UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHOWA DENKO K.K.,

SGL CARBON SE, and

SGL GE CARBON HOLDING LLC (USA),

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 October 20, 2016, defendants Showa Denko K.K. ("SDK"), SGL Carbon SE ("SGL Carbon"), and SGL GE Carbon Holding LLC (USA) ("SGL US") entered into an agreement pursuant to which SDK agreed to acquire SGL Carbon's global graphite electrode business for approximately $264.5 million.

The United States filed a civil antitrust Complaint on September 27, 2017 seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition

would be to lessen competition substantially for the manufacture and sale of large ultra-high power ("UHP") graphite electrodes sold to electric arc furnace (EAF) steel mills in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would give SDK the ability and incentive to increase prices or decrease the quality of delivery and service provided to U.S. EAF customers.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and 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, defendants are required to divest SGL Carbon's entire U.S. graphite electrodes business (the "Divestiture Assets") to Tokai Carbon Co., Ltd. ("Tokai") or to an alternate Acquirer approved by the United States. Under the terms of the Hold Separate, defendants will take certain steps to ensure that the Divestiture Assets are operated as a competitive, independent, economically viable, and ongoing business concern, that the Divestiture Assets 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. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

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

A. The Defendants and the Transaction

SDK, a Japanese corporation headquartered in Tokyo, Japan, is one of Japan's leading chemical companies, and had global sales of approximately $5.8 billion in 2016. SDK is one of the world's largest providers of graphite electrodes, with global sales of $248 million in 2016, including approximately $85 million in U.S. revenues from graphite electrodes sales.

SGL Carbon is a German-based corporation headquartered in Wiesbaden, Germany. SGL Carbon is a leading manufacturer of carbon-based products, ranging from carbon and graphite products to carbon fibers and composites, with operations in 34 countries. SGL Carbon is a leading global producer of graphite electrodes, with worldwide graphite electrode revenues of approximately $326.6 million in 2016, including approximately $58.6 million from sales of graphite electrodes in the United States.

SGL US, an indirect, wholly-owned subsidiary of SGL Carbon, is a Delaware limited liability company headquartered in Charlotte, North Carolina. SGL US is the sole shareholder of SGL GE Carbon LLC, which owns the assets of SGL US's operations in the United States, including SGL Carbon's Hickman and Ozark graphite electrode plants.

Pursuant to an agreement dated October 20, 2016, SDK intends to acquire SGL Carbon's global graphite electrode operations, including SGL US, for approximately $264.5 million. The proposed acquisition, as initially agreed to by defendants, would lessen competition substantially in the manufacture and sale of large UHP graphite electrodes to U.S. EAF customers. This acquisition is the subject of the Complaint and proposed Final Judgment filed today by the United States.

B. Graphite Electrode Industry Overview

Graphite electrodes are used to conduct electricity to generate sufficient heat to melt scrap metal in EAFs or to refine steel in ladle metallurgical furnaces. In a typical EAF operation, a series of electrodes are attached to a steel arm with connecting pins to form columns that are suspended over a large bucket of scrap steel. Large amounts of electricity are sent through the electrodes and the resulting heat melts the scrap into liquid. Graphite electrodes are consumed as they are used and continually need to be replaced with fresh electrodes. Electrodes are designed in a range of sizes to fit the characteristics of each furnace and are suited to the electrical properties of a specific EAF.

Graphite electrodes are subdivided into three grades based on their level of current-carrying capacity: low power, high power, and UHP. EAFs typically utilize UHP graphite electrodes that are between 18 and 32 inches in diameter and are characterized by an ability to withstand high currents. Large UHP graphite electrodes are the most sophisticated products used for the most demanding steelmaking applications and, as a result, are produced by a smaller number of manufacturers than low power or high power graphite electrodes.

EAF steel mills, which are a part of a vital U.S. industry involved in the manufacture and sale of steel and steel products used for many applications, represent an average of 45 percent of all domestic steel production. Over the past three years, U.S. EAF steel mills collectively averaged $262 million in large UHP graphite electrode purchases, and that number is expected to increase in the coming years due to a recent increase in steel demand and a decrease in the volume of steel imported into the United States.

