UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, STATE OF ILLINOIS, STATE OF COLORADO, and STATE OF INDIANA, *Plaintiffs*, v. AMC ENTERTAINMENT HOLDINGS, INC., and KERASOTES SHOWPLACE THEATRES, LLC, *Defendants*.	Civil Action No: Judge: **Case: 1:10-cv-00846** **Assigned To : Kennedy, Henry H.** **Assign. Date : 5/21/2010** **Description: Antitrust**

COMPETITIVE IMPACT STATEMENT

Plaintiff, United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C.§16(b)-(h), files this Competitive

Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On January 19, 2010, Defendant AMC Entertainment Holdings, Inc. ("AMC") agreed to acquire most of the assets of Defendant Kerasotes Showplace Theatres, LLC ("Kerasotes"). Plaintiffs filed a civil antitrust complaint on May 21, 2010, seeking to enjoin the proposed acquisition and to obtain equitable relief. The Complaint alleges that the acquisition, if permitted to proceed, would combine under common ownership the two leading, and in some cases, only mainstream movie theatres exhibiting first-run, commercial movies in parts of the metropolitan areas of Chicago, Denver, and Indianapolis. The likely effect of this acquisition would be to lessen competition substantially for exhibition of first-run, commercial movies in mainstream theatres in violation of Section 7 of the Clayton Act, 15 U.S.C. §18.

At the same time the Complaint was filed, the Plaintiffs also filed a Hold Separate Stipulation and Order ("Hold Separate") and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, AMC and Kerasotes are required to divest eight theatres located in the Chicago, Denver, and Indianapolis areas to acquirer(s) acceptable to the Plaintiffs.

Under the terms of the Hold Separate, Defendants will take certain steps to ensure that the eight theatres to be divested are operated as competitively independent, economically viable and ongoing business concerns, that they will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The Plaintiffs 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 Proposed Transaction

AMC is a Delaware corporation with its headquarters in Kansas City, Missouri. It is the holding company of AMC Entertainment, Inc. AMC owns or operates 304 theatres containing 4,574 screens in locations throughout the United States and four foreign countries. Measured by number of screens, AMC is the second-largest theatre exhibitor in the United States and had revenues of approximately $2.26 billion in 2009.

Kerasotes is a Delaware corporation with its principal place of business in Chicago, Illinois. It owns or operates 96 theatres with 973 screens in various states. Kerasotes is the sixth-largest theatre exhibitor in the United States and earned revenue of approximately $327.7 million in 2009.

On January 19, 2010, AMC and Kerasotes signed a purchase and sale agreement under which AMC will acquire all the outstanding membership units of Kerasotes, with the exception of three theatres which will be retained by the Kerasotes family, for approximately $275 million.

The proposed transaction, as initially agreed to by Defendants on January 19, 2010, would lessen competition substantially as a result of AMC's acquisition of Kerasotes. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the Plaintiffs on May 21, 2010.

B. The Competitive Effects of the Transaction on the Exhibition of First-Run, Commercial Movies in Mainstream Theatres

The Complaint alleges that the exhibition of first-run, commercial movies in mainstream theatres in areas the Complaint defines as North Suburban Chicago, Upper Southwest Suburban Chicago, Lower Southwest Suburban Chicago, Upper Northwest Denver, Lower Northwest Denver, North Indianapolis, and South Indianapolis constitute lines of commerce and relevant markets for antitrust purposes.

1. The Relevant Product and Geographic Markets

The exercise of defining a relevant market helps analyze the competitive effects of a horizontal transaction. Market definition identifies an area of competition and enables the identification of market participants and the measurement of market shares and concentration. This exercise is useful to the extent it illuminates the transaction's likely competitive effects.

