UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, and STATE OF NEW YORK, *Plaintiffs,* v. TWIN AMERICA, LLC, et al. *Defendants.*	Civil Action No. 12-cv-8989 (ALC) (GWG) ECF CASE

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), Plaintiff United States of America ("United States") files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On March 17, 2009, Defendants Coach USA, Inc. (through subsidiary International Bus Services, Inc. ("IBS")) and CitySights LLC (through subsidiary City Sights Twin, LLC) formed Twin America, LLC ("Twin America"), a joint venture that combined the companies' hop-on, hop-off bus tour businesses in New York City. The United States and the State of New York (collectively, "Plaintiffs") filed a civil antitrust Complaint on December 11, 2012, alleging that the formation of Twin America substantially lessened competition in the market for hop-on, hop-off bus tours in New York City in violation of Section 7 of the Clayton Act (15 U.S.C. § 18), and

also violated Section 1 of the Sherman Act (15 U.S.C. § 1), Section 340 of the Donnelly Act (N.Y. Gen. Bus. Law § 340), and Section 63(12) of the New York Executive Law (N.Y. Exec. Law § 63(12)).[1] The Complaint sought to remedy harm to competition and disgorge Defendants' ill-gotten gains.

The Parties completed discovery and dispositive motions practice and trial was scheduled to begin on February 23, 2015. On December 10, 2014, the Parties informed the Court that they had reached an agreement in principle to settle the litigation and the trial date was adjourned while the Parties finalized the settlement.

Concurrent with the filing of this Competitive Impact Statement, Plaintiffs have filed a proposed Stipulation and Order, a proposed Final Judgment, and an Explanation of Consent Decree Procedures. The proposed Final Judgment is designed to remedy the competitive concerns resulting from Defendants' formation of Twin America and deprive Defendants of ill-gotten gains. As explained more fully below, the proposed Final Judgment requires Defendants to relinquish the complete set of City Sights's Manhattan bus stop authorizations to the New York City Department of Transportation (NYCDOT) and to pay $7.5 million in disgorgement, among other remedial actions.[2]

Plaintiffs and Defendants have stipulated that Defendants are bound by the terms of the proposed Final Judgment and 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

[1] The Tunney Act applies to "proposal[s] for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws [of the United States]." 15 U.S.C. § 16(b). Therefore, the proposed Final Judgment's settlement of Plaintiff State of New York's claims under N.Y. Gen. Bus. Law § 340 and N.Y. Exec. Law § 63(12) are not subject to the Tunney Act.

[2] Defendant Coach USA and the United States have also reached a settlement relating to costs and expenses incurred by the United States associated with discovery into allegations that Coach did not meet its document preservation obligations. This settlement, which is being filed concurrently with the filing of the proposed Final Judgment, is not subject to Tunney Act review.

the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Transaction

Coach USA, Inc. ("Coach"), a Delaware corporation with its principal place of business in Paramus, New Jersey, operated hop-on, hop-off bus tours in New York City under the "Gray Line New York" brand. Coach acquired the Gray Line business in 1998, and, by the early 2000s, was the dominant provider of hop-on, hop-off bus tours in New York City.

CitySights LLC ("City Sights"), a New York limited liability company with its principal place of business in New York, New York, began operating hop-on, hop-off bus tours under the "CitySights NY" brand in 2005. Between 2005 and 2009, City Sights steadily grew its business and established itself as Gray Line's only meaningful competitor. By the end of 2008, City Sights had almost equaled Gray Line in market share and was poised for further growth.

The impact of increasing competition from City Sights generated concern at the highest levels of Coach and its corporate parent, Stagecoach Group plc ("Stagecoach"), and led them to seek a business combination with City Sights. On March 17, 2009, following several months of negotiations, Coach (through subsidiary IBS) and City Sights (through subsidiary City Sights Twin, LLC) executed a joint venture agreement creating Twin America, a Delaware limited liability company with its principal place of business in New York City. Twin America combined Defendants' New York City hop-on, hop-off bus tour operations and ended all competition between Gray Line and City Sights. Twin America continued to operate both the Gray Line and City Sights brands under common ownership and control.

The formation of Twin America was not subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), which requires companies to notify and provide information to the Department of Justice and the Federal Trade Commission before consummating certain transactions. Neither the United States nor the State of New York was aware of the transaction until after it had been consummated. Upon learning of the transaction, the Antitrust Bureau of the New York State Attorney General's Office ("NYSAG") opened an investigation, and on July 31 and August 3, 2009, served subpoenas on Defendants seeking information about Twin America's formation.

