IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)
Plaintiff,	)
v.	)
COX ENTERPRISES, INC., COX AUTOMOTIVE, INC., and DEALERTRACK TECHNOLOGIES, INC.	)
Defendants.	)

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

On June 12, 2015, Defendant Cox Automotive, Inc., a subsidiary of Defendant Cox Enterprises, Inc. (collectively "Cox"), and Defendant Dealertrack Technologies, Inc. ("Dealertrack") entered into an Agreement and Plan of Merger whereby Cox agreed to commence a cash tender offer to acquire all of the outstanding shares of Dealertrack for $63.25 per share, for a total of approximately $4 billion. The United States filed a civil antitrust Complaint on September 29, 2015, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially for the development, marketing, and sale of full-featured inventory management solutions ("IMSs")

in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in higher prices and lower quality for dealership consumers.

At the same time the Complaint was filed, the United States also filed a proposed Final Judgment and Hold Separate Stipulation and Order ("Hold Separate"), which are designed to prevent the alleged anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are required: (1) to divest to DealerSocket, Inc., or to another Acquirer that is acceptable to the United States, all of Dealertrack's interest in its IMS products and related assets; (2) to provide short-term transition services and support to enable the Acquirer to operate the divested assets without any disruption as of the date of the divestiture; (3) to permit for up to four years the continuing exchange of data and content between the divested assets and other data sources, Internet sites, and automotive solutions that are owned, controlled, provided, or managed by Defendants; and (4) to undertake various obligations to prevent Defendants from exploiting Dealertrack's interest in Chrome Data Solutions, LP. ("Chrome"). The parties have submitted a proposed agreement to sell the divestiture assets to DealerSocket, which is currently under review by the United States.

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

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, and the Hold Separate provides that Defendants will comply with the terms of the proposed Final Judgment pending its entry. 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. Defendants and the Proposed Transaction

Cox Automotive, Inc. and Cox Enterprises, Inc. are privately-held Delaware corporations, with their headquarters in Atlanta, Georgia. The automotive products managed by Cox encompass a broad portfolio of automated solutions and services for automotive dealers and consumers, including vAuto, a full-featured IMS. Cox's total annual automotive revenue in 2014 was about $4.9 billion, of which its U.S. IMS revenue was a small part.

Dealertrack is a Delaware corporation with its headquarters in Lake Success, New York. Dealertrack develops and sells a variety of automated solutions and services for automotive dealers, including Inventory+, a full-featured IMS that combines the functionality from two IMSs that Dealertrack acquired – AAX and eCarList. Dealertrack's total annual revenue in 2014 was about $854 million, of which its U.S. IMS revenue was a small part. Dealertrack also owns a 50% interest in Chrome, a company that compiles and licenses vehicle information data for use in IMSs and other automated solutions and services for the automotive industry. The remaining 50% interest in Chrome is owned by Autodata Solutions, Inc. and Autodata Solutions Company (collectively, "Autodata").

Cox's proposed acquisition of Dealertrack would lessen competition substantially in the development, marketing, and sale of full-featured IMSs in the United States. The acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on September 29, 2015.

B. The Competitive Effects of the Transaction on IMSs in the United States

1. Automotive Dealerships and IMSs

In the United States, new and used vehicles are typically sold to consumers through automotive dealerships. A dealership may be "franchised," meaning it is associated with an original equipment manufacturer ("OEM"), or "independent" of any association with an OEM. New vehicles are acquired by franchised dealers directly from OEMs and resold to consumers. Used vehicles are purchased or otherwise acquired (often through trade-ins) by franchised or independent dealers and then sold to consumers or at wholesale (often at auction). A dealer may have more than one physical store (or "rooftop") and franchised dealers may be associated with more than one OEM. The type of automated products and services that a dealer uses to manage its business often depends on its size, its level of sophistication, and whether it is franchised or independent.

Most large franchised and independent dealers rely on dealer management systems ("DMSs") to manage the primary functions of their businesses, including sales, finance, accounting, service, parts, and personnel. The DMS is the central repository for a large amount of data about the dealer's day-to-day business activities. IMSs are a type of "point" solution that a dealer may use to obtain enhanced functionality that is not provided in its DMS. IMSs communicate and share data with the dealer's DMS and other point solutions.