The Complaint alleges that the relevant product market within which to assess the competitive effects of this transaction is the exhibition of first-run, commercial movies in mainstream theatres. Mainstream theatres are movie theatres that exhibit a variety of first-run, commercial movies to attract moviegoers of all ages and offer basic concessions, such as popcorn, candy and soft drinks. According to the Complaint, the experience of viewing a film in a theatre is an inherently different experience from other forms of entertainment, such as a live show, a sporting event, or viewing a movie in the home (*e.g.*, on a DVD player or via pay-per-view). Reflecting the significant differences between viewing a movie in a theatre and other forms of entertainment, ticket prices for movies are generally very different from prices for other forms of entertainment. Live entertainment is typically significantly more expensive than a

movie ticket, whereas renting a DVD for home viewing is usually significantly cheaper than viewing a movie in a theatre.

The Complaint alleges that moviegoers generally do not regard theatres showing "sub-run" movies, art movies, or foreign language movies as adequate substitutes for mainstream theatres showing first-run movies. The Complaint also alleges that "premiere" theaters do not typically serve as competitive constraints on mainstream theaters. Although premiere theatres show first-run, commercial movies, they typically have more restrictive admission policies (*e.g.*, minors must be accompanied by adults for all movies), charge higher ticket prices, serve alcoholic beverages, and often have full-service restaurants or in-service dining.

The Complaint defines seven relevant geographic markets in the Chicago, Denver, and Indianapolis areas in which to measure the competitive effects of this transaction. Each geographic market contains a number of mainstream theatres – most of which are owned by the Defendants – at which consumers can view first-run, commercial movies. The Complaint identifies the relevant geographic markets as follows: North Suburban Chicago, Upper Southwest Suburban Chicago, Lower Southwest Suburban Chicago, Upper Northwest Denver, Lower Northwest Denver, North Indianapolis, and South Indianapolis.

Chicago, Illinois Area

According to the Complaint, the North Suburban Chicago area, in and around the communities of Glenview and Skokie, encompasses AMC's Northbrook Court 14, AMC's Gardens 13, Kerasotes' Glen 10, Kerasotes' Village Crossing 18, and Kerasotes' Showplace 12 (Niles) theatres. There are no other mainstream theatres in the North Suburban Chicago area.

The Upper Southwest Suburban Chicago area, in and around the city of Naperville, encompasses AMC's Cantera 30 and Kerasotes' Showplace Naperville 16 (Naperville) theatres. There are no other mainstream theatres in the Upper Southwest Suburban Chicago area.

The Lower Southwest Suburban Chicago area, in and around the village of Bolingbrook, encompasses AMC's Woodridge 18 and Kerasotes' Showplace 12 (Bolingbrook) theatres. There is only one non-party mainstream theatre in the Lower Southwest Suburban Chicago area – a 16-screen theatre operated by Cinemark.

Denver, Colorado Area

The Upper Northwest Denver area, in and around the cities of Louisville and Broomfield, encompasses AMC's Flatiron Crossing 14 and Kerasotes' Colony Square 12 theatres. There are no other mainstream theatres in the Upper Northwest Denver area.

The Lower Northwest Denver area, in and around the cities of Westminster and Arvada, encompasses AMC's Westminster Promenade 24 and Kerasotes' Olde Town 14 theatres. There are no other mainstream theatres in the Lower Northwest Denver area.

Indianapolis, Indiana Area

The North Indianapolis area, in and around the community of Glendale, encompasses AMC's Castleton Square 14 and Kerasotes' Glendale Town 12 theatres. There is only one other non-party mainstream theatre in the North Indianapolis area – a Regal theatre with 14 screens.

The South Indianapolis area, in and around the city of Greenwood, encompasses AMC's Greenwood 14 and Kerasotes' Showplace 16 and IMAX. There are no other mainstream theatres in the South Indianapolis area.

