competitively independent, economically viable, and ongoing business concern, which will remain independent and uninfluenced by CPI or its parent company, Odyssey Investment Partners Fund V, LP ("Odyssey"), and that competition is maintained during the pendency of the required divestiture.

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 will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

(A) The Defendants and the Proposed Transaction

Odyssey, a private equity fund managed by Odyssey Investment Partners, is a Delaware limited partnership with its headquarters in New York, New York. Odyssey Investment Partners has raised over $5 billion since its inception and invests in a wide array of industries, including

aerospace and defense. CPI is a portfolio company of Odyssey. It is a Delaware corporation with its headquarters in Palo Alto, California. CPI is a global manufacturer of electronic components and subsystems focused primarily on communications and defense markets. CPI had sales of approximately $500 million in 2019 and sells satellite communication antennas through its subsidiary, ASC Signal, a business it acquired in 2017.

General Dynamics is a Delaware corporation with its headquarters in Reston, Virginia. General Dynamics's subsidiary, GD SATCOM, designs, manufactures, and sells satellite communications systems used in commercial, defense, and scientific applications and provides related products such as amplifiers and antennas. GD SATCOM earned between $200 million and $300 million in revenues in 2019.

Pursuant to a purchase agreement dated July 22, 2019, CPI intends to acquire GD SATCOM from General Dynamics for approximately $175 million.

(B) Industry Background

Satellite communications networks enable secure communications links in remote areas that lack access to the main telecommunications grid. For example, the Department of Defense ("DoD") uses satellite communications networks to communicate with military bases in theaters of war, where access to the communications grid may be intermittent or even non-existent. Similarly, where it is too expensive to run traditional communications lines, commercial network operators provide satellite communications networks that individual users—or clusters of users in a central location—can use to access the internet, television, and voice communications services.

Both commercial and military satellite communications networks operate in the same way: information is transmitted from a remote user through a satellite in orbit and back down

through a ground station that is connected to a traditional communications grid. This process is reversed as information returns to the remote user. At both ends of the satellite communication link, there must be an antenna that can "see" the satellite(s) with which the ground stations are interfacing.

The satellite is the most critical, and expensive, element of a satellite communications network. Satellite-based design constraints, such as the power of the transmission signal (which is directly impacted by limitations on size and weight) and the orbit in which the satellite will operate, thus drive other significant design decisions for the entire satellite communications network.

The other key component of a satellite communications network is the ground station antenna, which connects the satellite to the communications grid. The ground station antenna consists of a parabolic dish, the structure on which the dish is mounted, and any motors or other equipment needed to move, or "point," the dish at the satellite(s) in its network.

Several characteristics differentiate ground station antennas, but the two most important are the size of the antenna (which is typically measured by the diameter of its parabolic dish) and the ability of the antenna to track satellites that change their position relative to the Earth (as described below, some antennas remain pointed in the same direction while others track satellites as they cross the sky).

Antenna size is important because larger antennas can receive fainter signals (i.e., signals impacted by rain, clouds, or other atmospheric conditions) than smaller antennas. As a result, satellite networks using larger antennas are more reliable than networks using smaller antennas. Additionally, because larger antennas can receive fainter signals, the power requirements for the transmitting satellite (which must be supplied through batteries and/or solar generation) are

diminished as compared to transmission to smaller antennas. Satellites for larger antennas therefore need not be as large or expensive as satellites for smaller antennas. Larger antennas thus decrease the overall cost of the satellite communications system.

The other major factor differentiating between types of ground station antennas is their ability to track satellites that change their position relative to the Earth. For example, satellites in geostationary orbit remain in a fixed position relative to the Earth's rotation and are more than 20,000 miles above Earth. Antennas for geostationary satellites are therefore "fixed" and point in one direction. Low-earth orbit ("LEO") and mid-earth orbit ("MEO") satellites, by contrast, are multiple thousands of miles closer to earth and rotate the earth every 70 minutes. LEO and MEO satellites thus frequently "cross" the sky as they orbit and antennas used to communicate with them must be "full-motion" in order to track the LEO and MEO satellites as they move relative to the antennas' positions. While full motion antennas duplicate some of the capabilities of fixed antennas, they are typically only used for LEO and MEO satellites because they are significantly more expensive due to the motors and structural design elements necessary to ensure accurate full-motion pointing. Fixed antennas are thus more cost-effective than full-motion antennas.

