UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA and

STATE OF TENNESSEE,

Plaintiffs,

v.

VULCAN MATERIALS COMPANY,

SPO PARTNERS II, L.P.,

and

AGGREGATES USA, LLC,

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

Defendant Vulcan Materials Company ("Vulcan") and Defendant SPO Partners II, L.P. ("SPO") entered into an agreement, dated May 25, 2017, pursuant to which Vulcan would acquire SPO's aggregates business, Aggregates USA, LLC ("Aggregates USA"), for approximately $900 million. The United States and the State of Tennessee filed a civil antitrust

Complaint on December 22, 2017, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this proposed acquisition would be to substantially lessen competition in the production and sale of Department of Transportation ("DOT")-qualified coarse aggregate in the Knoxville, Tri-Cities and Abingdon areas (the 'Relevant Areas"), in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in increased prices and decreased customer service for customers in those areas.

At the same time the Complaint was filed, Plaintiffs 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, among other things, to divest Aggregates USA's active quarries and yards in the Relevant Areas. Under the terms of the Hold Separate, Defendants will take certain steps to ensure that the quarries and yards are operated as a competitively independent, economically viable and ongoing business concern, that they will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestitures.

Plaintiffs and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Defendant Vulcan is incorporated in New Jersey with its headquarters in Birmingham, Alabama. Vulcan produces and sells coarse aggregate for the construction industry in 20 states as well as the District of Columbia. Vulcan also produces coarse aggregate in Mexico, which it distributes and sells at numerous terminals and yards along the Gulf Coast of the United States. In 2016, Vulcan reported net sales of $3.5 billion.

Defendant SPO Partners is a Delaware limited partnership headquartered in Mill Valley, California. With more than $7 billion in assets under management, SPO Partners invests in a wide range of industries, including industrial materials, media, telecommunications, energy, power and real estate. SPO Partners acquired Aggregates USA in 2010.

Defendant Aggregates USA is headquartered in Birmingham, Alabama. Aggregates USA produces and sells coarse aggregate in four states: Florida, Georgia, Tennessee and Virginia. In 2016, Aggregates USA reported net sales of approximately $124 million.

The proposed transaction, as initially agreed to by Defendants on May 25, 2017, would lessen competition substantially as a result of Vulcan owning nearly all of the quarries and yards that supply DOT-qualified aggregate to the Relevant Areas. This acquisition is the subject of the Complaint and proposed Final Judgment filed by Plaintiffs on December 22, 2017.

B. Coarse Aggregate is an Essential Input for Many Construction Projects

Coarse aggregate is a category of material used for construction projects and in various industrial processes. Produced in quarries, mines, and gravel pits, coarse aggregate is

predominantly limestone, granite, or trap rock. Different types and sizes of rock are needed to meet different specifications for use in asphalt concrete, ready mix concrete, industrial processes, and other products. Asphalt concrete consists of approximately 95 percent coarse aggregate, and ready mix concrete is made of up of approximately 75 percent coarse aggregate. Coarse aggregate thus is an integral input for road and other construction projects.

For each construction project, a customer establishes specifications that must be met for each application for which coarse aggregate is used. For example, state DOTs, including the Tennessee and Virginia DOTs, set specifications for coarse aggregate used to produce asphalt concrete, ready mix concrete, and road base for state DOT projects. State DOTs specify characteristics such as hardness and durability, size, polish value, and a variety of other characteristics. The specifications are intended to ensure the longevity and safety of the projects that use coarse aggregate.

For Tennessee and Virginia DOT projects, to ensure that the stone for an application meets proper specifications, the respective DOTs qualify quarries according to the end uses of the coarse aggregate. In addition, the Tennessee and Virginia DOTs test the coarse aggregate at various points: at the quarry before it is shipped; when the coarse aggregate is sent to the purchaser to produce an end product such as asphalt concrete; and after the end product has been produced. Many cities, counties, commercial entities, and individuals in Tennessee and Virginia use their respective state DOT-qualified coarse aggregate specifications when building roads, bridges, and other construction projects in order to optimize longevity.