Large UHP graphite electrodes are purchased through an annual bid process where manufacturers are invited to bid for an entire year or partial year's supply. EAF customers evaluate electrode suppliers based on the reliability and efficiency of their electrodes, the timeliness of electrode delivery, the supplier's commercial business practices, and ongoing technical service capabilities. Many U.S. customers prefer suppliers that have a domestic manufacturing capability and a robust local service operation. Given the high costs of temporarily shutting down a furnace to remove broken electrode pieces, EAF customers typically avoid suppliers that develop a reputation for graphite electrode breakages even if the supplier offers electrodes at steep discounts. Electrodes usually are ordered in advance and are expected to be shipped in a timely manner by truck to each steel mill, where they are stored until used, although some customers have consignment arrangements with manufacturers that keep inventories of graphite electrodes in the manufacturers' own warehouses.

C. Relevant Markets Affected by the Proposed Acquisition

As alleged in the Complaint, there are no functional substitutes for large UHP graphite electrodes for U.S. EAF steel mills. Without large UHP graphite electrodes, EAF steel mills cannot be operated and must be idled. Moreover, customers cannot substitute a different size graphite electrode for use in an EAF because the electrode size and current-carrying capacity is tailored to the specific facility. For these reasons, the Complaint alleges that it is likely that every individual size of large UHP graphite electrodes is a separate relevant product market. Because market participation by manufacturers is similar, and potential anticompetitive effects likely are similar across the entire range of sizes, all large UHP graphite electrodes can be grouped together in a single market for purposes of analysis. The Complaint alleges that a

hypothetical profit-maximizing monopolist of large UHP graphite electrodes likely would impose a small but significant non-transitory increase in price ("SSNIP") that would not be defeated by substitution to a different kind of electrode or any other product, or result in a reduction in purchases of such electrodes in volumes sufficient to make such a price increase unprofitable. Accordingly, the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills is a line of commerce and relevant market within the meaning of Section 7 of the Clayton Act.

As alleged in the Complaint, the United States is the relevant geographic market for the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills. In the United States, individual EAF customers solicit bids from producers of large UHP graphite electrodes, and these producers develop individualized bids based on each customer's Request for Proposal. The bidding process enables large UHP graphite electrode producers to engage in "price discrimination," *i.e.*, to charge different prices to different EAF customers. A small but significant increase in the prices of large UHP graphite electrodes can therefore be targeted to customers in the United States without causing a sufficient number of these customers to use arbitrage to defeat the price increase, such as by buying electrodes from customers outside the country so as to make such a price increase unprofitable. Since the availability of domestic technical services is important to U.S. customers, these customers would not buy electrodes from customers outside the United States. Accordingly, the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

D. Anticompetitive Effects

According to the Complaint, the proposed acquisition would substantially increase concentration in the relevant market. SDK and SGL Carbon have market shares of approximately 35 and 21 percent, respectively, in the relevant market; a third major seller of large UHP graphite electrodes to U.S. EAF customers has a market share of 22 percent. The remaining competitors, which include firms from Japan, India, Russia, and China, have a combined 22 percent share. Under the Herfindahl-Hirschman Index ("HHI"), a widely-used measure of market concentration utilized in the Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission (the "Horizontal Merger Guidelines"), the pre-merger HHI is 2230 and the post-merger HHI is 3693, representing an increase in the HHI of 1,463. As discussed in the Horizontal Merger Guidelines and alleged in the Complaint, these HHIs indicate that the proposed acquisition will result in a highly concentrated market and is presumed likely to enhance market power.

In addition to increasing concentration, the Complaint alleges that SDK's acquisition of SGL Carbon's global graphite electrode business would eliminate head-to-head competition between SDK and SGL Carbon in the relevant market. Both SDK and SGL Carbon have a strong reputation for high-quality graphite electrodes, a robust local manufacturing presence, an established delivery infrastructure, and superior technical service capabilities and support, including proprietary software specifically designed to assist steel mills in the installation and efficient maintenance of electrodes within their EAFs. As alleged in the Complaint, SDK and SGL Carbon compete directly on price, quality, delivery, and technical service, and the competition between them has directly benefitted U.S. EAF customers.

The Complaint further alleges that the acquisition is likely to lead to higher prices because there is only one other significant competitor with a comparable reputation for product quality, shipment and delivery logistics, and local technical service, and therefore, for most customers, the transaction will reduce the number of significant bidders from three to two. According to the Complaint, the remaining market participants, each of which has participated in the U.S. market with only limited sales, are not in a position to constrain a unilateral exercise of market power by SDK after the acquisition. The most significant of these firms, based in Japan, has a long history of sales of large UHP graphite electrodes in the United States, a good reputation for quality, and an enduring small presence in the market. However, this firm and the other remaining firms that have made limited sales to U.S. EAF steel mills are each disadvantaged by a lack of domestic manufacturing capability, limited delivery and technical service infrastructure, and high costs. As a result, none of these firms will be able to replace the competition lost as a result of SDK's acquisition of SGL Carbon's global graphite electrode business.