B. The STB's Rejection of the Joint Venture

Within weeks of receiving the NYSAG's subpoenas, on August 19, 2009, Defendants applied to the federal Surface Transportation Board ("STB") for approval of Twin America. Pursuant to 49 U.S.C. § 14303, the STB must approve certain transactions involving passenger motor carriers prior to consummation. Following their application, Defendants asserted that review of Twin America was within the STB's exclusive jurisdiction because STB approval would immunize the transaction from antitrust law.[3]

On February 8, 2011, following the collection of fact and expert evidence, the STB rejected the Twin America joint venture. The STB expressed "concern[] that the Board's processes may have been manipulated to avoid the inquiry by NYSAG" and concluded that "[t]he transaction produce[d] an unacceptably high market concentration that can lead to, and has in fact led to, unchecked rate increases, and that holds the potential for other harmful effects of

[3] A party to a transaction approved by the STB is "exempt from the antitrust laws and from all other law . . . as necessary to let that person carry out the transaction." 49 U.S.C. §14303(f).

excessive market power."[4] Defendants moved for reconsideration, but in January 2012, the STB affirmed its prior finding. The STB gave Defendants the option of unwinding Twin America or spinning off Twin America's nominal interstate services, which the STB identified as the basis for its jurisdiction. On February 8, 2012, Defendants chose to spin off the interstate services, which removed the matter from STB jurisdiction but did nothing to address the joint venture's anticompetitive effects in the New York City hop-on, hop-off bus tour market. Plaintiffs filed the above-captioned lawsuit on December 11, 2012.

C. The Competitive Effects of the Transaction in the Market for Hop-On, Hop-Off Bus Tours in New York City

1. Relevant Market

The evidence demonstrates that a significant number of customers would not substitute to other tours or attractions in response to a small but significant and non-transitory increase in the price (SSNIP) of hop-on, hop-off bus tours. These bus tours combine transportation and sightseeing into a unique product that is not reasonably interchangeable with other tours or attractions. In addition to providing an informative and entertaining tour of New York City's most popular attractions and neighborhoods, hop-on, hop-off bus tours provide customers with the ability to "hop off" the bus to visit attractions of interest and "hop on" a later bus to continue their tour using the same ticket. As a result of this feature, customers are provided an affordable and reliable means to travel around New York City and the ability to customize their sightseeing itineraries to the attractions and neighborhoods that interest them. Defendants' documents and business practices illustrate that they have long recognized hop-on, hop-off bus tours in New York City to be a distinct market and do not view other types of tours as a significant constraint, a view shared by numerous other New York City sightseeing tours and attractions.

[4] Stagecoach Group PLC and Coach USA, Inc., et al., *Acquisition of Control – Twin America LLC*, STB Docket No. MC-F-21035 (Feb. 8, 2011) at 7.

The direct evidence of anticompetitive effects following the formation of Twin America provides further support for the conclusion that hop-on, hop-off bus tours in New York City constitute a relevant antitrust market. Defendants implemented a substantial price increase around the time of Twin America's early 2009 formation, raising the fares of City Sights's and Gray Line's downtown, uptown, and all loops tours, for example, by approximately 10 percent. These price increases, which Defendants have sustained for six years (and supplemented with further increases), are higher than the 5 percent SSNIP that is often used under the *Horizontal Merger Guidelines* to define a market. Defining a relevant antitrust market generally involves answering the question of whether a hypothetical monopolist would find it profitable to impose a SSNIP. The evidence that Coach and City Sights significantly increased price as a result of the market power conferred by the joint venture directly answers this question: it is clear that a *hypothetical* monopolist would find it profitable to impose a SSNIP because an *actual* near-monopolist (Twin America) did, in fact, find it profitable to raise price significantly for an extended period of time.

Hop-on, hop-off bus tours in New York City therefore constitute a relevant market and line of commence under Section 7 of the Clayton Act, Section 1 of the Sherman Act, and Section 340 of the Donnelly Act.

2. Competitive Effects

The formation of Twin America resulted in actual and immediate harm to consumers as it enabled Defendants to increase hop-on, hop-off bus tour prices by approximately 10 percent. The evidence demonstrates that at the time Coach and Stagecoach were negotiating a business combination with City Sights, Coach and Stagecoach consistently planned for and assumed that the merged firm would implement a 10 percent fare increase on Gray Line and City Sights tours

and that Coach shared this assumption with City Sights. Coach ultimately increased Gray Line's hop-on, hop-off bus tour fares by approximately 10 percent shortly before executing the joint venture and Defendants increased City Sights's fares to match the Gray Line increase shortly after consummation. Defendants sustained the Gray Line and City Sights fare increases in the years following Twin America's formation and raised prices further in 2013.

