UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALASKA AIR GROUP, INC.

and

VIRGIN AMERICA 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 April 4, 2016, Alaska Air Group, Inc. ("Alaska"), the sixth-largest domestic airline, agreed to acquire Virgin America, Inc. ("Virgin"), the ninth-largest domestic airline, for $2.6 billion in cash and the assumption of $1.4 billion in liabilities.

The airline industry in the United States is dominated by four large airlines – American Airlines, Delta Air Lines, United Airlines, and Southwest Airlines – that collectively account for over 80% of domestic air travel each year. In this highly-concentrated industry, the smaller

airlines play a critical competitive role. In order to compete with the four largest airlines, these smaller airlines often must offer consumers lower fares, additional flight options, and innovative services.

Although Alaska would become only the fifth-largest domestic airline as a result of the proposed merger, its extensive codeshare agreement with the largest domestic airline, American, threatens to blunt important competition supplied by Virgin today. A codeshare agreement is a commercial relationship that allows each airline to market tickets for certain flights on the other's network. Although the codeshare agreement effectively extends Alaska's geographic reach – potentially strengthening Alaska's ability to compete against other carriers like Delta and United – it also creates an incentive for Alaska to cooperate rather than compete with American.

Alaska's acquisition of Virgin would significantly increase Alaska's network overlaps with American, and would thus dramatically increase the circumstances where the incentives created by the codeshare threaten to soften head-to-head competition. Roughly two-thirds of Virgin's network overlaps with American's network, and Virgin has aggressively competed with American on many of these overlap routes in ways that have forced American to respond with lower fares and better service. Unless the codeshare is substantially modified, the proposed merger would diminish the important competition Virgin has provided on these routes.

On December 6, 2016, the United States filed a civil antitrust Complaint seeking to enjoin the proposed acquisition. The Complaint alleges that Defendants' proposed merger would likely lessen competition substantially for scheduled air passenger service in numerous markets throughout the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Specifically, the Complaint alleges that following the merger, Alaska, as a result of its extensive

codesharing relationship with American, would likely exit or compete less aggressively on routes where Virgin and American compete today, and would be less likely to enter new routes in competition with American in the future than Virgin would be standing alone.

At the same time the Complaint was filed, the United States filed a Stipulation and Order and proposed Final Judgment, which are designed to eliminate the likely anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Alaska would be obligated to substantially reduce the scope of its codeshare agreement with American in order to enhance Alaska's incentive to compete with American after the merger.

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

Defendant Alaska Air Group, Inc. is a Delaware corporation headquartered in Seattle, Washington. Last year, Alaska flew over 31 million passengers to approximately 112 locations worldwide, taking in more than $5.5 billion in revenue. Alaska operates hubs in Seattle, Washington; Portland, Oregon; and Anchorage, Alaska, and has the largest share of traffic at each of these hubs.

Defendant Virgin America Inc. is a Delaware corporation headquartered in Burlingame, California. Last year, Virgin America flew over 7 million passengers to approximately 24 locations worldwide, taking in more than $1.5 billion in revenue. Virgin America is one of

several entities bearing the "Virgin" name pursuant to a licensing agreement with the Virgin Group, which owns approximately 18% of Virgin America's outstanding voting common stock.

Virgin America was founded in 2004. Unlike Alaska, Virgin does not have a hub-and-spoke network. Although Virgin has "focus cities" – Los Angeles, San Francisco, and Dallas – from which it provides service to many destinations, Virgin does not use these focus cities as points for transferring large volumes of connecting traffic. Instead, the bulk of Virgin's passengers fly on nonstop flights in markets where Virgin is typically not the dominant carrier.

On April 1, 2016, Alaska and Virgin agreed to merge for $2.6 billion in cash and the assumption of $1.4 billion in liabilities.

B. Alaska's Codeshare Agreement with American

Although codeshare agreements can take various forms, they generally allow for flights operated by one airline to be marketed and sold by another airline under the marketing airline's own brand. A codeshare agreement can extend an airline's network by enabling passengers to seamlessly book a connecting itinerary consisting of flights operated by different airlines. For example, a passenger seeking to fly from Walla Walla, Washington to Charlotte, North Carolina could purchase tickets for the entire trip through Alaska, using an Alaska flight from Walla Walla to Seattle that connects to an American flight from Seattle to Charlotte. This arrangement allows Alaska to rely on the codeshare agreement with American to offer service to Charlotte, instead of having to launch its own competing service between Seattle and Charlotte in order to serve the customer.

