UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA and the STATE OF NORTH CAROLINA, Plaintiffs, v. THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, d/b/a CAROLINAS HEALTHCARE SYSTEM, Defendant.	Case No. 3:16-cv-00311-RJC-DCK

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 9, 2016, the United States and the State of North Carolina filed a civil antitrust lawsuit against The Charlotte-Mecklenburg Hospital Authority, formerly known as Carolinas HealthCare System and now doing business as Atrium Health ("Atrium"), to enjoin it from using steering restrictions in its agreements with health insurers in the Charlotte, North Carolina area. The Complaint alleges that Atrium's steering restrictions are anticompetitive and violate Section 1 of the Sherman Act, 15 U.S.C. § 1, because the restrictions have detrimental effects on competition among healthcare providers in the Charlotte area.

Healthcare providers charge health insurers a wide variety of prices for the same service, but insurers have generally not passed these price differences on to consumers because most commercial health plans offer coverage that is the same no matter which provider a patient chooses. This weakens the connection between price and quantity that is the essence of competition because it allows a provider to charge a high price without losing business to rivals. To control escalating healthcare costs, insurers have developed health plans and plan features that "steer" members by providing financial incentives that enable members to share savings by choosing more cost-effective providers, which stimulates competition between providers. To enable patients to choose more cost-effective providers, insurers also provide members with transparency about the prices, quality, patient experience, or anticipated out-of-pocket costs at different healthcare providers.

Atrium is the largest health system in the Charlotte area. For an insurer to maintain a competitive health insurance business in the Charlotte area, it needs to have a contractual relationship with Atrium that gives employers and consumers the option of purchasing insurance that covers care there.

Atrium has used its dominant position to demand contractual restrictions on steering and transparency that interfere with the competitive process. Insurers that contract with Atrium are prohibited from providing financial incentives or information that would encourage consumers to obtain healthcare services from competing providers. These contract provisions significantly reduce the number of additional patients that Atrium's competitors can hope to attract by agreeing to lower prices or otherwise providing greater value. These restrictions have been in Atrium's contracts for years, and remain to this day.

Atrium's steering restrictions reduce the competitive incentive that Atrium's competitors would otherwise have to lower prices in order to win more business. This interference in the competitive process has reduced competition between Atrium and other healthcare providers in the Charlotte area. In addition, because many of the most innovative healthcare plans in the country today are based on steering to more efficient providers, Atrium's steering restrictions have also curbed the introduction of such plans, and reduced choices for Charlotte-area consumers.

Plaintiffs and Atrium have entered into a Stipulation and proposed Final Judgment. The proposed Final Judgment enjoins Atrium from (1) enforcing provisions in its current insurer contracts that restrict steering and transparency; (2) seeking or obtaining contract provisions with an insurer that would prohibit, prevent, or penalize the insurer from using popular steering methods or providing transparency; and (3) penalizing, or threatening to penalize, any insurer for its use of these popular steering methods and transparency. The proposed Final Judgment is described in detail beginning with Section III below. In the Stipulation, Atrium agrees to abide by the injunctive provisions of the proposed Final Judgment while awaiting its entry by the Court.

The United States (unless it has withdrawn its consent), the State of North Carolina, and Atrium have stipulated that the Court may enter the proposed Final Judgment at any time 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 ALLEGED VIOLATION

A. Atrium and other Charlotte-Area Hospitals

Atrium is the largest healthcare system in North Carolina and one of the largest not-for-profit healthcare systems in the United States. It is the dominant hospital system in the Charlotte area. Its flagship facility is Carolinas Medical Center, a general acute-care hospital located near downtown Charlotte and the largest hospital in North Carolina. Atrium also operates nine additional general acute-care hospitals in the Charlotte area. Atrium owns, manages, or has strategic affiliations with over 40 hospitals in the Carolinas, and sells healthcare services throughout the Carolinas, including in freestanding emergency departments, urgent care centers, physician practices, outpatient surgery centers, imaging centers, nursing homes, and laboratories. In 2017, Atrium's owned, managed, and affiliated hospitals and other healthcare providers earned net operating revenue of close to $10 billion.