Full-featured IMSs have traditionally been used to assist dealers in managing their used vehicle inventory, although the leading IMSs increasingly offer extended functionality to manage new vehicle inventories. A full-featured IMS uses algorithms and sophisticated analytics to help dealers: (1) optimize their inventories; (2) appraise the value of vehicles they want to acquire; (3)

set prices for vehicles they want to sell; (4) publish listings of vehicles that they have for sale; and (5) run detailed reports and analytics on vehicle and dealership performance relative to other vehicles and dealerships. This combination of automated analytics, reporting, optimization, pricing, and merchandising enables dealers using full-featured IMSs to operate their used vehicle businesses more efficiently and to increase the rate at which they sell vehicles ("inventory turns") and their overall profitability.

2. IMS Data Exchange Requirements and Sources

To perform the functionality described above, a full-featured IMS must be able to exchange data and communicate with other automated solutions. The performance and competitive viability of a full-featured IMS depends on the breadth and quality of its data sets.

To optimize a dealer's inventory, a full-featured IMS obtains data about the dealer's current inventory from its DMS and analyzes it against certain benchmarks. The IMS recommends vehicles that the dealer should add to its inventory and identifies and scores the desirability of vehicles that are available for acquisition, thereby allowing dealers to pick the fastest-selling or most profitable vehicles. It also identifies vehicles in inventory that are not selling well and recommends actions the dealer should take to price or dispose of those vehicles.

To appraise and price a vehicle, a full-featured IMS collects, aggregates, and analyzes a large amount of wholesale and retail pricing data, which may include data from auction services, book value guides, vehicle history reports, and online listings, as well as historical data from the DMS relating to transactions involving other similar vehicles. A full-featured IMS uses this data to provide the dealer with a view of the current competitive landscape for a vehicle, including suggested prices for meeting various objectives the dealer may have for the sale of the vehicle. In addition, a full-featured IMS may provide an indication of consumer interest in a particular

vehicle, based on an analysis of when the current inventory of similar vehicles in an area will be exhausted or click data relating to consumers' online browsing activities.

A full-featured IMS also automates the online merchandising of a vehicle by preparing online postings with vehicle descriptions and uploading the vehicle listings, together with photos and marketing descriptions, to the dealer's website and third-party vehicle retail sites. These tools save time by providing dealers access to multiple sites through a single platform and allowing them to create effective, professional vehicle listings that are consistent across multiple websites.

Defendants own or otherwise control access to many significant data sources and destinations for full-featured IMSs. Cox's Manheim Market Report is the most comprehensive and widely used source of data from auction services. With AutoTrader, Cox controls the leading online solution for buying and selling new and used vehicles. With Kelly Blue Book, Cox controls the most widely used consumer-facing vehicle book value guide. With Dealer.com, Dealertrack manages the majority of franchised dealer websites. With its DMS, Dealertrack manages the inventory and transaction data for a significant number of franchised dealers. As described above, Dealertrack also owns 50% of Chrome, which is the primary source of vehicle-specific data relied upon by full-featured IMSs, DMSs, and many other point solutions and websites.

To operate efficiently, a full-featured IMS must access and communicate data about specific vehicles with other automated solutions. This vehicle-specific data includes, but is much broader than, information about the year, make, model, engine, plant location, and country of origin of a vehicle that is encoded in the 17-digit vehicle identification number ("VIN"). A full-featured IMS also relies on many additional categories of vehicle-specific data, such as

editorial content, stock images, stock videos, ordering guide pricing data, OEM features and specifications data, configuration data, factory service schedule data, accessories data, warranty information, OEM new vehicle rebates and incentives data, and OEM build data (the "as built" equipment manifest and pricing data). Chrome is the leading provider of this vehicle-specific information, and Chrome offers significantly more vehicle data than any other supplier

Every full-featured IMS relies on Chrome data, as do most other automotive solutions and websites with which the IMSs exchange information about specific vehicles. Indeed, Chrome has become the *de facto* standard that these solutions and websites employ to enable the efficient exchange of information about specific vehicles. Incorporation of Chrome data into most major automotive solutions has resulted in significant network efficiencies.