C. Transportation is a Significant Component of the Cost of Coarse Aggregate

Coarse aggregate is priced by the ton and is a relatively inexpensive product, with prices typically ranging from approximately five to twenty dollars per ton. A variety of approaches are used to price coarse aggregate. For small volumes, coarse aggregate often is sold according to a posted price. For large volumes, customers typically either negotiate prices for a particular job or seek bids from multiple coarse aggregate suppliers.

In areas where coarse aggregate is locally available, it is transported from quarries to customers by truck. Truck transportation is expensive and, for construction projects located more than a few miles from a quarry, transportation costs can become a significant portion of the total cost of coarse aggregate.

D. Relevant Markets

1. State DOT-Qualified Coarse Aggregate is a Relevant Product Market

Within the broad category of coarse aggregate, different types and sizes of stone are used for different purposes. For instance, coarse aggregate qualified for use as road base may not be the same size and type of rock as coarse aggregate qualified for use in asphalt concrete. Accordingly, they are not interchangeable for one another and demand for each is separate. Thus, each type and size of coarse aggregate likely is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

State DOT-qualified coarse aggregate is coarse aggregate qualified by the state DOT for use in road construction in that particular state. State DOT-qualified coarse aggregate meets particular standards for size, physical composition, functional characteristics, end uses, and availability. A customer whose job specifies state DOT-qualified coarse aggregate cannot

substitute non-DOT-qualified coarse aggregate or other materials, including coarse aggregate qualified by a different state DOT.

Although numerous narrower product markets exist, the competitive dynamic for most types of state DOT-qualified coarse aggregate is nearly identical, as a quarry can typically produce all, or nearly all, types of state DOT-qualified coarse aggregate for a particular state. Therefore, most types of state DOT-qualified coarse aggregate for a particular state may be combined for analytical convenience into a single relevant product market for the purpose of evaluating the competitive impact of the acquisition.

A small but significant increase in the price of state DOT-qualified coarse aggregate would not cause a sufficient number of customers to substitute to another type of coarse aggregate or another material so as to make such a price increase unprofitable. Accordingly, the production and sale of Tennessee DOT-qualified coarse aggregate and Virginia DOT-qualified coarse aggregate (hereinafter "DOT-qualified coarse aggregate") are distinct lines of commerce and relevant product markets within the meaning of Section 7 of the Clayton Act.

2. The Relevant Geographic Markets are Local

Coarse aggregate is a relatively low-cost product that is bulky and heavy. As a result, the cost of transporting coarse aggregate is high as compared to the value of the product.

When customers seek price quotes or bids, the distance from the quarry to the project site or plant location will have a considerable impact on the selection of a supplier, due to the high cost of transporting coarse aggregate relative to the low value of the product. Suppliers know the importance of transportation cost to a potential customer's selection of a coarse aggregate

supplier; they know the locations of their competitors, and they often will factor the cost of transportation from other suppliers into the price or bid that they submit.

The primary factor that determines the area a supplier can serve is the location of competing quarries. When quoting prices or submitting bids, coarse aggregate suppliers will account for the location of the project site or plant, the cost of transporting coarse aggregate to the project site or plant, and the locations of the competitors that might bid on a job. Therefore, depending on the location of the project site or plant, suppliers are able to adjust their bids to account for the distance other competitors are from a job.

a. The Knoxville area is a Relevant Geographic Market

Vulcan owns and operates eleven quarries that serve Knox, Loudon, Jefferson, and Grainger Counties in Tennessee as well as portions of surrounding counties (hereinafter referred to as the "Knoxville area"). Customers with plants or jobs in the Knoxville area may, depending on the location of their plant or job sites, also economically procure Tennessee DOT-qualified coarse aggregate from four quarries operated by Aggregates USA. Other more distant quarries cannot compete successfully on a regular basis for customers with plants or jobs in the Knoxville area because they are too far away and transportation costs are too great.