In addition to Atrium's ten Charlotte-area hospitals, there are eleven other general acute-care hospitals in the Charlotte area. The next largest hospital system, Novant Health ("Novant"), owns five general acute-care hospitals located in that area and had operating revenue of approximately $4.6 billion in 2017, making Novant less than half the size of Atrium. Novant's largest hospital in the Charlotte area is Novant Presbyterian Medical Center, which is the second-largest hospital in Charlotte. After Novant, the next-largest hospital in the Charlotte area is CaroMont Regional Medical Center. CaroMont Regional Medical Center is a 370-bed hospital in Gastonia, North Carolina, and is owned and operated by CaroMont Health, an independent community hospital system. In 2016, CaroMont Health had net operating revenue of approximately $529 million. The remaining hospitals in the Charlotte area are operated by Community Health Systems, Inc., Tenet Healthcare Corporation, and Iredell Health System.

B. The Relevant Market

The Complaint alleges that Atrium has market power in a relevant market for the sale of general acute care inpatient hospital services sold to commercial health insurers ("GAC inpatient hospital services") in the Charlotte area. GAC inpatient hospital services consist of a broad group of medical and surgical diagnostic and treatment services that includes a patient's overnight stay in the hospital. Although individual GAC inpatient hospital services are not substitutes for each other (*e.g.*, a patient who needs heart surgery cannot elect instead to have her knee replaced), GAC inpatient hospital services can be aggregated for analytical convenience because the competitive conditions for each of the individual services is largely the same.

The relevant geographic market for the sale of GAC inpatient hospital services is no larger than the Charlotte area.[1] Insurers contract to purchase GAC inpatient hospital services from hospitals within the geographic area where their members are likely to seek medical care because consumers prefer to seek medical care near the places where they work and live. As a result, insurers doing business in the Charlotte area must include in their provider networks hospitals located in the Charlotte area. Charlotte-area consumers have little or no willingness to enroll in an insurance plan that provides no network access to hospitals located in the Charlotte area. For these reasons, it is not a viable alternative for insurers that sell health plans to consumers in the Charlotte area to contract for GAC inpatient hospital services from providers outside the Charlotte area.

[1] As used in this case, the Charlotte area means the Charlotte Combined Statistical Area, as defined by the U.S. Office of Management and Budget, which consists of Cabarrus, Cleveland, Gaston, Iredell, Lincoln, Mecklenburg, Rowan, Stanly, and Union counties in North Carolina, and Chester, Lancaster, and York counties in South Carolina.

C. Anticompetitive Effects of the Steering Restrictions

1. Atrium is the dominant hospital system in the Charlotte area

Atrium is the dominant seller of GAC inpatient hospital services in the Charlotte area. Atrium has market power in this market. The market for GAC inpatient hospital services in the Charlotte area is highly concentrated, and Atrium's market share is more than 55 percent. By comparison, Atrium's largest rival, Novant Health, has approximately 17 percent of the licensed hospital beds in the Charlotte area. Without an attractive broad-network plan that includes Atrium, insurers would not be viable in the Charlotte area because they would not be able to attract the business of employers. Atrium's size and breadth give it significant market power because it can decline to participate in an insurer's network unless it obtains high prices and advantageous contract terms.

As a result of its market power, Atrium has been able to secure from insurers high prices relative to other hospital systems in the Charlotte area and relative to other advanced medical centers in North Carolina. These higher prices are not explained by any measure of relative high-quality. Because of high provider prices, patients' out-of-pocket healthcare costs in the Charlotte area are among the highest in North Carolina.

2. Steering is part of the competitive process

Employers in Charlotte and elsewhere around the country have approached health insurers about ways to address rising healthcare costs. One approach of increasing interest is the introduction of steering mechanisms into the health plans that employers offer. Steering can be one way of fostering competition among hospitals.