According to the Complaint, the relevant markets in which to assess the competitive effects of this transaction are the mainstream theatres in the above-mentioned areas: North Suburban Chicago, Upper Southwest Suburban Chicago, Lower Southwest Suburban Chicago, Upper Northwest Denver, Lower Northwest Denver, North Indianapolis, and South Indianapolis areas. A small but significant post-acquisition increase in movie ticket prices by a hypothetical monopolist of mainstream theatres in those areas would not cause a sufficient number of customers to shift to other alternatives, including to other forms of entertainment, to non-mainstream theatres, or to mainstream theatres outside the relevant geographic markets described above to make such a price increase unprofitable.

2. Competitive Effects in the Relevant Markets

The Complaint alleges that exhibitors that operate mainstream movie theatres compete on multiple dimensions. Exhibitors compete over the quality of the viewing experience. They compete to offer the most sophisticated sound and viewing systems, best picture clarity, nicest seats with the best views, and cleanest floors and lobbies for moviegoers. Such exhibitors also compete on price, knowing that if they charge too much (or do not offer sufficiently discounted tickets for matinees, seniors, children, etc.), moviegoers will choose to view movies at rival theatres.

According to the Complaint, the proposed transaction is likely to eliminate these multiple dimensions of competition between AMC and Kerasotes. In each of the relevant markets, AMC and Kerasotes are each other's most significant competitor, given their close proximity to one another and to moviegoers, and the similarity in their theatres' size and quality of viewing experience. Their competition spurs each to keep its prices in check and improve its quality. For

example, Kerasotes expanded its discounts on matinees at its Bolingbrook 12 theatre, in Lower Southwest Suburban Chicago, after AMC opened its Woodridge 18 theatre nearby. Kerasotes retrofitted its Bolingbrook 12 theatre, in Lower Southwest Suburban Chicago, in response to AMC's opening its Woodridge 18 theatre nearby.

As alleged in the Complaint, each of the relevant markets would see a significant increase in market concentration under a measure called the Herfindahl-Hirschman Index ("HHI"), explained in Appendix A of the Complaint. In the area with the least change in concentration--the Lower Southwest Suburban Chicago area – the proposed transaction would give the newly combined entity control of two of the only three mainstream theatres in that area. In that market the post-transaction HHI would rise to roughly 5,017, representing an increase of 1,221 points. In other markets, the proposed acquisition would place all of the mainstream theatres under AMC's control, creating a local monopoly and yielding a post-transaction HHI of 10,000 – the maximum.

In the seven relevant markets today, were AMC or Kerasotes to increase ticket prices and the other were not to follow, the exhibitor that increased price would likely suffer financially, as a substantial number of its customers would patronize the other exhibitor's theatre. After the transaction, the newly combined entity would recapture such losses, making profitable price increases that would have been unprofitable before the transaction. Likewise, the proposed transaction would eliminate competition between AMC and Kerasotes over the quality of the viewing experience at their theatres in each of the geographic markets at issue. After the transaction, the newly combined entity would have a reduced incentive to maintain, upgrade, and renovate its theatres in the relevant markets, and to improve its theatres' amenities and services,

thus reducing the quality of the viewing experience.

The Complaint alleges that the presence of the other mainstream theatres in certain of the relevant geographic markets would be insufficient to replace the competition lost due to the transaction, and thus render unprofitable post-transaction increases in ticket prices or decreases in quality by the newly combined entity.

Finally, the Complaint alleges that the entry of a mainstream theatre that would deter or counteract an increase in movie ticket prices or a decline in theatre quality is unlikely in all of the relevant markets. Exhibitors are reluctant to locate new theatres near existing theatres unless the population density and demographics makes new entry viable or the existing theatres do not have stadium seating. Those conditions do not exist in any of the relevant markets. All of these markets currently have mainstream theatres with stadium seating. Given the number of existing comparable theatres, population density and demographics in the relevant markets, demand for additional mainstream theatres in the areas at issue is not likely to support entry of a new theatre.