The codesharing partnership between Alaska and American began in 1999. The initial scope of the parties' codeshare agreement was very limited: it allowed Alaska to market

American's flights on only 88 routes where Alaska did not otherwise provide service, and did not permit American to market any Alaska flights. Since 1999, however, Alaska and American have repeatedly expanded their codeshare arrangement, enabling American to also market certain Alaska flights and steadily increasing the number of flights each partner may sell on behalf of the other. American and Alaska most recently expanded the codeshare agreement in April 2016. As a result of the most recent expansion, Alaska is able to market American flights on over 250 routes, and American is able to market Alaska flights on about 80 routes. The April 2016 expansion also enabled American and Alaska to sell one another's flights on certain overlap routes where both companies offer competing nonstop service.

C. Virgin's Aggressive Competition with American

Virgin has served as one of American's fiercest competitors. Virgin competes directly with American on twenty nonstop routes, which constitute approximately two-thirds of Virgin's entire network. These twenty routes represent about $8 billion in commerce annually.

Virgin and American vigorously compete on numerous nonstop routes in part because Virgin controls critical assets in cities where American maintains a hub. These assets include gates and/or takeoff and landing rights at airports including Washington Reagan National Airport, Dallas Love Field, and Los Angeles International Airport. Virgin's presence in these markets provides a critical alternative for consumers and helps keep American's prices lower than they otherwise would be.

Virgin's ownership of many of these assets and aggressive competition with American is no coincidence – consumers were promised the benefits of expanded Virgin service to counteract the anticompetitive effects threatened by the 2013 merger between American and US Airways.

To resolve the United States's challenge to that merger, American agreed to divest a host of critical assets at key airports where the two firms had a significant presence to low-cost competitors, including Virgin. *See* Final Judgment, *United States v. US Airways Group, Inc.*, Case No. 1:13-cv-01236 (CKK) (Dkt. No. 170) (D.D.C. Apr. 25, 2014). As contemplated by the settlement, Virgin has used the assets to compete directly with American. For instance, Virgin has utilized the two airport gates it acquired at Dallas Love Field to launch aggressive new service against American, forcing American to respond with lower prices. Virgin has estimated that its entry at Love Field caused American to lower certain fares on flights out of Dallas by more than 50%.

D. The Transaction's Likely Anticompetitive Effects

1. <u>Relevant Markets</u>

As alleged in the Complaint, scheduled air passenger service enables consumers to travel quickly and efficiently between various cities in the United States. Air travel offers passengers significant time savings and convenience over other forms of travel. For example, a flight from Washington, D.C. to Detroit takes just over an hour of flight time. Driving between the two cities takes at least eight hours. A train between the two cities takes more than fifteen hours.

Due to time savings and convenience afforded by scheduled air passenger service, few passengers would substitute other modes of transportation (car, bus, or train) for scheduled air passenger service in response to a small but significant industry-wide fare increase. Another way to say this, as described in the Department of Justice and Federal Trade Commission's *Horizontal Merger Guidelines* (2010), and endorsed by courts in this Circuit, is that a hypothetical monopolist of all scheduled air passenger service could profitably increase its prices

by at least a small but significant and non-transitory amount. The Complaint alleges, therefore, that scheduled air passenger service constitutes a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

Moreover, most passengers book flights with their origins and destinations predetermined. Few passengers who wish to fly from one city to another would switch to flights between other cities in response to a small but significant and non-transitory fare increase. A hypothetical monopolist of all scheduled air passenger service on any particular route between two destinations likely would be able to profitably increase its prices by at least a small but significant and non-transitory amount. Accordingly, scheduled air passenger service between each origin and destination pair constitutes a line of commerce and section of the country under Section 7 of the Clayton Act.

The Complaint alleges that scheduled air passenger service on those twenty routes on which Virgin and American compete today, and the routes on which they would have likely competed in the future, are relevant markets within the meaning of Section 7 of the Clayton Act.

2. <u>Competitive Effects</u>

The codeshare agreement between Alaska and American creates an incentive for Alaska to cooperate rather than compete with American. Alaska's acquisition of Virgin's network would extend this incentive to the extensive overlaps between Virgin and American, and will therefore likely reduce the vigorous competition that Virgin is presently providing against American. Specifically, the Complaint alleges that the merger is likely to substantially lessen competition on each of the twenty nonstop routes on which Virgin and American currently compete because Alaska will have an incentive to avoid aggressive head-to-head competition in

order to preserve its codeshare relationship with American. Once Alaska has control of Virgin, it is likely to reduce capacity, decrease service quality, and/or raise prices on these routes. In some cases, Alaska may completely stop serving the routes with its own flights, and instead simply market American's flights between the destinations, thereby eliminating an independent and meaningful competitive choice for millions of consumers. The Complaint further alleges that Alaska's acquisition of Virgin will likely lessen competition because Alaska is likely to enter fewer new routes in competition with American than Virgin would if Virgin remained a standalone airline.

