UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. NEENAH ENTERPRISES, INC., U.S. HOLDINGS, INC., and U.S. FOUNDRY AND MANUFACTURING CORPORATION Defendants.	Case No.

COMPETITIVE IMPACT STATEMENT

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "APPA" or "Tunney Act"), the United States of America files this Competitive Impact Statement relating to the proposed Final Judgment filed in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On March 9, 2021, Defendant Neenah Enterprises, Inc. ("NEI") entered into a binding agreement with Defendant U.S. Holdings, Inc. to acquire substantially all of the assets of its wholly-owned subsidiary U.S. Foundry and Manufacturing Corporation ("US Foundry") for approximately $110 million. The United States filed a civil antitrust Complaint on October 14, 2021 seeking to enjoin the proposed transaction. The Complaint alleges that the likely effect of

this transaction would be to substantially lessen competition in the design, production, and sale of gray iron municipal castings in Alabama, Florida, Georgia, Indiana, Maryland, New Jersey, New York, North Carolina, South Carolina, Tennessee, and Virginia (the "overlap states") in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and an Asset Preservation Stipulation and Order ("Stipulation and Order"), which are designed to remedy the loss of competition alleged in the Complaint.

Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest over 500 patterns or molds used to produce gray iron municipal castings sold in the overlap states ("Divestiture Patterns"), along with all drawings, measurements, specifications, licenses, permits, certifications, and approvals relating to or used in connection with the Divestiture Patterns. Under the terms of the Stipulation and Order, Defendants must take certain steps to ensure that, until final delivery to an acquirer, the Divestiture Patterns are maintained in operable condition so they can be used by the acquirer as part of a viable, ongoing business of the design, production, and sale, including distribution, of gray iron municipal castings.

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 will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

(A) Defendants and the Proposed Transaction

NEI and US Foundry are U.S. corporations based in Neenah, Wisconsin, and Medley, Florida, respectively, that each own and operate iron casting foundries that design, produce, and sell gray iron municipal castings for several purposes. US Foundry is a wholly-owned subsidiary of Defendant U.S. Holdings, Inc. NEI had 2020 revenues of $343.3 million, of which approximately $152 million was derived from gray iron municipal castings. US Foundry had 2020 revenues of approximately $90 million, of which approximately $73 million was derived from gray iron municipal castings. Gray iron municipal castings are customized molded iron products produced at iron foundries and include products such as manhole covers and frames, drainage grates, inlets, and tree grates. These castings include manhole covers and frames used to access subterranean areas, and various grates and drains used to direct water in roadway, parking, and industrial areas. Pursuant to a Transaction Agreement dated March 9, 2021, NEI intends to acquire all of US Foundry's gray iron municipal castings business for approximately $110 million.

(B) The Competitive Effects of the Transaction

The Complaint alleges that the combination of NEI and US Foundry will lead to anticompetitive effects in the market for the design, production, and sale of gray iron municipal castings in the overlap states.

a. Relevant Product Market

The Complaint alleges that the sale of gray iron municipal castings constitutes a line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18. Gray iron municipal castings are customized to a purchaser's specifications for the physical characteristics of these products, including strength, width, length, and any distinguishing marks, such as

municipal logos. Customer specifications are used by the manufacturer to make a reusable pattern that is an exact replica of the final product. During the casting process, reusable patterns are pressed into a sand mold box to create an impression in the sand. After the pattern is removed, molten iron is poured into the sand mold to create the casting. The casting is then removed, cooled, and finished by shot-blasting or other machining before being shipped to the customer.

Gray iron municipal castings are used most often in construction and infrastructure projects, with smaller volumes used for maintenance or repair purposes. A state department of transportation ("DOT"), county, or municipality typically determines the specifications of the gray iron municipal castings that can be used in projects within its authority. Municipalities and counties often adopt the relevant DOT's technical specifications, and commercial projects may choose to adopt DOT specifications even when not required. A DOT, county, or municipality also may have a qualified product list that identifies approved patterns and manufacturers for specific gray iron municipal castings.

As alleged in the Complaint, there are no functional or economic substitutes for gray iron municipal castings, which are customized according to unique specifications designed to meet the customer's goals of subterranean access or water drainage as part of an integrated and possibly complex public infrastructure project. For example, a state DOT will specify the exact dimensions and structural requirements of each casting for all DOT construction products. Other customers, such as counties or municipalities within a state, will often use state DOT specifications for size and structural integrity, but will further customize their gray iron municipal castings by including the town name or other distinguishing marks on the casting or by specifying custom shapes for lifting holes. These customer-specified requirements mean that

gray iron municipal castings made for a particular project or municipality typically cannot be used on other projects or in other areas.