In years prior to the joint venture, Coach and City Sights were each other's main rival and consumers benefited from the improved products and services that resulted from the fierce and direct competition between them. This head-to-head competition, which intensified over time, was eliminated when Defendants merged their hop-on, hop-off bus tour operations. In addition, the formation of Twin America substantially increased concentration in an already highly concentrated market. Concentration is typically measured by the Herfindahl-Hirschman Index ("HHI"). The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition. Markets in which the HHI is in excess of 2500 points are considered highly concentrated, and a transaction that increases concentration by more than 200 points in such a market is presumed likely to enhance market power. In the year prior to the joint venture's formation, Gray Line had an approximately 63 percent market share, City Sights had an approximately 37 percent share, and a third firm had a less than one percent share, resulting in an HHI of 5271. The formation of Twin America created an effective monopoly with an approximately 99 percent market share and increased the market's HHI by 4599 to 9870. Based on the pre- and post-transaction market concentration measures, Twin America's formation is presumed likely to enhance market power.

3. Entry

Entry and expansion into the relevant market has not been, and is not likely to be, timely or sufficient to counteract the joint venture's anticompetitive effects. For more than three years following Twin America's formation, there was no new entry or expansion in the New York City hop-on, hop-off bus tour market and Defendants sustained their early 2009 price increases. Entry that has occurred since 2012 has also failed to roll back Defendants' price increases and has been insufficient to constrain Twin America's exercise of market power.

The most significant barrier to entry in the hop-on, hop-off bus tour market is the requirement that an entrant obtain authorizations from the New York City Department of Transportation ("NYCDOT") for each location where it wishes to stop to load and unload passengers on its tour. Both Gray Line and City Sights have long held large portfolios of bus stop authorizations that enable them to stop at or in close proximity to virtually all of New York City's top attractions and neighborhoods, providing Defendants with a distinct competitive advantage over other operators in the market. Gray Line and City Sights obtained these bus stop authorizations without difficulty years before their joint venture because NYCDOT awarded the bus stops on a "first come, first served" basis. Recent entrants, by contrast, have faced persistent difficulties securing bus stop authorizations at or sufficiently near key tourist attractions to be competitive with Twin America as NYCDOT has denied the overwhelming majority of bus stops applied for since Twin America's formation. Most of the stops sought by the entrants – particularly those at or in close proximity to top tourist attractions – are now at capacity or are otherwise unavailable, leaving Twin America with the dominant share of competitively-meaningful stops. The chronic denial of bus stop authorizations has blocked some firms from entering the market altogether and prevented those that have entered from replicating the scale

and strength of either City Sights or Gray Line prior to the joint venture. Without needed bus stops, some entrants stop at key attractions on an unauthorized basis, creating the risk of an enforcement action that could curtail their operations at any time.

4. Efficiencies

The formation of Twin America has not resulted in, and is unlikely to result in, cognizable, merger-specific efficiencies that have been passed through to consumers on a sufficient scale to offset Twin America's anticompetitive effects.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestiture

The proposed Final Judgment remedies the competitive harm alleged in the Complaint by requiring Twin America to relinquish to the NYCDOT the complete set of City Sights bus stop authorizations in Manhattan so that other firms are better positioned to obtain the bus stop authorizations needed to compete more effectively with Twin America.

Here, the most intractable barrier to entry is the inability of new firms to obtain bus stop authorizations from NYCDOT at or in sufficient proximity to New York City's top attractions and neighborhoods. The divestiture significantly eases this entry barrier by increasing NYCDOT's inventory of bus stops and freeing up capacity at locations throughout Manhattan, including the locations most sought by recent entrants. Notably, City Sights's set of approximately 50 bus stop authorizations includes highly-coveted stops surrounding key tourist attractions such as Times Square, the Empire State Building, and Battery Park that are critical to operating a competitive hop-on, hop-off bus tour. By relinquishing the City Sights bus stop authorizations to NYCDOT, the city agency charged with managing bus stop authorizations, the

proposed Final Judgment increases availability of stops, especially at key attractions, that rival firms can use to compete against Twin America.

The proposed Final Judgment requires Defendants to complete the relinquishment of the City Sights bus stop authorizations by May 1, 2015, prior to the start of the busy summer tourist season. Twin America will continue to hold Gray Line's pre-existing bus stop authorizations for its own hop-on, hop-off service.