E. Barriers to Entry

As alleged in the Complaint, entry of additional competitors into the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills is unlikely to be timely, likely, or sufficient to prevent the harm to competition caused by the elimination of SGL Carbon as an independent supplier. New entrants face significant entry barriers in terms of cost and time, including the substantial time and expense required to construct a manufacturing facility, the need to build technical capabilities sufficient to meet customer expectations, the requirement that a new supplier demonstrate competence to U.S. customers through a lengthy qualification and

trialing period, and the need to create a strong local infrastructure to ensure reliable and prompt delivery and technical service.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing an independent and economically viable competitor in the manufacture and sale of large UHP graphite electrodes in the relevant market.

Pursuant to the proposed Final Judgment, defendants must divest SGL Carbon's entire U.S. graphite electrodes business, which is defined in Paragraph II(F) to include SGL Carbon's manufacturing facilities located in Ozark, Arkansas and Hickman, Kentucky and all tangible and intangible assets used in connection with SGL Carbon's U.S. graphite electrodes business. Among the assets to be divested is SGL Carbon's CEDIS® EAF performance monitoring system, proprietary software specifically designed to assist steel mills in the installation and efficient maintenance of electrodes within their EAFs.

Paragraph IV(A) of the proposed Final Judgment provides that defendants must divest the Divestiture Assets to Tokai Carbon Co., Ltd., or to an alternative acquirer acceptable to the United States within 45 days of the Court's signing of the Hold Separate. The Divestiture 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 Tokai or an alternate purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with Tokai or any other prospective purchaser.

The proposed Final Judgment contains several provisions designed to facilitate the

Acquirer's immediate use of the Divestiture Assets. Paragraph IV(J) provides the Acquirer with the option to enter into a transition services agreement with SGL Carbon to obtain back office and information technology services and support for the Divestiture Assets for a period of up to one year. The United States, in its sole discretion, may approve one or more extensions of this agreement for a total of up to an additional 12 months. Paragraph IV(K) provides the Acquirer with the option to enter into a supply contract with SDK for connecting pins sufficient to meet all or part of the Acquirer's needs for a period of up to three years. Connecting pins are a component used to connect graphite electrodes in an EAF, and the inclusion of a supply option in the proposed Final Judgment will enable Tokai or an alternate acquirer to devote additional capacity to the manufacture of large UHP graphite electrodes if it so chooses. The proposed Final Judgment provides that the United States, in its sole discretion, may approve one or more extensions of this supply contract for a total of up to an additional 12 months.

The proposed Final Judgment also contains provisions intended to facilitate the Acquirer's efforts to hire the employees involved in SGL Carbon's U.S. graphite electrode business. Paragraph IV(D) of the proposed Final Judgment requires defendants to provide the Acquirer with organization charts and information relating to these employees and make them available for interviews, and provides that defendants will not interfere with any negotiations by the Acquirer to hire them. In addition, Paragraph IV(E) provides that for employees who elect employment with the Acquirer, defendants, subject to exceptions, shall waive all noncompete and nondisclosure agreements, vest all unvested pension and other equity rights, and provide all benefits to which the employees would generally be provided if transferred to a buyer of an ongoing business. The paragraph further provides, that for a period of 12 months from the filing

of the Complaint, defendants may not solicit to hire, or hire any such person who was hired by the Acquirer, unless such individual is terminated or laid off by the Acquirer or the Acquirer agrees in writing that defendants may solicit or hire that individual.

In the event that defendants do not accomplish the divestiture within the period provided in the proposed Final Judgment, Paragraph V(A) 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 defendants 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 divestiture is accomplished. After its appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth its efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States 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.

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 Antitrust Division's internet website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W.
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 SDK's acquisition of SGL Carbon's global graphite electrode business. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the manufacture and sale of large UHP graphite electrodes sold to U.S. EAF steel mills. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

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

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the

> court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. US Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy

[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).

secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also US Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies

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

because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also US Airways*, 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements) (citing *Microsoft*, 56 F.3d at 1461); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also US Airways*, 38 F. Supp. 3d at 75 (noting that the

court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also US Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather,

the procedure for the public interest determination is left to the discretion of the Court, with the recognition that the Court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *US Airways*, 38 F. Supp. 3d at 76.

VIII. DETERMINATIVE DOCUMENTS

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

Dated: September 27, 2017

Respectfully submitted,

/s/

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