The Complaint alleges that, because there are no reasonable substitutes for gray iron municipal castings, a hypothetical monopolist of gray iron municipal castings could profitably impose a small but significant increase in price without losing significant sales to alternative products. The sale of gray iron municipal castings therefore constitutes a line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18

b. Relevant Geographic Market

The Complaint alleges that both NEI and US Foundry have committed significant capital to develop specific patterns for gray iron municipal castings used by customers in the overlap states and have made substantial investments to develop an efficient distribution network in those states for their gray iron municipal castings. Custom-designed castings mean that buyers cannot successfully use gray iron municipal castings designed for projects outside the overlap states for projects within the overlap states. As a result, customers cannot buy gray iron municipal castings designed for projects outside the overlap states to avoid a higher price charged by foundries designing castings for projects within the overlap states.

As alleged in the Complaint, a hypothetical monopolist of gray iron municipal castings sold to customers in the overlap states could profitably impose a small but significant increase in the price of gray iron municipal castings without losing significant sales to product substitution or arbitrage. The sale of gray iron municipal castings to customers in the overlap states therefore constitutes a relevant market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

c. Anticompetitive Effects of the Proposed Transaction

The Complaint alleges that NEI and US Foundry compete for sales of gray iron municipal castings primarily on the basis of price, quality, and speed of delivery. This competition has resulted in lower prices, higher quality, and shorter delivery times. This competition has been particularly important to customers in the overlap states where NEI and US Foundry compete today.

In the overlap states, NEI and US Foundry have developed hundreds of approved patterns and are two of only three firms with a significant presence in the design, production, and sale of gray iron municipal castings. Both NEI and US Foundry consistently bid on customer contracts in the overlap states, and customers use the competition between the two firms to obtain lower prices, higher quality, and shorter delivery times.

While there are other firms that occasionally compete for contracts in the overlap states, these fringe competitors typically have a small presence and are unlikely to replace the competition lost by the proposed transaction. Other than NEI, US Foundry, and one other firm, smaller competitors have not invested the time and money to develop, seek approval for, and produce the hundreds of patterns necessary to compete consistently for projects in the overlap states nor have they invested in distribution for castings within those states. Thus, the transaction would reduce the number of significant competitors in the overlap states from three to two and leave only one other significant competitor as an alternative to the merged firm. Faced with only one significant alternate supplier, the merged firm likely would have the incentive and ability to increase prices, lower quality, and increase delivery times in the overlap states.

d. Difficulty of Entry

The Complaint alleges that sufficient, timely entry of additional competitors into the market for gray iron municipal castings in the overlap states is unlikely. A new entrant would have to invest substantial capital equipment and human resources in order to build new production facilities, sales infrastructure, and distribution networks for gray iron municipal castings. To be competitively viable, a new entrant would need to construct a foundry or establish production lines at an existing foundry capable of manufacturing the castings, as well as establish a system of regional distribution. This process would be capital intensive and likely take years to complete.

Similarly, a firm currently making gray iron municipal castings for use outside the overlap states is unlikely to expand into the overlap states. This is because such an entrant would not have proven or approved designs and patterns or established local distribution. It is highly unlikely that new entrants or firms thinking of geographic expansion would invest the time and money needed to create a portfolio of new, as-yet unapproved designs and patterns of sufficient scale to compete in the overlap states on the speculative possibility of attracting enough new business to justify the investment.

As a result, entry or expansion into the market for gray iron municipal castings in the overlap states would not be timely, likely, or sufficient to defeat the anticompetitive effects likely to result from the combination of NEI and US Foundry.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by the timely establishment of an independent and economically viable competitor in the market for the design, production, and sale, including distribution, of gray iron

municipal castings in the overlap states. Paragraph IV.A of the proposed Final Judgment requires Defendants, within 30 calendar days after the entry of the Stipulation and Order by the Court, to divest the Divestiture Assets to D&L Foundry, Inc., or an alternative acquirer acceptable to the United States, in its sole discretion. Paragraph IV.B allows the United States, in its sole discretion, to consent to one or more extensions of this 30-day period not to exceed 60 calendar days in total.