The proposed Final Judgment prohibits Defendants from applying for or obtaining bus stop authorizations for hop-on, hop-off bus tours at the locations of the divested City Sights bus stop authorizations for a period of five years. However, after May 1, 2016, if NYCDOT revokes a bus stop authorization currently granted to a Twin America affiliate other than City Sights, the proposed Final Judgment allows Defendants to apply for a bus stop authorization at the location of a divested City Sights bus stop authorization that is at or in close proximity to the bus stop authorization that NYCDOT has revoked.

B. Disgorgement

The proposed Final Judgment also requires Defendants to disgorge $7.5 million in profits obtained as a result of their unlawful formation of Twin America. Disgorgement is an equitable remedy that seeks to "depriv[e] violators of the fruits of their illegal conduct" by "forc[ing] a defendant to give up the amount by which he was unjustly enriched." *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) (internal quotation marks omitted). By preventing unjust enrichment, disgorgement has the forward-looking "effect of deterring subsequent fraud." *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006). Disgorgement is a "distinctly public-regarding remedy," *FTC v. Bronson Partners*, LLC, 654 F.3d 359, 372 (2d Cir. 2011), whose "emphasis [is] on public protection, as opposed to simple compensatory relief," *Cavanagh*, 445 F.3d at 117.

"Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity," a district court's ability to exercise the full powers of equity jurisdiction, including disgorgement, "is not to be denied or limited." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 289, 291-92 (1960) ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."). The Second Circuit has long affirmed the ability of district courts to award disgorgement in government enforcement actions redressing statutory violations. *See SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102-03 (2d Cir. 1978) (Friendly, J.); *Bronson Partners*, 654 F.3d at 365-67, 372-74. This Court has also specifically recognized the government's ability to seek disgorgement in antitrust suits brought under the Sherman Act. *See United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 638-41 (S.D.N.Y. 2011) (Pauley, J.) (holding that an award of disgorgement "comports with established principles of antitrust law"). Although *Keyspan* considered the availability of disgorgement under the Sherman Act, its analysis also applies to the Clayton Act, as both Acts similarly authorize the United States to bring suits "in equity to prevent and restrain such violations." *Compare* Sherman Act, 15 U.S.C. § 4 (2012) *with* Clayton Act, 15 U.S.C. § 25 (2012). *See also People v. Ernst & Young LLP*, 980 N.Y.S.2d 456, 457 (N.Y. App. Div. 2014) (affirming authority of New York Attorney General to obtain disgorgement under New York law).

As in *Keyspan*, there are specific "exigencies of [this] case" that justify a disgorgement award. *Keyspan*, 765 F. Supp. 2d at 640. Unlike the majority of Section 7 challenges brought by the United States, which are brought prior to the closing of the challenged transaction, this case

involves a consummated joint venture that resulted in actual and substantial consumer harm. As alleged in the Complaint, Defendants not only increased prices by approximately 10 percent in connection with the joint venture's formation, they reaped these illegal profits for years while forestalling antitrust enforcement. By awarding disgorgement of Defendants' ill-gotten gain, the proposed Final Judgment will prevent Defendants from being unjustly enriched by their conduct and deter Defendants and others from engaging in similar conduct in the future.

In determining the appropriate disgorgement amount, Plaintiffs accounted for the fact that Defendants have agreed to pay $19 million to settle related private class action lawsuits that were brought after Plaintiffs filed this action.[5] Because Plaintiffs' reasonable approximation of profits connected to Defendants' antitrust law violations exceeds $19 million, Plaintiffs determined that disgorgement of an additional amount was appropriate. The $7.5 million in disgorgement provided under the proposed Final Judgment will be divided equally between the United States and the State of New York.

C. Antitrust Compliance and Inspection

Sections IX and XI of the proposed Final Judgment establish procedures to ensure that Defendants comply with the terms of the Final Judgment and the antitrust laws. Section IX grants the United States or the State of New York access, upon reasonable notice, to Defendants' records and documents relating to matters contained in the Final Judgment. Defendants must also make their personnel available for interviews or depositions regarding such matters. In addition, upon request, Defendants must prepare written reports or responses to written interrogatories relating to matters contained in the Final Judgment.

[5] See Order and Final Judgment Approving *In Re NYC Bus Tour Antitrust Litigation* Class Action Settlement, *In re NYC Bus Tour Antitrust Litigation*, No. 13-CV-0711 (ALC) (GWG) (S.D.N.Y. Oct. 21, 2014) (Dkt. No. 122).