A small but significant post-acquisition increase in the price of Tennessee DOT-qualified coarse aggregate to customers with plants or job sites in the Knoxville area would not cause those customers to procure coarse aggregate from suppliers other than Vulcan and Aggregates USA in sufficient quantities so as to make such a price increase unprofitable. Accordingly, the Knoxville area is a relevant geographic market for the production and sale of Tennessee DOT-qualified coarse aggregate within the meaning of Section 7 of the Clayton Act.

b. The Tri-Cities area is a Relevant Geographic Market

Vulcan owns and operates four quarries that serve Washington, Sullivan, Carter and Unicoi Counties in Tennessee as well as portions of surrounding counties (hereinafter referred to as the "Tri-Cities area"). Customers with plants or jobs in the Tri-Cities area may, depending on the location of their plant or job site, also economically procure Tennessee DOT-qualified coarse aggregate from five quarries operated by Aggregates USA. Other more distant quarries cannot compete successfully on a regular basis for customers with plants or jobs in the Tri-Cities area because they are too far away and transportation costs are too great.

A small but significant post-acquisition increase in the price of Tennessee DOT-qualified coarse aggregate to customers with plants or job sites in the Tri-Cities area would not cause those customers to procure coarse aggregate from suppliers other than Vulcan and Aggregates USA in sufficient quantities so as to make such a price increase unprofitable. Accordingly, the Tri-Cities area is a relevant geographic market for the production and sale of Tennessee DOT-qualified coarse aggregate within the meaning of Section 7 of the Clayton Act.

c. The Abingdon area is a Relevant Geographic Market

Vulcan owns and operates one quarry that serves parts of Washington County in Virginia and portions of surrounding counties (hereinafter referred to as the "Abingdon area"). Customers with plants or jobs in the Abingdon area may, depending on the location of their plant or job sites, also economically procure Virginia DOT-qualified coarse aggregate from a quarry operated by Aggregates USA. Other more distant quarries cannot compete successfully on a regular basis for customers with plants or jobs in the Abingdon area because they are too far away and transportation costs are too great.

A small but significant post-acquisition increase in the price of Virginia DOT-qualified coarse aggregate to customers with plants or job sites in the Abingdon area would not cause those customers to procure coarse aggregate from suppliers other than Vulcan and Aggregates USA in sufficient quantities so as to make such a price increase unprofitable. Accordingly, the Abingdon area is a relevant geographic market for the production and sale of Virginia DOT-qualified coarse aggregate within the meaning of Section 7 of the Clayton Act.

E. Vulcan's Acquisition of Aggregates USA is Anticompetitive

Vigorous competition between Vulcan and Aggregates USA on price and customer service in the production and sale of DOT-qualified coarse aggregate has benefitted customers in the Relevant Areas, all of which face similar competitive conditions.

The competitors that could constrain Vulcan and Aggregates USA from raising prices on DOT-qualified coarse aggregate in the Relevant Areas are limited to those who are qualified by the Tennessee and Virginia DOTs to supply coarse aggregate and can economically transport the coarse aggregate into these areas.

Since the Relevant Areas are each exclusively served today by Vulcan and Aggregates USA, the proposed acquisition will reduce from two to one the number of suppliers of DOT-qualified coarse aggregate in each of those areas. Further, the proposed acquisition will substantially increase the likelihood that Vulcan will unilaterally increase the price of DOT-qualified coarse aggregate to a significant number of customers in the Relevant Areas.

For many customers, a combined Vulcan and Aggregates USA will have the ability to increase prices for DOT-qualified coarse aggregate. The combined firm could also decrease service for these same customers by limiting availability or delivery options. DOT-qualified

coarse aggregate producers know the distance from their own quarries or yards and their competitors' quarries to a customer's job site. Generally, because of transportation costs, the farther a supplier's closest competitor is from a job site, the higher the price and margin that supplier can expect for that project. Post-acquisition, in instances where Vulcan and Aggregates USA quarries or yards are the closest locations to a customer's project, the combined firm, using the knowledge of its competitors' locations, will be able to charge such customers higher prices or decrease the level of customer service.