(C) Relevant Markets

1. Product Market

For DoD customers, satellite communications networks provide vital communications links for the battlefield and other remote locations. For many uses, DoD requires large geostationary satellite antennas in order to guarantee reliable communications connections. DoD cannot switch to smaller geostationary antennas without compromising the reliability and usefulness of its network. Because switching to smaller geostationary antennas would effectively render a satellite communications network unfit for its intended use, the Complaint alleges that

DoD is unlikely to switch to smaller geostationary antennas in response to a small but significant increase in price for large geostationary satellite antennas.

According to the Complaint, commercial customers—whose reliability requirements are not as rigid as DoD's—are also unlikely to switch to smaller geostationary antennas in the event of a small but significant increase in price for large geostationary satellite antennas because, like DoD, doing so would decrease the reliability of their network. Further, switching to smaller geostationary antennas would require a satellite communications network with a larger—and significantly more expensive—satellite at its core, thus increasing the overall cost of the network.

Similarly, the Complaint alleges that DoD and commercial customers with geostationary satellites are unlikely to switch from fixed to full-motion antennas—like those used for MEO and LEO satellites—in response to a small but significant increase in price of fixed antennas. Even when full-motion antennas have similar capabilities to fixed antennas, they are significantly more expensive due to the additional motors and equipment necessary to ensure accurate full-motion pointing.

According to the Complaint, customers will not substitute to smaller or full-motion antennas in response to a small but significant and non-transitory increase in the price of large geostationary satellite antennas. Therefore, the Complaint alleges that the design, manufacture, and sale of large geostationary satellite antennas is a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. Geographic Market

The Complaint alleges that the relevant geographic market for large geostationary satellite antennas is the United States. For national security reasons, DoD prefers domestic

suppliers of large geostationary satellite antennas when it is deciding on potential antenna sources. Similarly, commercial customers prefer domestic suppliers of large geostationary satellite antennas, in part because they resell network access to DoD and other government customers that prefer to avoid having foreign suppliers for components in the transmission chain for sensitive national security-related information. For these reasons, neither DoD nor commercial customers are likely to turn to any foreign suppliers in the face of a small but significant and non-transitory price increase by domestic suppliers of large geostationary satellite antennas.

(D) Anticompetitive Effects of the Proposed Transaction

As alleged in the Complaint, CPI, through its subsidiary ASC Signal, and GD SATCOM are the only two significant suppliers that design, manufacture, and sell large geostationary satellite antennas in the United States. The merger would give the combined firm an effective monopoly, leaving customers, including DoD, without a meaningful competitive alternative for this critical component of satellite communications networks.

According to the Complaint, CPI and GD SATCOM compete for sales of large geostationary satellite antennas on the basis of quality, price, and contractual terms such as delivery times. This competition has resulted in higher quality, lower prices, and shorter delivery times. The combination of CPI and GD SATCOM would eliminate this competition and its future benefits to customers, including DoD. Post-acquisition, the merged firm likely would have the incentive and ability to increase prices and offer less favorable contractual terms.

As described in the Complaint, competition between CPI and GD SATCOM has also fostered important industry innovation, leading to antennas that are more durable, can withstand more extreme environments, and operate at higher bandwidths. The combination of CPI and GD

SATCOM would eliminate this competition and its future benefits to customers, including DoD. Post-acquisition, the merged firm likely would have less incentive to engage in research and development efforts that lead to innovative and high-quality products.

(E) Entry

According to the Complaint, entry of additional competitors into the market for the design, manufacture, and sale of large geostationary satellite antennas in the United States is unlikely to prevent the harm to competition that is likely to result if the proposed acquisition is consummated. Production facilities for large geostationary satellite antennas require a substantial investment in both capital equipment and human resources. A new entrant would need to set up a factory to produce parabolic dishes, design the complex electronic assemblies and components necessary to point the antenna, and build assembly lines and testing facilities. Engineering and research personnel would need to be assigned to design, test, and troubleshoot the complex manufacturing process that is necessary to produce large geostationary satellite antennas. Any new products manufactured by such an entrant would also require extensive testing and qualification before they could be used by the U.S. military. As a result, the Complaint alleges that entry would be costly and time-consuming.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the design, manufacture, and sale of large geostationary satellite antennas. Paragraph IV(A) of the proposed Final Judgment requires CPI, within the later of 60 calendar days after the entry of the Stipulation and Order by the Court or 30 calendar days after all regulatory approvals needed to complete the transaction and divestiture have been received, to