3. Entry and Expansion

As alleged in the Complaint, new entry, or expansion by existing competitors, is unlikely to prevent or remedy the merger's likely anticompetitive effects. New entrants into a particular market face significant barriers to success, including difficulty in obtaining access to slots and gate facilities; the effects of corporate discount programs offered by dominant incumbents; loyalty to existing frequent flyer programs; an unknown brand; and the risk of aggressive responses to new entry by the dominant incumbent carrier. In addition, entry is highly unlikely on routes where the origin or destination airport is another airline's hub, because the new entrant would face substantial challenges attracting sufficient local passengers to support service.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

As alleged in the Complaint, Alaska's acquisition of Virgin threatens to substantially lessen competition on the routes where Virgin and American compete today, and would likely compete in the future, because Alaska's existing codeshare agreement with American creates significant incentives for Alaska to reduce – or eliminate – its competition with American on

these routes.

The codeshare agreement incentivizes Alaska to avoid competition with American in two ways. First, the overall scale of the codeshare agreement and Alaska's dependence on it creates an incentive for Alaska to compete less aggressively with American in order to avoid upsetting American and jeopardizing the codeshare partnership. Second, the opportunity to market American's flights on particular routes creates an incentive for Alaska to rely on the codeshare to provide service to its customers rather than undertaking the risk and expense of initiating its own service. Alaska's acquisition of Virgin would significantly increase Alaska's network overlaps with American, and would thus dramatically increase the circumstances where these incentives threaten to soften head-to-head competition.

As explained in more detail below, the relief set forth in the "Prohibited Conduct" section of the proposed Final Judgment would substantially reduce each of these incentives. First, through prohibitions on codesharing in a variety of circumstances, it would substantially reduce the overall size and scope of the codeshare partnership between Alaska and American, which, in turn, would decrease Alaska's reliance on the codeshare and enhance Alaska's incentive to compete on those routes where Virgin and American compete today. Second, it would prohibit Alaska from substituting to codeshare service on routes that Virgin already serves or would otherwise be likely to serve.

At the same time, because the codeshare between Alaska and American may benefit consumers in some circumstances by enabling Alaska and American to offer their customers service that neither airline would provide on its own, the proposed Final Judgment does not categorically prohibit all codesharing. Instead, the proposed Final Judgment focuses on reducing

codesharing where it is likely to blunt Alaska's incentives to compete with American after the merger.

In addition, the proposed Final Judgment provides protections for the assets that Virgin acquired from American as part of the settlement of the lawsuit challenging the merger of American and US Airways to ensure the continued use of these assets in competition with American. Finally, the proposed Final Judgment includes notification, monitoring, and enforcement provisions so that Defendants comply with all of their obligations.

A. By Prohibiting Codesharing in Certain Circumstances, the Proposed Final Judgment Incentivizes the Merged Firm to Compete Aggressively

To reduce Alaska's dependence on the codeshare agreement with American, Section IV.A of the proposed Final Judgment requires Alaska to cease codesharing in four different scenarios no later than sixty days after the closing of the transaction. Together, the restrictions on codesharing will reduce by approximately 50% the volume of Alaska passengers flying on American flights.

First, Section IV.A.1 of the proposed Final Judgment prohibits Alaska and American from codesharing on routes where Virgin and American both offer competing nonstop service today, irrespective of network changes that either carrier makes in the future. By eliminating Alaska's ability to replace Virgin's service with codeshare flights on American, this provision will ensure that if Alaska wishes to offer its customers service on these routes, it will need to continue to compete head-to-head with American as Virgin does today.

Second, Section IV.A.2 of the proposed Final Judgment further reduces the overall scope of the codeshare relationship by prohibiting codesharing on all routes on which Alaska and American both offer competing nonstop service. Prohibiting codesharing on the

Virgin/American overlap routes alone is insufficient to prevent harm from the merger because Alaska would retain the broader incentive to avoid endangering the partnership and could still choose to reduce or eliminate service on the routes where Virgin and American compete today. To adequately address this broader incentive, the proposed Final Judgment also prohibits codesharing on Alaska/American overlap routes because, as previously recognized by both the U.S. Department of Transportation and the Department of Justice, such codesharing can diminish competition and facilitate collusion by, for example, creating opportunities for the airlines to communicate about fares and closely coordinate their service offerings. Such codesharing is also especially unlikely to benefit consumers because it does not extend the reach of either carrier's network.