Steering can be accomplished in several ways. Popular types of steering in healthcare are narrow networks and tiered networks, reference-based pricing, and centers of excellence.[2] Transparency into hospitals' or physicians' relative prices and quality is also important to help effectuate steering.

a. Narrow networks and tiered networks

In addition to offering the broad-network plans that are most popular with employers, insurers in Charlotte want to introduce narrow network and tiered insurance options. Narrow networks are formed by using cost and/or quality criteria to select and contract with a subset of healthcare providers in an area. For example, a health plan sold in the Charlotte area that consists of hospitals and physicians only at Novant, CaroMont, and Community Health Systems would be a narrow-network plan. Because using an in-network provider costs a member less than using an out-of-network provider, a consumer that enrolls in a narrow-network plan is choosing to be steered to participating providers. The likely increase in patient volume realized by providers in the narrow network can help the insurer to negotiate lower prices, and then to pass those savings along in the form of lower premiums.

Tiered networks are typically created by designating network providers into different levels (or tiers) based mostly on quality and price. Tiered networks typically have two or more tiers of in-network providers: a preferred tier and one or more secondary in-network tiers. There may also be providers that remain out-of-network. In tiered networks, members are free to use any of the providers, but receive the most substantial benefits when they choose a provider in the preferred tier. This tier typically includes the providers with the best mix of quality and price.

[2] The proposed Final Judgment defines narrow networks, tiered networks, and health plans with reference-based pricing or centers of excellence as "Steered Plans."

Tiered and narrow network plans are increasingly popular with employers and consumers. For example, in 2017, 19 percent of large employers that offered healthcare coverage provided a narrow-network plan to their employees and 31 percent offered a tiered plan.[3] A large majority of the plans offered on the individual healthcare exchanges are narrow network plans. Narrow and tiered networks can effectively reduce healthcare costs and make insurance more affordable.

b. Reference-based pricing and centers of excellence

Reference-based pricing and centers of excellence are forms of steering that can be used as a feature of a health benefit plan. For reference-based pricing, the insurer establishes a market-wide standard, or "reference," price for a service. The reference price can be established by drawing from average local prices or from other sources such as the reimbursement amounts established by Medicare rules. The benefit plan covers the member's expenses up to the "reference price." Reference-based pricing steers members towards the providers that have prices at or below the reference price. This gives higher-priced providers an incentive to reduce their prices to be closer to the reference price.[4]

A center of excellence is a designation that an insurer applies to a provider for its quality and/or cost efficiency in delivering a particular healthcare service. The insurer often provides a financial incentive to consumers to select the center of excellence. For example, an insurer may designate a particular hospital in a metropolitan area as its center of excellence in bariatric

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[3] Kaiser Family Foundation, *2017 Employer Health Benefits Survey*, 213-214, http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2017.

[4] The California Public Employees' Retirement System ("CalPERS") has successfully used reference-based pricing to lower expenses on hip and knee replacements. A study of the first year after implementation of the reference-based pricing program indicates that surgical volumes at low-price facilities increased while volumes at high-price facilities decreased. Prices declined at both high and low price facilities. As a result CalPERS and its employees saved approximately $3 million. James C. Robinson and Timothy T. Brown, *Increases in Consumer Cost Sharing Redirect Patient Volumes and Reduce hospital Prices for Orthopedic Surgery*, 32 HEALTH AFFAIRS 1392, 1394-97 (2013).

surgery because the hospital has superior expertise or is particularly cost effective. To incent members to obtain bariatric surgery there, the insurer may reduce or eliminate out-of-pocket expenses for members who choose that hospital. Members remain free to obtain bariatric surgery elsewhere and pay the out-of-pocket expenses prescribed under the plan. Members are steered towards a center of excellence by virtue of the designation and the cost savings.

c. Transparency

Transparency is the communication of price, cost, quality, or patient experience information to a member. Transparency makes steered plans more effective by providing consumers with information to enable them to comparison shop before selecting a provider. Transparency may also be a form of steering even in the absence of differential benefits because information that identifies one provider as more cost effective than another provider may prompt consumers to choose the more cost-effective provider.