For all of these reasons, the Plaintiffs have concluded that the proposed transaction would lessen competition substantially in the exhibition of first-run, commercial movies in mainstream theatres in the North Suburban Chicago area, Upper Southwest Suburban Chicago area, Lower Southwest Suburban Chicago area, Upper Northwest Denver area, Lower Northwest Denver area, North Indianapolis area, and the South Indianapolis area, eliminate actual and potential competition between AMC and Kerasotes, and likely result in increased ticket prices and lower quality theatres in those markets. The proposed transaction therefore violates Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisitions in each relevant geographic market, establishing new, independent, and economically viable competitors. The proposed Final Judgment requires AMC, within sixty (60) calendar days after the filing of the Complaint, or five (5) days after the notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as viable ongoing businesses, a total of eight theatres in the seven relevant geographic markets in the Chicago, Denver, and Indianapolis areas: Kerasotes Glen 10 and AMC Gardens 13 (North Suburban Chicago), AMC Cantera 30 (Upper Southwest Suburban Chicago), Kerasotes Showplace 12 (Bolingbrook) (Lower Southwest Suburban Chicago), Kerasotes Colony Square 12 (Upper Northwest Denver), Kerasotes Olde Town 14 (Lower Northwest Denver), Kerasotes Showplace 12 or AMC Castleton Square 12 (North Indianapolis), and AMC Greenwood 14 (South Indianapolis). The assets must be divested in such a way as to satisfy the Plaintiffs that the theatres can and will be operated by the purchaser as viable, ongoing businesses that can compete effectively in the relevant markets as mainstream theatres exhibiting first-run, commercial movies. AMC must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

Until the divestitures take place, AMC and Kerasotes must maintain the sales and marketing of the theatres, and maintain the theatres in operable condition at current capacity configurations. Until the divestitures take place, AMC and Kerasotes must not transfer or reassign to other areas within the company their employees with primary responsibility for the

operation of the theatres, except for transfer bids initiated by employees pursuant to Defendants' regular, established job-posting policies.

In the event that AMC does not accomplish the divestitures within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that AMC will pay all costs and expenses of the trustee. The 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 divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the parties, setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestitures have not been accomplished, the trustee and the plaintiffs will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

If AMC is unable to effect the divestitures required herein due to their inability to obtain the landlords' consent, Section VI of the proposed Final Judgment requires AMC to divest alternative theatre assets that compete effectively with the theatres for which the landlord consent was not obtained. This provision will insure that any failure by AMC to obtain landlord consent does not thwart the relief obtained in the proposed Final Judgment.

The proposed Final Judgment also prohibits AMC from acquiring any other theatres in counties that correspond to the relevant geographic markets and Kerasotes from acquiring any other theatres in Cook County, Illinois, without providing at least thirty (30) days notice to the United States Department of Justice. Such acquisitions could raise competitive concerns but

might be too small to be reported under the Hart-Scott-Rodino ("HSR") premerger notification statute.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of AMC's acquisition of Kerasotes.

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 attorney's 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 Plaintiffs 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 Plaintiffs have not withdrawn their consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this

Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

John R. Read
Chief, Litigation III
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 the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The Plaintiffs considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The Plaintiffs could have continued the litigation and sought preliminary and permanent injunctions against AMC's acquisition of Kerasotes. The Plaintiffs are satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of exhibition of first-run, commercial movies in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the Plaintiffs would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V. /S.A.*, 2009-2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed

remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the 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) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the

---

[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).

[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is

government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

---

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'").

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; see also *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("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 recently 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). 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 Senator Tunney). Rather, the procedure for the public interest determination is left to the

discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

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 21, 2010

Respectfully submitted,

Gregg I. Malawer (DC Bar No. 481685)
Nina Hale
Bennett Matelson (DC Bar No. 454551)
Creighton J. Macy
U.S. Department of Justice Antitrust Division 450 5th Street, N.W. Suite 4000
Washington, DC 20530
Telephone: (202) 616-5943
Fax: (202) 514-7308
E-mail: gregg.malawer@usdoj.gov
Attorneys for Plaintiff the United States

[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt 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, 93d Cong., 1st Sess., 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.")