Third, in order to ensure that Alaska uses the Virgin assets to grow in ways that continue to enhance competition following the merger, the proposed Final Judgment prohibits Alaska from marketing American flights on routes that it is most likely to serve itself and prohibits Alaska from permitting American to market Alaska flights on routes that American is most likely to serve itself. Airlines are most likely to enter routes that emanate from one of their hubs or focus cities, and thus, Section IV.A.3 of the proposed Final Judgment prevents both Alaska and American from marketing each other's flights on routes that touch their respective hubs or focus cities, defined as "Key Alaska Airports" and "Key American Airports" in Definitions II.L and II.M of the proposed Final Judgment, respectively.

Finally, Los Angeles International Airport ("LAX"), which is not included as a "Key Alaska Airport" or "Key American Airport," is a special case because both carriers will have significant operations at this airport post-merger. If Section IV.A.3 applied to LAX, it would

eliminate all codesharing at this airport, including potentially beneficial codesharing on routes the two airlines would be unlikely to serve independently. Section IV.A.4 of the proposed Final Judgment therefore prohibits either carrier from codesharing on routes between LAX and either an American or Alaska hub or focus city, as the airlines are more likely to serve these routes on a standalone basis, but allows for codesharing on routes between LAX and other cities.

B. The Proposed Final Judgment Provides Additional Protections for Assets American Divested to Virgin as Part of the American-US Airways Merger Settlement

As alleged in the Complaint, Virgin aggressively competes with American on several routes using assets that American divested to Virgin to settle the United States's challenge to American's 2013 merger with US Airways. These assets, which include gates and takeoff and landing rights (known as "slots"), are located at constrained airports in several of American's strongholds. Although the proposed Final Judgment strongly incentivizes Alaska to continue competing with American on routes that Virgin serves today through limitations on codesharing, Alaska may decide for independent reasons that these assets do not fit into its business or network plans and seek to sell or lease them to another carrier. Section IV.B of the proposed Final Judgment prohibits Alaska from allowing American to acquire or use the assets, which would circumvent the purpose of the American/US Airways settlement. In addition, Section IV.B of the proposed Final Judgment requires Alaska to obtain the United States's approval of a buyer or lessee if the combined company chooses to sell or lease these assets to a carrier other than American. This provision allows the United States to ensure that American does not have undue influence over the disposition of these assets. Section IV.C of the proposed Final Judgment permits Alaska to allow another airline to use the assets in limited

circumstances that are routine, short-term, or necessary for operational or safety reasons and thus highly unlikely to harm competition – for example, when an airport orders Alaska to permit another airline to use an asset to prevent a potentially dangerous situation. Section IV.C also permits Alaska to make one-for-one trades of slots or gates at the same airport, which is also highly unlikely to harm competition.

C. The Proposed Final Judgment Includes Robust Notification, Monitoring, and Enforcement Provisions

The proposed Final Judgment includes several provisions designed to allow the United States to assess the implementation and effectiveness of the proposed Final Judgment and ensure Alaska's compliance with its requirements. To this end, Section V.A requires Defendants to inform pertinent personnel of the Defendants' obligations under the proposed Final Judgment. Section V.B requires Defendants to comply with Section IV.A.2 no later than sixty days after Alaska or American enters a new route that creates a new competitive overlap. Section V.D of the proposed Final Judgment imposes annual reporting requirements regarding the scope of the codeshare relationship, including the identity of the routes subject to the codeshare, the number of passengers that have purchased tickets pursuant to the codeshare, and the amount of revenue Alaska has received from the codeshare. Section V.E also requires Alaska to notify the United States in advance if Alaska seeks to modify its contractual relationship with American as a means of providing the United States an opportunity to take action if the modification would threaten competition. In addition, Section VII of the proposed Final Judgment expressly reserves the right of the United States to take enforcement action to enjoin the codeshare agreement should changes in the competitive landscape or the networks or incentives of these airlines warrant such action.

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 the 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:

Kathleen O'Neill
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and that 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 sought preliminary and permanent injunctions against Alaska's acquisition of Virgin. The United States is satisfied, however, that the remedies described in the proposed Final Judgment will effectively address the transaction's likely anticompetitive effects and preserve competition for the provision of scheduled air passenger service in the relevant markets identified by the United States. 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 APPA requires that proposed consent judgments in antitrust cases brought by the

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

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

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

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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a

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[1] 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).

[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.

proposed settlement is in the public interest, a 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*, 8 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 government's 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

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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'").

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 (concluding that "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." 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 government antitrust enforcement actions, 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). This language codified what Congress intended when it enacted the Tunney Act in 1974, as, Senator Tunney, the author of this legislation, unambiguously explained: "The 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. 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.[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.

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

Dated: December 6, 2016

Respectfully submitted,

/s/

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