3. To insulate itself from competition, Atrium required that steering restrictions be included in its insurer contracts

To protect its dominant share and high prices and insulate itself from competition, Atrium has used its market power to require every major insurer in the Charlotte area— Aetna Health of the Carolinas, Inc. ("Aetna"), Blue Cross and Blue Shield of North Carolina ("BCBS-NC"), Cigna Healthcare of North Carolina, Inc. ("Cigna"), and United Healthcare of North Carolina, Inc. ("UnitedHealthcare")[5]— to accept contract terms that restrict the insurers from steering their members to Atrium's lower-cost competitors.

[5] These four major insurers cover over 90 percent of the commercially-insured residents of the Charlotte area. MedCost is the next-largest health plan in the Charlotte area. MedCost provides administrative services and access to its healthcare provider networks to employers that self-fund their employees' healthcare benefits. Employers that are self-funded pay the healthcare benefit claims from the assets of their business, rather than purchase health insurance policies for the benefit of their employees. Atrium owns 50 percent of MedCost.

Atrium's contracts with each of these insurers contain steering restrictions that either expressly prohibit the insurer from steering their members away from Atrium, or impede steering through other means, such as by imposing a financial penalty on any steering against Atrium that exceeds a specified amount or by allowing Atrium to promptly terminate the insurer's contract if the insurer steers against Atrium. Atrium used its market power to require that insurers agree to these contract provisions that restrict steering, and thereby restrict competition.

Atrium's steering restrictions restrain insurers from offering consumers the choice of narrow-network plans that do not include Atrium, and tiered-network plans that do not place Atrium in the most favorable tier. Atrium's steering restrictions also prevent insurers from offering reference-based pricing because if the reference price for a service is lower than the price that Atrium charges for that service, members will be steered away from Atrium. Insurers are also prevented from offering financial incentives for members to obtain services at non-Atrium providers that are designated centers of excellence.

These restrictions also prevent insurers from providing members transparency into the price, quality, patient experience, and anticipated out-of-pocket costs of Atrium's healthcare services compared to Atrium's competitors. Atrium's restrictions on transparency indirectly restrict steering because they inhibit consumers from accessing information that would allow them to make better-informed healthcare provider choices.

Deprived of any mechanism to reward low prices with more patient volume, insurers cannot create incentives for Atrium's rivals to compete on price. Atrium's steering restrictions, therefore, reduce competition for GAC inpatient hospital services in the Charlotte area by impeding its competitors' ability to attract patients by offering lower prices to insurers and their members. The steering restrictions prevent consumers from benefitting from lower prices, so

they protect Atrium from losing patient volume in response to high prices. This reduction in competition causes prices to be higher than they would be in the absence of Atrium's steering restrictions.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The purpose of the proposed Final Judgment is to prevent Atrium from impeding insurers' steered plans and transparency, and to restore competition among healthcare providers in the Charlotte area. The proposed Final Judgment will accomplish this objective through injunctive, compliance, and enforcement provisions.

Atrium has market power in GAC inpatient hospital services, but the proposed Final Judgment applies to the broad range of healthcare services that Atrium provides and to which its steering restrictions apply. The additional healthcare services covered by the proposed Final Judgment include outpatient services (such as ambulatory surgeries and radiological services), professional services rendered by physicians, and ancillary services such as imaging and lab services. The full scope of services covered by the proposed Final Judgment falls within the proposed Final Judgment's definition of "Healthcare Services." Because Atrium uses its market power to restrict steering away from it for any healthcare service, the proposed Final Judgment provides relief that is broader than the set of services in the relevant market.

The proposed Final Judgment also applies to a broad range of benefit plans. This includes health insurance policies sold to individuals, fully-insured and self-funded health plans sold to employers and other groups, and Medicare Advantage plans.