3. Market Structure and Competitive Effects

Full-featured IMSs are most frequently used by large franchised and independent dealers. These dealers generally have larger IT budgets, make more decisions centrally, and have more complex operating requirements than smaller dealers due to larger vehicle inventories, higher inventory turns, and more rooftops. These dealers are more dependent on full-featured IMSs and other robust, integrated automated solutions to effectively manage their businesses. Although some other solutions offer dealers certain aspects of inventory management functionality, they are less comprehensive and less robust than full-featured IMSs. These solutions are used primarily by smaller dealers and are not meaningful alternatives to full-featured IMSs.

Cox and Dealertrack are by far the two leading providers of full-featured IMSs. Cox is the market leader with a market share of approximately 60%; Dealertrack has a market share of about 26%.

Cox and Dealertrack currently compete head-to-head in the development, marketing, and sale of their respective full-featured IMSs. The proposed acquisition would eliminate this competition, and Cox would emerge as the clearly dominant full-featured IMS provider with the ability to exercise substantial market power, thereby increasing the likelihood that Cox can and would unilaterally increase prices or reduce its investment or other efforts to improve the quality of its products and services. Moreover, with the acquisition of Dealertrack, Cox would acquire an ownership interest in Chrome that could enable Cox to deny or restrict access to Chrome data and thereby unilaterally undermine the competitive viability of Cox's remaining IMS competitors.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture and other remedial measures of the proposed Final Judgment will prevent the alleged anticompetitive effects of the acquisition by preserving Dealertrack's IMS business as an economically viable competitor. Pursuant to Section IV, the proposed Final Judgment requires Defendants, within ten (10) days after the Court's signing of the Hold Separate or the closing of Cox's acquisition of Dealertrack, whichever is later, to divest the products, related assets, and ongoing business operations relating to Dealertrack's IMS business operations in the United States.[1] The assets must be divested in such a way as to satisfy the United States in its sole discretion that the operations can and will be operated by the Acquirer as a viable, ongoing business that can compete effectively in providing IMSs.

[1] Some IMS products that Dealertrack sells in the U.S. are also sold in Canada. Defendants are required to divest Dealertrack's entire interest in the specified IMS products.

Defendants must use their best efforts to complete the required divestiture as expeditiously as possible. Defendants have proposed a divestiture to DealerSocket. If the proposed divestiture to DealerSocket is delayed, abandoned, or not approved, the United States, in its sole discretion, may agree to one or more extensions of the time for Defendants to complete the divestiture to DealerSocket or another Acquirer that is acceptable to the United States. All such extensions may not exceed one hundred and twenty (120) calendar days.

If Defendants do not complete the divestiture within the prescribed time, Section VI of the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. Defendants are required to use their best efforts to assist the trustee in accomplishing the divestiture and will pay the trustee's costs and expenses. 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 divestiture is accomplished. The trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. If the trustee does not complete the divestiture within six 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 proposed Final Judgment, including potentially extending the trust or the term of the trustee's appointment.

Section V of the proposed Final Judgment imposes additional obligations to foster a smooth transfer of Dealertrack's IMS business to DealerSocket or another Acquirer and to ensure for a reasonable time that Defendants permit the uninterrupted exchange of data and content between the divested IMS products and other data sources, Internet sites, and automotive solutions that are owned, controlled, provided, or managed by Defendants. Section V.A requires

Defendants to provide for up to one year any transition services that are necessary to enable the Acquirer to operate the divested assets and compete effectively in the market for IMSs as of the date of the divestiture.

Section V.B requires Defendants to enable for up to four years the exchange of data and other content that is currently being exchanged between the divested IMS products and any destinations, sites, or other data sources that Defendants control. This section provides for the continuing exchange of data between the divested IMS products and, for example, Cox's Manheim, AutoTrader, and KBB products. Section V.C requires Defendants to provide for the exchange of this data on the same terms that were in effect before the divestiture and specifies conditions when the Acquirer may elect to exchange the data under more favorable terms.