(A) Divestiture Assets

The Divestiture Assets, which are defined in Paragraph II.G of the proposed Final Judgment, consist of over 500 gray iron municipal casting patterns currently owned by NEI or US Foundry and identified in Appendix A of the proposed Final Judgment ("Divestiture Patterns"). Along with the Divestiture Patterns themselves, the Divestiture Assets also include all drawings, measurements, specifications, licenses, permits, certifications, approvals, consents, registrations, waivers, authorizations, and pending applications or renewals for the same, relating to or used in connection with the Divestiture Patterns.

The Divestiture Patterns include a set of all patterns owned both by NEI and US Foundry and used by either NEI or US Foundry to produce gray iron municipal castings that generated sales of 50 or more castings by either NEI or US Foundry in the overlap states between 2019 and 2020. The Divestiture Assets will provide a qualified acquirer with all the assets, including the patterns and related documentation, needed to quickly and effectively compete at scale in the design, production, and sale of gray iron municipal castings in the overlap states.

(B) Divestiture Provisions

Defendants are required to use best efforts to act expeditiously (Paragraph IV.B), to divest the Divestiture Assets in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets will be used as a part of a viable ongoing business for the design, production, and sale, including distribution, of gray iron municipal castings in the overlap states and will remedy the competitive harm alleged in the Complaint (Paragraph IV.C). The divestiture must be made to an acquirer that, in the United States' sole judgment, has the intent and capability to compete effectively in the design, production, and sale, including distribution, of gray iron municipal castings in the overlap states (Paragraph IV.D) and that none of the terms of any agreement between acquirer and Defendants gives Defendants the ability to interfere in the acquirer's efforts to compete effectively in the design, production, and sale, including distribution, of gray iron municipal castings (Paragraph IV.E). If Defendants attempt to divest to an acquirer other than D&L Foundry, Paragraphs IV.F and IV.G require Defendants to make certain information available to other prospective acquirers, including a copy of the proposed Final Judgment. The United States has the sole discretion to approve an alternative acquirer (Paragraph IV.A).

Paragraph IV.H of the proposed Final Judgment ensures that the Divestiture Assets are unencumbered and operable on the date of their transfer to the acquirer. Paragraph IV.I requires that Defendants use best efforts to assist acquirer to obtain all necessary licenses, registrations, and permits to design, produce, and sell gray iron municipal castings using the Divestiture Patterns. Until the acquirer obtains the necessary licenses, registrations, and permits for the Divestiture Patterns, Defendants must provide the acquirer with the benefit of Defendant's licenses, registrations, and permits to the full extent permissible by law. Paragraph IV.J ensures

that the terms of the proposed Final Judgment supersede any terms of agreement between Defendants and the acquirer that are inconsistent with the proposed Final Judgment.

(C) Divestiture Trustee Provisions

If Defendants do not accomplish the divestiture within the period prescribed in Paragraph IV.A of the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to affect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that Defendants must pay all costs and expenses of the trustee. The divestiture trustee's compensation must be structured so as to provide an incentive for the trustee based on the price and terms obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee must provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within six months of the divestiture trustee's appointment, the United States may make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment by a period requested by the United States.

(D) Compliance and Enforcement Provisions

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the Final Judgment as effective as possible. Paragraph XIII.A provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right 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 with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph XIII.B provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the loss of competition the United States alleges would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment and that they may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIII.C provides that if the Court finds in an enforcement proceeding that a Defendant has violated the Final Judgment, the United States may apply to the Court for an extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XIII.C provides that, in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, the Defendant must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph XIII.D states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been

terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

(E) Term of the Final Judgment

Finally, Section XIV of the proposed Final Judgment provides that the Final Judgment will expire 10 years from the date of its entry, except that after five 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 divestiture has been completed and that continuation of the Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

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 neither impairs nor assists 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 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 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 U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the *Federal Register* unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to:

Jay Owen
Acting Chief, Defense, Industrials, and Aerospace Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 8700
Washington, D.C. 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against NEI's acquisition of US Foundry. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the design, production, and sale of gray iron municipal castings in those markets. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation but avoids the time, expense, and uncertainty of a full trial on the merits.

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

Under the Clayton Act and APPA, proposed Final Judgments or "consent decrees" in antitrust cases brought by the United States are 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); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a proposed Final 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").

As the U.S. 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 proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo

determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. 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." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." (internal citations omitted)); *United States v. Republic Servs., Inc.*, 723 F.

Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co*., 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he '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.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section

shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). 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). "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 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

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: October 14, 2021

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA:

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