A. Prohibited Conduct

The proposed Final Judgment seeks to restore competition by prohibiting Atrium from engaging in specific conduct. There are three main provisions. The first stops Atrium from enforcing the current contract provisions at issue in this suit. The second stops Atrium from

enforcing similar or new contractual provisions that would restrict steering in the Charlotte area. The third stops Atrium from retaliating against insurers for steering in the Charlotte area.

1. Eliminating the anticompetitive contract provisions

The proposed Final Judgment eliminates the contractual language that Plaintiffs alleged is anticompetitive. The proposed Final Judgment voids the contractual provisions listed in Exhibit A to the proposed Final Judgment that expressly prevent steering. For example, a provision stating that an insurer "will not steer business away from" Atrium is voided from that insurer's contract. Additionally, a part of a contract between Atrium and an insurer that required the insurer to give Atrium 90 days' notice before bringing a plan to market that would steer patients away from Atrium is also voided. Further, the proposed Final Judgment eliminates a provision in one insurer's contract that allows Atrium to terminate the contract on 90 days' notice if the insurer offers a plan that would steer away from Atrium.

In addition, Atrium's contracts with commercial insurers contain other provisions that require the insurer to include Atrium in all of its benefit plans. Each such provision prevents the insurer from creating narrow networks that feature Atrium's rivals, but exclude Atrium. The proposed Final Judgment lists that language in Exhibit B, and prohibits Atrium from enforcing or attempting to enforce such contractual provisions to prevent, prohibit, or penalize steered plans and transparency.[6]

[6] The contract provisions appearing in Exhibit B could remain enforceable to prevent insurers from "carving out" certain Atrium procedures from their benefits plans. A "carve-out" is an industry term defined in the proposed Final Judgment as an arrangement by which an insurer unilaterally removes all or substantially all of a particular healthcare service from coverage in a benefit plan during the performance of a network-participation agreement. Insurers are free to negotiate carve-outs as part of a contract, but Atrium may prohibit insurers from carving additional services out of a contract after it is signed.

Finally, the proposed Final Judgment prevents Atrium from enforcing a "material impact" provision in its contract with BCBS-NC in a manner that reduces BCBS-NC's incentives to steer to more efficient providers.

2. Preventing new contractual provisions that harm steering

The proposed Final Judgment also prevents Atrium from seeking or obtaining similar or new contract provisions that would prohibit, prevent, or penalize steering through steered plans or transparency in the Charlotte area.

Paragraph IV(B) of the proposed Final Judgment identifies three types of contractual provisions that, among others, would prohibit, prevent, or penalize steering through steered plans and would thus violate the terms of the proposed Final Judgment. First, Atrium may not expressly prohibit steered plans or transparency. Second, Atrium may not require prior approval of new benefit plans. Third, Atrium may not demand to be included in the most-preferred tier of benefit plans regardless of price.

The Final Judgment's injunction against steering restrictions also reaches beyond these three existing provisions to include any contract provision that prohibits, prevents, or penalizes steering. "Penalize" is a term in the proposed Final Judgment that includes within its definition anything that would significantly restrain an insurer's steering. Because steering away from Atrium necessarily reduces its volume and revenues, terms that punish such reductions with higher prices or other detrimental consequences may be penalties. Whether a provision or action is likely to significantly restrain steering depends on the facts and circumstances, including but not limited to its economic impact, and any procompetitive effects that would tend to lower healthcare costs or otherwise benefit consumers in the Charlotte area.

3. Atrium may not retaliate against steering

Under the terms of the proposed Final Judgment Atrium also may not seek or obtain any contract provision, or take any other action that would penalize an insurer for steering away from Atrium through steered plans or transparency. For example, Atrium may not threaten to terminate its participation in an insurer's healthcare networks because the insurer was planning to introduce a tiered-network plan that steered away from Atrium.

B. Conduct That is Not Prohibited by the Final Judgment

Paragraph V of the proposed Final Judgment sets forth conduct that Atrium may undertake without violating the terms of the proposed Final Judgment. Paragraph V(A) makes clear that nothing in the proposed Final Judgment prohibits Atrium from exercising any of its contractual rights provided it does not engage in any conduct that would violate the terms of the proposed Final Judgment.