Section V.F requires Defendants to enable, at cost, for up to four years the exchange of an IMS customer's data that is currently being exchanged between the divested IMS products and any of the customer's other sites or solutions that are provided or managed by Defendants. This section provides for the continuing exchange of a customer's data between the divested IMS product used by the customer and, for example, the customer's website that is managed by Dealertrack's Dealer.com or the customer's Dealertrack DMS. Section V.G requires Defendants to provide for the exchange of this customer data on the same terms that were in effect before the divestiture and specifies conditions when the Acquirer may elect to exchange the data under more favorable terms.

Sections V.L through V.P impose various obligations to ensure that Defendants do not take any action to disrupt access to Chrome data by their IMS competitors, including the Acquirer, or to reduce or limit the value that Defendants' IMS competitors derive from Chrome's status as a *de facto* standard in many automotive solutions and websites. In particular,

Defendants are prohibited from taking any action that would prevent Autodata from exercising the right it will have to acquire and exercise control of Chrome after Cox completes its acquisition of Dealertrack (Section V.L); from exercising any rights, other than a limited right to veto the renewal of a Chrome license to CDK Global or Reynolds and Reynolds ("Reynolds") (discussed below), with respect to the licensing or pricing of Chrome data to any customer or customer class that competes with Defendants (Section V.M); from reviewing or using the competitively sensitive information of any customer or customer class that competes with Defendants (Section V.N); and from acquiring any additional assets or interests in Chrome (Section V.O). Section V.P requires Defendants to use all reasonable efforts to amend the Chrome joint venture and operating agreements to incorporate the limitations or rights imposed by Sections V.L through V.O. These amendments would allow the requirements in Sections V.L through V.O to survive termination of the proposed Final Judgment in a private agreement that could be enforced by Autodata and could only be withdrawn or modified with Autodata's consent.

CDK Global and Reynolds currently account for the vast majority of all DMS sales, and Dealertrack currently has the right to veto any Chrome license with CDK Global or Reynolds. Section V.M would substantially limit Defendants' use of this preexisting right to when either CDK Global or Reynolds terminates, without reasonable cause, the ability of CDK Global's or Reynolds' DMS products to interoperate with the Defendants' products. This provision preserves an industry dynamic that favors interoperability and benefits consumers.

Section XI of the proposed Final Judgment provides that, on application of the United States, the Court shall appoint a Monitoring Trustee selected by the United States. The Monitoring Trustee will have the power and authority to investigate and report on Defendants'

compliance with the Final Judgment and Hold Separate, including Defendants' compliance with all of the obligations in Section V relating to transition services, data exchange, and Chrome data. The Monitoring Trustee will not have any responsibility or obligation for the operation of Defendants' businesses. The Monitoring Trustee will serve at Defendants' expense, on such terms and conditions as the United States approves, and Defendants must use their best efforts to assist the trustee in fulfilling its obligations. The Monitoring Trustee will file quarterly reports and will serve until the required divestiture is complete and for so long as Defendants continue to have obligations under Section V.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least sixty (60) days preceding the effective date of the

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

Written comments should be submitted to:

James J. Tierney, Chief
Networks & Technology Enforcement Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 7100
Washington, D.C. 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Cox's acquisition of Dealertrack. The United States is satisfied, however, that the divestiture of assets and other relief described in the

proposed Final Judgment and Hold Separate will preserve competition for the provision of IMSs in the United States, and thus effectively addresses the violation alleged in the Complaint. The proposed Final Judgment would therefore 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.

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, U.S. 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.").[2]

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

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

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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 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 U.S. Airways*, 38 F. Supp. 3d at 76 (noting that

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

room must be made for the government to grant concessions in the negotiation process for settlements) (citing *Microsoft*, 56 F.3d at 1461); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 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 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). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the Court, with the recognition that the Court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[4] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 76.

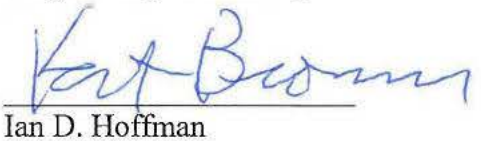
[4] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*,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

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: September 29, 2015

Respectfully submitted,



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