The proposed acquisition will substantially lessen competition in the market for the production and sale of DOT-qualified coarse aggregate in the Relevant Areas, which is likely to lead to higher prices and reduced customer service for consumers of such products, in violation of Section 7 of the Clayton Act.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestiture Provisions

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the production and sale of DOT-qualified coarse aggregate in the Knoxville, Tri-Cities and Abingdon areas by establishing a new, independent, and economically viable competitor. Paragraph IV(A) of the proposed Final Judgment requires Defendants to divest, as a viable, ongoing business, Aggregates USA's active quarries and yards in the Relevant Areas to Blue Water Industries LLC or an alternative Acquirer acceptable to the United States, in its sole discretion, after consultation with the State of Tennessee, within forty-five (45) days after the signing of the Hold Separate. The assets must be divested in such a way

as to satisfy the United States in its sole discretion, after consultation with the State of Tennessee, that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant markets. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

The proposed Final Judgment also contains provisions intended to facilitate the Acquirer's efforts to hire the employees involved with the Aggregates USA business. Paragraph IV(D) of the proposed Final Judgment requires Defendants to provide the Acquirer with information relating to the personnel involved in the operation of the Divestiture Assets to enable the Acquirer to make offers of employment, and provides that Defendants will not interfere with any negotiations by the Acquirer to hire these employees.

In the event that Defendants do not accomplish the divestitures within the period prescribed in the proposed Final Judgment, Paragraph V(A) of the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, Paragraph V(D) of 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 divestitures are accomplished. Paragraph V(F) of the proposed Final Judgment requires that, after his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestitures. Paragraph V(G) of the proposed Final Judgment requires that, at the end of six months, if the divestitures have 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.

B. Notification

Section XI of the proposed Final Judgment requires Defendants to provide notification to the Antitrust Division of certain proposed acquisitions not otherwise subject to filing under the Hart-Scott-Rodino Act, 15 U.S.C 18a (the "HSR Act"), and in the same format as, and per the instructions relating to the notification required under that statute. The notification requirement applies in the case of any direct or indirect acquisitions of any assets related to the production and sale of DOT-qualified coarse aggregate in Knox, Loudon, Jefferson, Grainger, Washington, Sullivan, Carter, and Unicoi Counties in Tennessee, or Washington County, Virginia, during the term of the proposed Final Judgment. Section XI further provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before such acquisitions can be consummated.

C. Enforcement and Expiration of the Final Judgment

The proposed Final Judgment contains provisions designed to promote compliance and make the enforcement of Division consent decrees as effective as possible. Paragraph XIV(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, Defendants have 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 Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have

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 XIV(B) of the proposed Final Judgment further provides that should the Court find in an enforcement proceeding that Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the 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 XIV(B) requires Defendants to reimburse the United States for attorneys' fees, experts' fees, or costs incurred in connection with any enforcement effort.

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment shall expire ten (10) years from the date of its entry, except that after five (5) years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestitures have been completed and that the continuation of the 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 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

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

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

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Defense, Industrials, and Aerospace Section
Antitrust Division

United States Department of Justice
450 Fifth Street, NW, Suite 8700
Washington, DC 20530

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

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

Plaintiffs considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. Plaintiffs could have continued the litigation and sought preliminary and permanent injunctions against Vulcan's acquisition of Aggregates USA. Plaintiffs are satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the production and sale of DOT-qualified coarse aggregate in the Relevant Areas. Thus, the proposed Final Judgment would achieve all or substantially all of the relief Plaintiffs would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

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

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

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting the court has broad discretion of the adequacy of the relief at issue); *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]

[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).

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

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required 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

[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'").

remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 38 F. Supp. 3d at 74 (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 U.S. Airways*, 38 F. Supp. 3d at 74 (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 recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 75 (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. *U.S. Airways*, 38 F. Supp. 3d at 75.

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: December 22, 2017

[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.").

Respectfully Submitted,

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