UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

UNITED STATES OF AMERICA, STATE of WISCONSIN, STATE of ILLINOIS, and STATE of MICHIGAN, *Plaintiffs*, v. DEAN FOODS COMPANY, *Defendant.*	Civil Action No. 2:10-cv-00059 (JPS)

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

The United States filed a civil antitrust Complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25, on January 22, 2010, alleging that the acquisition by Dean Foods Company ("Dean") of two fluid milk processing plants in Wisconsin from Foremost Farms USA ("Foremost") violated Section 7 of the Clayton Act ("Section 7"), 15 U.S.C. § 18.

The Complaint alleges that Dean's acquisition of the Foremost plants (the "Acquisition") likely would substantially lessen competition in two types of markets:

(1) the sale of fluid milk to customers (e.g., retailers and distributors) located in Wisconsin, northeastern Illinois;[1] and the Upper Peninsula of Michigan (the "UP"); and (2) the sale of school milk to school districts located throughout Wisconsin and the UP.

On March 29, 2011, the United States filed a proposed Final Judgment designed to remedy the competitive harm caused by the Acquisition. Under the proposed Final Judgment, which is explained more fully below, Dean is required to divest the Waukesha milk processing plant and related assets.

The United States and Dean 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. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendant and the Acquisition

Dean is one of the largest food and beverage producers in this country, with revenues of approximately $12 billion in 2010. Dean's Dairy Group is the country's largest processor and distributor of milk and other dairy products. Dean is a corporation organized under Delaware state law, with its principal place of business in Dallas, Texas.

Foremost is a dairy cooperative headquartered in Baraboo, Wisconsin, and formed under Wisconsin state law. Like other agricultural cooperatives, Foremost is a member-

[1] "Northeastern Illinois" is defined as the following counties in the State of Illinois: Cook County, DeKalb County, DuPage County, Grundy County, Kane County, Kendall County, Lake County, McHenry County, and Will County.

owned business association. Prior to Dean's acquisition of the Foremost plants, Foremost processed its members' raw milk at its De Pere and Waukesha plants, as well as at other facilities.

On April 1, 2009, Dean acquired the De Pere and Waukesha plants, along with related assets, from Foremost for $35 million. This Acquisition was not required to be reported to federal antitrust authorities under the Hart–Scott–Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act").

B. Competitive Effects of the Acquisition

1. Fluid Milk

a. Fluid Milk is a Relevant Product Market

The Complaint alleges that fluid milk is a relevant product market. Fluid milk is a product with special nutritional characteristics and has no practical substitutes. Consumer demand for fluid milk is relatively inelastic, i.e., fluid milk consumption does not decrease significantly in response to a price increase. Demand by retailers, distributors, and other customers of fluid milk is also inelastic because it is based on consumer demand.

b. Wisconsin, Northeastern Illinois, and the Upper Peninsula of Michigan Constitute a Relevant Geographic Market

The Complaint alleges that Wisconsin, northeastern Illinois, and the UP constitute a relevant geographic market for the sale of fluid milk. The Plaintiffs defined this geographic market with respect to the locations of the customers (e.g., grocery stores), rather than the location of the competitors (i.e., fluid milk processing plants) because, as the Complaint alleges, fluid milk processors can price discriminate, in other words, they

can charge different fluid milk prices (net of transportation cost) to customers in different areas. This price discrimination is possible because processors individually negotiate prices with many customers, deliver the fluid milk to their customers' locations, and customers cannot eliminate price disparities through arbitrage, due in part to high transportation costs.[2]

The price discrimination analysis underlying the geographic market definition set forth in the Complaint is thus consistent with the 2010 Horizontal Merger Guidelines, which explain that "[f]or price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage." U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines § 3 (2010). More specifically, when suppliers can profitably charge different prices (net of costs) to different customers in different locations, competition does not occur at the point of production but *at the customers' locations*. Consequently, the relevant analysis focuses on how much a hypothetical monopolist would want to raise price at various points of consumption, and the relevant geographic market is defined around the location of those customers vulnerable to a price increase.[3] If a hypothetical monopolist can identify and price differently to buyers in certain areas ("targeted buyers"), and if arbitrage is unlikely, then a hypothetical monopolist would profitably impose a discriminatory price increase on buyers in that area.