divest the Divestiture Assets. The assets must be divested in such a way as to satisfy the United States in its sole discretion that they can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the design, manufacture, and sale of large geostationary satellite antennas. The regulatory approvals are defined in Paragraph II(J) of the proposed Final Judgment and include approvals or clearances pursuant to filings with the Committee on Foreign Investment in the United States ("CFIUS") or under antitrust or competition laws required for CPI's acquisition of GD SATCOM and approvals or clearances pursuant to filings with CFIUS or under antitrust, competition, or other U.S. or international laws or regulations required for the divestiture of the Divestiture Assets. The Divestiture Assets are defined as ASC Signal, and include four facilities (a support facility in Plano, Texas, a manufacturing facility located in Whitby, Ontario, and testing facilities located in Ashburn, Ontario and Caddo Mills, Texas) and all tangible and intangible assets related to or used in connection with the ASC Signal. CPI must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with prospective purchasers.

The proposed Final Judgment also contains provisions intended to facilitate the acquirer's efforts to hire employees supporting ASC Signal. Paragraph IV(C) of the proposed Final Judgment requires CPI to provide the acquirer and the United States with organization charts and information relating to these employees and to make them available for interviews, and it provides that the Defendants must not interfere with any negotiations by the acquirer to hire them. In addition, for employees who elect employment with the acquirer, CPI must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, and provide all benefits that the employees would generally be provided if transferred to a buyer of an ongoing business. This paragraph further provides that the Defendants may not solicit to

hire any employee of the Divestiture Assets who was hired by the acquirer, unless that individual is terminated or laid off by the acquirer or the acquirer agrees in writing that the Defendants may solicit to hire that individual. The non-solicitation period runs for 12 months from the date of the divestiture.

Paragraph IV(H) of the proposed Final Judgment requires CPI, at the acquirer's option, to enter into a transition services agreement for back office, human resource, and information technology services and support for ASC Signal for a period of up to 12 months. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions of this transition services agreement for a total of up to an additional six months. Paragraph IV(H) also provides that employees of CPI tasked with providing any transition services must not share any competitively sensitive information of the acquirer with any other employee of Defendants.

Paragraph IV(G) of the proposed Final Judgment facilitates the transfer of customers and other contractual relationships from CPI to the acquirer. CPI must transfer all contracts, agreements, and relationships to the acquirer and must make best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting or other transfer.

If CPI does not accomplish the divestiture within the period prescribed in the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that CPI will pay all costs and expenses of the trustee. The divestiture trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished.

After the divestiture trustee's appointment becomes effective, the trustee will provide periodic reports to the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the divestiture trustee and the United States will make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the trust, including by extending the trust or the term of the divestiture trustee's appointment.

Section XI of the proposed Final Judgment requires Odyssey and CPI to notify the United States in advance of acquiring an entity involved in the design, manufacture, and sale of large ground station antennas for geostationary satellites in the United States in a transaction that would not otherwise be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"). The proposed Final Judgment further provides for waiting periods and opportunities for the United States to obtain additional information analogous to the provisions of the HSR Act. Because CPI and GD Satcom are the only two significant suppliers of these products in the United States, it is important for the Division to receive notice of even small transactions that have the potential to eliminate competition in this market through the acquisition of an important startup or new entrant. Requiring notification of any acquisition of an entity involved in the design, manufacture, and sale of large ground station antennas for geostationary satellites in the United States will permit the United States to assess the competitive effects of that acquisition before it is consummated and, if necessary, seek to enjoin the transaction.

The proposed Final Judgment also contains provisions designed to promote compliance and make the enforcement of the Final Judgment as effective as possible. Paragraph XIV(A) provides that the United States retains and reserves all rights to enforce the provisions of the

Final Judgment, including its rights to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XIV(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to restore competition the United States alleges would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIV(C) of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XIV(C) provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendant will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

Paragraph XIV(D) states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

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 neither impairs nor assists 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 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, 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 U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final 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:

Katrina Rouse
Chief, Defense, Industrials, and Aerospace Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 8700
Washington, DC 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against CPI's acquisition of GD SATCOM. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the design, manufacture, and sale of large geostationary satellite antennas. Thus, the proposed Final Judgment achieves 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 60-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). 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); *United States v. U.S. Airways Grp., 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 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a 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 U.S. 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 in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[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." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public

interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co.*, 900 F.2d at 309).

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*, 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 ("[T]he '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.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added 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*, 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). This language explicitly wrote into the statute what Congress intended when it first 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). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. DETERMINATIVE DOCUMENTS

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

Dated: May 28, 2020

Respectfully submitted,

/s/ Jay D. Owen

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