To ensure future compliance with the antitrust laws, Section XI of the proposed Final Judgment requires Defendants Coach and Twin America to maintain an antitrust compliance program for each company's officers and directors with responsibility for any operations in the United States, as well as any other employee with pricing or decision-making responsibility for the provision of hop-on, hop-off tour bus tours in New York City. The antitrust compliance program will provide these personnel with annual training on the meaning and requirements of the antitrust laws and shall be delivered by an attorney with experience in the field of antitrust law. Section XI also requires Defendants Coach and Twin America to designate an Antitrust Compliance Officer to oversee the antitrust compliance program. The Antitrust Compliance Officer must communicate annually to all employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of the antitrust laws.

D. Notification of Future Transactions

Section X of the proposed Final Judgment requires Defendants to provide advance notification of any future acquisition of any assets or of any interest, including any financial, security, loan, equity or management interest, in a person providing hop-on, hop-off bus tours in New York City during the term of the Final Judgment regardless of whether the transaction meets the reporting thresholds set forth in the HSR Act. The proposed Final Judgment further provides for waiting periods and opportunities for the United States or the State of New York to obtain additional information analogous to the provisions of the HSR Act.

E. Stipulation and Order Provisions

Defendants have entered into a Stipulation and Order, which was filed simultaneously with the Court, to ensure that the City Sights bus stop authorizations are maintained until Defendants have relinquished them to NYCDOT.

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 the Defendants.[6]

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The Parties 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

[6] As previously noted, a related private class action lawsuit seeking damages from Defendants was settled in October 2014. *See* Order and Final Judgment Approving *In Re NYC Bus Tour Antitrust Litigation* Class Action Settlement, *In re NYC Bus Tour Antitrust Litigation*, No. 13-CV-0711 (ALC) (GWG) (S.D.N.Y. Oct. 21, 2014) (Dkt. No. 122).

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:

William H. Stallings
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8000
Washington, DC 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The proposed Final Judgment, however, avoids the time, expense, and uncertainty of a full trial on the merits. The United States also considered whether the City Sights bus stop authorizations could be transferred on a standalone basis or with other assets to an upfront buyer, but determined that such a transaction was not feasible in light of current NYCDOT regulations and policies governing bus stop authorizations. The United States is satisfied that the remedies set forth in the proposed Final Judgment will sufficiently restore the

competition lost when Defendants formed their joint venture and will appropriately deprive Defendants of ill-gotten gains.

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

The Clayton and Sherman Acts, as amended by the APPA, require 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); *see also United States v. Int'l Bus. Mach. Corp.*, 163 F.3d 737, 740 (2d Cir. 1998). In making a "public interest" 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); *see generally Keyspan*, 763 F. Supp. 2d at 637-38 (discussing Tunney Act standards); *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (similar). 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); *accord United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235, 238 (S.D.N.Y. 1997)

(quoting Microsoft, 56 F.3d at 1460), *aff'd sub nom. United States v. Bleznak*, 153 F.3d 16 (2d Cir. 1998); *Keyspan*, 763 F. Supp. 2d at 637 (same).

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, the court's function is "not to determine whether the proposed [d]ecree results in the balance of rights and liabilities that is the one that will *best* serve society, but only to ensure that the resulting settlement is within the reaches of the public interest." *Keyspan*, 763 F. Supp. 2d at 637 (quoting *Alex. Brown & Sons*, 963 F. Supp. at 238) (internal quotations omitted). In making this determination, "[t]he [c]ourt is not permitted to reject the proposed remedies merely because the court believes other remedies are preferable. [Rather], the relevant inquiry is whether there is a factual foundation for the government's decision such that its conclusions regarding the proposed settlement are reasonable." *Keyspan*, at 637-38 (quoting *United States v. Abitibi-Consolidated Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008)); *see also United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012) (Cote, J.); *Alex. Brown & Sons*, 963 F. Supp. at 238.[7] The government's predictions about the efficacy of its remedies are entitled to deference. *Apple*, 889 F. Supp. 2d at 631 (citation omitted).[8]

[7] *See also United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981) ("The 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."); *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'").

[8] *See 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 United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 76 (D.D.C. 2014) (noting that room must be made for the government to grant concessions in the negotiation process for settlements); *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 Keyspan*, 763 F. Supp. 2d at 638 ("A court must limit its review to the issues in the complaint.") (citations omitted). 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. 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 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). 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.[9] 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.

[9] *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.").

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.

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Respectfully submitted,

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