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[2] Arbitrage occurs when purchasers protect themselves by buying the same product from favored purchasers in other areas.

[3] *See* U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines § 4.2.2 (2010).

Applying this analysis, the evidence in this case satisfies the conditions necessary to show price discrimination. The evidence shows that fluid milk processors negotiate prices for delivery of fluid milk to individual customers in Wisconsin, northeastern Illinois, and the UP and that prices vary among the customers. The evidence also shows that customers cannot arbitrage because of significant loading and shipping costs incurred in reselling. Moreover, the customers lack the coolers necessary to act as arbitrageurs on a significant scale and could not arbitrage fluid milk labeled with their own trademarks to other customers. Thus, fluid milk customers in Wisconsin, northeastern Illinois and the UP are vulnerable to anticompetitive effects flowing from Dean's acquisition of the Foremost plants. As the Complaint alleges, prior to the Acquisition, Foremost sold virtually all of its fluid milk to customers located in these locations, and Dean competed to supply fluid milk to customers throughout this same area. Fluid milk customers located in Wisconsin, northeastern Illinois, and the UP would not defeat a price increase by a hypothetical monopolist of fluid milk by substituting to other products or by taking advantage of arbitrage.

c. The Acquisition Will Likely Substantially Lessen Competition in the Sale of Fluid Milk to Customers Located in Wisconsin, Northeastern Illinois, and the Upper Peninsula of Michigan

The Complaint alleges that the Acquisition will likely substantially lessen competition in the sale of fluid milk in the relevant geographic market. Indicative of this are the effects of the Acquisition on market shares. In a geographic market defined on the basis of price discrimination, the participants in the relevant market are firms that currently supply customers in the market and firms that could economically begin doing so in the event of a small price increase. Market shares typically are assigned to these

firms on the basis of their current (or projected) sales to customers within the geographic market, without regard to the location of the processing plant from which the product is supplied.[4]

Based on current sales, as a result of the Acquisition, Dean increased its share of fluid milk sold to customers in the relevant geographic market from approximately 45 percent to more than 57 percent. There are only two other competitors with more than five percent of fluid milk sales in the relevant geographic market—Kemps LLC (a subsidiary of Hood LLC) accounts for approximately 17 percent of sales and Prairie Farms Dairy, Inc. accounts for approximately 15 percent of sales. The Acquisition will eliminate head-to-head competition that has benefitted, and would otherwise continue to benefit, customers and final consumers. The Acquisition will also likely facilitate easier and more durable coordinated interaction among Dean and its few remaining competitors.

Dean and Foremost often competed head-to-head to serve fluid milk customers. Prior to the Acquisition, Foremost competed with Dean throughout the relevant geographic market. Foremost had substantial excess capacity, and as a result, competed aggressively to secure new business. The presence of Foremost as an aggressive pricing competitor to Dean served as a constraining force on Dean's pricing. The elimination of this head-to-head competition likely will produce higher prices for many customers of fluid milk in the relevant geographic market.

By eliminating Foremost, a significant, disruptive, and aggressive competitor, the Acquisition also will likely substantially lessen competition among the remaining

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[4] U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines §§ 5.1, 5.2.

competitors selling fluid milk in the relevant geographic market by facilitating coordination among them. The Acquisition will result in a substantial increase in the concentration of processors that compete to supply fluid milk to customers located in the relevant geographic market. With the elimination of Foremost, fluid milk customers in many areas of the relevant geographic market will have only two or three significant suppliers of fluid milk. This increased market concentration and the elimination of Foremost as an aggressive competitor make it more likely that Dean and its remaining competitors will decline to bid aggressively for each other's existing customers to prevent retaliatory bidding. The practical effect of such a strategy likely will be to allocate customers based on existing supplier–customer relationships.

d. Neither Supply Responses nor Entry Would Prevent the Likely Anticompetitive Effects of the Acquisition in the Fluid Milk Market

The Complaint alleges that neither supply responses from market participants nor entry would likely prevent the anticompetitive effects of the Acquisition in the fluid milk market. Firms not currently serving these markets are unlikely to enter in response to a small, durable price increase. Firms currently selling fluid milk into the relevant geographic market are unlikely to expand their sales sufficiently to substantially mitigate the loss of Foremost's head-to-head competition with Dean or to disrupt potential coordination by Dean and its remaining competitors in the fluid milk market.