If Atrium is the most-prominently featured provider in a narrow-network plan or co-branded plan,[7] Paragraph V(B) of the proposed Final Judgment allows Atrium to restrict an insurer from steering away from Atrium in that plan. Such restrictions may help narrow networks and co-branded plans be more effective, and this provision allows Atrium to participate in plans that steer towards it.

Paragraph V(C) makes clear that the proposed Final Judgment does not prohibit Atrium from negotiating with insurers for the ability to review the information about Atrium that an insurer disseminates through transparency, as long as any provision for review does not delay dissemination of the information. The proposed Final Judgment does not prevent Atrium from

[7] A co-branded plan is a benefit plan created by a formal and substantial level of alliance or affiliation, such as a partnership or joint venture, between a provider and an insurer. A co-branded plan has the logos of both the insurer and provider on the plan's marketing materials.

challenging information that it believes is inaccurate, including pursuing legal remedies available to it.

Paragraph V(C) also makes clear that the proposed Final Judgment does not prohibit Atrium from seeking certain safeguards regarding the insurer's dissemination of the prices Atrium has negotiated with insurers. Atrium may seek contractual provisions with an insurer prohibiting the insurer from disseminating Atrium's negotiated prices to Atrium's competitors, other insurers, or the general public. Atrium may also seek contractual provisions with an insurer requiring the insurer to obtain a covenant from any third party receiving Atrium's negotiated prices that such third party will not disclose that information to Atrium's competitors, another insurer, the general public, or another third party lacking a reasonable need to know such information. Atrium may also seek all appropriate remedies in the event that dissemination of such information occurs.

C. Required Conduct

The proposed Final Judgment also prescribes conduct that Atrium is required to undertake in order to facilitate prompt and effective relief. Paragraph VI of the proposed Final Judgment requires Atrium to provide Aetna, BCBS-NC, Cigna, MedCost and UnitedHealthcare with a copy of the Final Judgment and notify them in writing within 15 business days of the Court's entry of the proposed Final Judgment that (1) the Final Judgment has been entered; (2) the Final Judgment prohibits Atrium from entering into or enforcing any agreement provision that violates the Final Judgment; (3) Atrium waives the right to enforce any contract language reproduced in Exhibit A; and (4) Atrium waives the right to enforce any contract language reproduced in Exhibit B to the extent such language prohibits, prevents, or penalizes steered plans or transparency.

D. Compliance

Under Paragraph VII of the proposed Final Judgment, within 15 calendar days of the entry of the Final Judgment, Atrium must provide a copy of the Final Judgment to each of its commissioners and officers as well as each employee who has responsibility to negotiate or approve contracts with insurers. Within 60 calendar days of the entry of the proposed Final Judgment, Atrium must develop and implement procedures necessary to ensure Atrium's compliance with the proposed Final Judgment, including procedures to answer questions from Atrium's commissioners and employees about abiding by the terms of the proposed Final Judgment.

Within 270 calendar days of entry of the proposed Final Judgment, Atrium must submit to the United States and the State of North Carolina a written report setting forth its actions to comply with the proposed Final Judgment. Atrium must also submit to the United States and the State of North Carolina a copy of any new or revised agreement or amendment to any agreement with any insurer that is executed during the term of the proposed Final Judgment no later than 30 calendar days after the date the agreement or amendment is executed.

Atrium must also notify the United States and the State of North Carolina within 30 calendar days of having reason to believe that a provider which Atrium controls has a contract with any insurer with a provision that prohibits, prevents, or penalizes transparency or any steered plan.

To facilitate monitoring Atrium's compliance with the proposed Final Judgment, Paragraphs VII(B) and VII(D) of the proposed Final Judgment require Atrium to grant the United States access, upon reasonable notice, to Atrium's records and documents relating to matters contained in the proposed Final Judgment. In addition Atrium must make its employees

available for interviews or depositions and answer interrogatories and prepare written reports relating to matters contained in the proposed Final Judgment upon request.

The proposed Final Judgment also contains provisions that promote compliance and make the enforcement of the proposed Final Judgment as effective as possible. Paragraph IX(A) provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. Under the terms of this Paragraph, Atrium has agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the proposed Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Atrium has waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph IX(B) sets forth the parties' agreed-upon rules for interpreting the proposed Final Judgment's provisions. Because consent decrees share many attributes with ordinary contracts, they should be construed as contracts for purposes of enforcement. *See Anita's New Mexico Style Mexican Food v. Anita's Mexican Foods Corp.*, 201 F.3d 314, 319 (4th Cir. 2000) (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975)). The parties have agreed that the Court should employ ordinary tools of interpretation to enforce the proposed Final Judgment. In Paragraph IX(B), the parties make clear the purpose of the proposed Final Judgment that can be used as an interpretive tool. The proposed Final Judgment was drafted with the purpose of resolving this litigation and restoring all competition that Plaintiffs alleged was harmed by the challenged conduct. Paragraph IX(B) says that the provisions of the proposed

Final Judgment are to be interpreted to give effect to the procompetitive purpose of the federal antitrust laws, and to restore this lost competition.

Atrium also agrees that the Court may enforce any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, *see* Fed.R.Civ.P. 65(d) (requiring specific terms and "reasonable detail"), even if the provision is not clear and unambiguous on its face, by applying these procompetitive principles and ordinary tools of interpretation. *See Martin's Herend Imports, Inc. v. Diamond & Gem Trading*, 195 F.3d 765, 771 (5th Cir. 1999) ("The mere fact that interpretation is necessary does not render the injunction so vague and ambiguous that a party cannot know what is expected of him." (internal citation and quotation omitted)). When interpreting the proposed Final Judgment, the Court should not construe the language of the proposed Final Judgment against either party as the drafter.

Paragraph IX(C) of the proposed Final Judgment provides that should the Court find in an enforcement proceeding that Atrium has violated the proposed Final Judgment, the United States may apply to the Court for a one-time extension of the proposed Final Judgment, together with such other relief as may be appropriate. In addition, in order to compensate American taxpayers for any costs associated with the investigation and enforcement of violations of the proposed Final Judgment, Paragraph IX(C) further provides that in any successful effort by the United States to enforce the proposed Final Judgment against Atrium, whether litigated or resolved prior to litigation, Atrium agrees to reimburse the United States for attorneys' fees, experts' fees, or costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

Finally, Paragraph X of the proposed Final Judgment provides that the proposed Final Judgment shall expire ten years from the date of its entry, except that after five years from the

date of its entry, the proposed Final Judgment may be terminated upon notice by the United States to the Court and Atrium that the continuation of the proposed Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist 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 Atrium.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least 60 calendar days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 calendar 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 entry of 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:

Peter J. Mucchetti
Chief, Healthcare and Consumer Products Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 4100
Washington, DC 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered continuing this litigation, and proceeding to trial in May 2019 against Atrium. While the proposed Final Judgment represents a negotiated resolution to the action that necessitated compromises by Plaintiffs and Atrium, the United States is satisfied that the relief contained in the proposed Final Judgment will remedy the anticompetitive conduct identified in the Complaint. 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.

VII. APPA's STANDARD OF REVIEW FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

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

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *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).

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 in the government's complaint, whether the decree is

sufficiently clear, whether its 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). Instead:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. 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).[8]

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 74-75 (noting that a court should not reject the proposed remedies because it believes others are preferable and that room must be made for the government to grant concessions in the negotiation process for settlements); *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*

[8] *See also 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").

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"). The ultimate question is 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.'" *Microsoft*, 56 F.3d at 1461. 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, a 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 a 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). 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 the 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,[9] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that

[9] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to

"[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). 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. *U.S. Airways*, 38 F. Supp. 3d at 76. *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"); S. Rep. No. 93-298 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

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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).

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.

Respectfully submitted,

Dated: December 4, 2018

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