2. School Milk

a. School Milk is a Relevant Product Market

The Complaint alleges that school milk (i.e., fluid milk packaged and distributed for sale to school districts, typically in half-pint containers) is a relevant product market.

School districts must provide milk in order to receive substantial funds under federal school meal subsidy programs. Schools will not substitute other products for school milk even at substantially higher school milk prices because they would lose their federal meal reimbursement.

b. School Districts Constitute Relevant Geographic Markets

The Complaint alleges that each school district in Wisconsin and the UP constitutes a relevant geographic market. A hypothetical monopolist of school milk could identify and individually target vulnerable school districts in Wisconsin and the UP as school districts solicit school milk contract bids directly from processors. It would not be feasible for an individual school district to defeat a price increase by substituting to other products or by engaging in arbitrage (i.e., by purchasing school milk from favored school districts). A hypothetical monopolist could easily detect and thwart such an attempt to arbitrage, and the attempt, in any event, would be greatly hindered by the significant loading and delivery costs incurred in reselling. Moreover, school districts lack the coolers necessary to act as arbitrageurs on a significant scale. Since the hypothetical monopolist could identify and individually target vulnerable school districts and arbitrage is infeasible, it is appropriate to define geographic markets around the locations of the school districts. Because sellers can price discriminate against individual school districts, it is appropriate to define the geographic markets as individual school districts.[5]

[5] U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines § 4.2.2 (2010).

c. The Acquisition Will Likely Substantially Lessen Competition in the Sale of School Milk to Certain School Districts Located in Wisconsin and the Upper Peninsula of Michigan

The Complaint alleges that the Acquisition will likely substantially lessen competition in the sale of school milk to school districts located in Wisconsin and the UP. School districts in Wisconsin and the UP have only a few choices for school milk suppliers. Prior to the Acquisition, Dean and Foremost were the two processors best situated to serve certain districts in Wisconsin and the UP. In many districts, the Acquisition created a "merger to monopoly," leaving Dean as the only likely bidder. These school districts include those where Dean and Foremost were the only two dairy processors to bid in recent years. There are also a substantial number of school districts in Wisconsin and the UP for which Dean and Foremost were two of only three recent or likely future bidders. For these school districts, the Acquisition represents a "merger to duopoly." The elimination of head-to-head competition between Dean and Foremost will likely substantially lessen competition in these school milk markets and enable Dean to raise prices and/or reduce services.

d. Entry Would Not Prevent the Likely Anticompetitive Effects of the Acquisition in the School Milk Markets

The Complaint alleges that entry into school milk markets is not likely to prevent the anticompetitive effects of the Acquisition. Firms not currently serving school districts in Wisconsin and the UP are unlikely to begin to do so in the foreseeable future.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestiture of the Waukesha Plant

The proposed Final Judgment requires Dean, within 90 days after the filing of the

proposed Final Judgment, or 5 days after entry of the Final Judgment by the Court, whichever is later, to divest the Waukesha plant it acquired from Foremost. The divestiture required by the proposed Final Judgment will establish an independent and economically viable competitor to Dean.

The proposed Final Judgment is in the public interest because the divestiture of the Waukesha plant will enable the buyer to compete for business in an area that includes the vast majority of the population in the relevant geographic market. Of the De Pere and Waukesha plants acquired by Dean through the Acquisition, the Waukesha plant currently produces more milk, has a larger capacity to process milk, and is located closer to major population centers, including Chicago, Green Bay, and Milwaukee. Distance between processors and customers is an important consideration in fluid milk pricing because fluid milk has a limited shelf life and is costly to transport. These costs result in most customers purchasing fluid milk from nearby processing plants. For example, more than 90 percent of the milk sold to customers in Wisconsin and the UP travels less than 150 miles from the plant in which it was processed. Ninety-two percent of the population of the relevant fluid milk geographic market is located within 150 miles of the Waukesha plant, and 80% of public school children in Wisconsin and the UP are enrolled in school districts within 150 miles of the Waukesha plant.[6] The Waukesha plant currently serves some of the largest fluid milk customers in Chicago and other areas of the relevant

[6] The State of Michigan and Dean have entered into a separate settlement agreement with respect to school milk sales in the UP. That agreement includes a pricing mechanism that sets a maximum school milk bid price based on prices Dean charged for school milk during 2010.

geographic market.

In addition, the Waukesha plant has significant excess capacity. This excess capacity will allow it to serve additional customers of all sizes and will give the purchaser of the plant the incentive to compete aggressively for new business.

The proposed Final Judgment requires Dean to divest all tangible assets that comprise the Waukesha plant business and all intangible assets used in the development, production, servicing, and sale of fluid milk and other dairy products for the Waukesha plant. These assets will give the acquirer a distribution network, an established customer base, and a brand (Golden Guernsey) with strong brand equity. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the divested assets can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Dean must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that Dean does not accomplish the divestiture within the period prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Dean will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After 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 divestiture. At the end of six months, if the divestiture has not

been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

B. Notification of Future Acquisitions

In addition to the divestiture of the Waukesha plant, the proposed Final Judgment requires Dean to provide advance notification of certain future acquisitions of fluid milk processing plants to the Antitrust Division. The notification provision of the proposed Final Judgment is intended to avoid the difficulties associated with remedying the harms of a consummated anticompetitive acquisition by permitting the United States to assess the competitive effects of Dean's future acquisitions before the acquisitions are consummated, and if necessary, to seek to enjoin any transaction pursuant to Section 7.

The proposed Final Judgment provides that Dean shall not directly or indirectly acquire any assets of or interest in any fluid milk processing plant located in the United States, where the value of the acquisition is $3 million or greater, without prior notification to the United States. Transactions otherwise subject to the reporting and waiting period requirements of the HSR Act are excepted from the notification provision of the proposed Final Judgment. This provision will significantly broaden Dean's pre-merger reporting requirements because the $3 million amount is significantly less than the HSR Act's "size of the transaction" reporting threshold.

The proposed Final Judgment requires that such notification shall be provided to the Antitrust Division in the same format as, and in accordance with the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested

in Items 5 through 9 of the instructions must be provided only about fluid and school milk processing. Notification shall be provided at least 30 calendar days prior to acquiring any such interest. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, Dean shall not consummate the proposed transaction or agreement until 30 calendar days after responding consistent with 15 U.S.C. § 18a(e)(2). Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder.

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 Dean.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Dean 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 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 and published in the Federal Register.

Written comments should be submitted to:

Joshua H. Soven
Chief, Litigation I 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 Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGEMENT

The United States considered various proposals for settlement offered by Dean that would have provided less relief than is contained in the proposed Final Judgment. Those proposals involved the divestiture of a single dairy with less capacity and a smaller

service area than the Waukesha dairy. The United States determined that the divestiture of the Waukesha dairy was far superior given its location, size, and excess capacity.

The United States also considered, as an alternative to the proposed Final Judgment, incurring the time, expense, and risk of a full trial on the merits in order to attempt to force Dean to divest both of the plants that it acquired. The United States is concerned that the competitive harm from the Acquisition will be ongoing, and may become harder to remedy, as time passes.[7] The proposed Final Judgment will provide immediate relief and will avoid possible degradation of the Waukesha plant's business or the Golden Guernsey brand. The United States recognizes that the divestiture of the Waukesha plant, while addressing the vast majority of harm alleged in the Complaint, likely will have little effect on competition for fluid milk and school milk consumers in the northernmost section of the affected region. However, the proposed Final Judgment avoids the time, expense, and uncertainty of a full trial on the merits. Moreover, the United States is satisfied that the divestiture of the Waukesha plant described in the proposed Final Judgment is in the public interest because it will create an independent competitor able to compete for business in an area that includes the vast majority of the population in the relevant geographic market.

[7] Plaintiffs have been concerned about the deterioration of the Foremost assets since filing the action. *See* Joint Rule 26(f) Conference Report (Docket No. 31, filed May 21, 2010). This settlement eliminates the risk of asset deterioration that would have occurred prior to the entry of a judgment after trial.

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

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. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), 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 mechanisms to enforce the final judgment are clear and manageable").[8]

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 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) (citing *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

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[8] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a 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).

> 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).[9] 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 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);

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[9] *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'").

see also 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.

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). 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 Senator 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.[10]

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[10] *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.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (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, 93d Cong., 1st Sess., at 6 (1973) ("Where the

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: March 29, 2011

Respectfully submitted,

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public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").