UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. GANNETT CO., INC., BELO CORP., and SANDER MEDIA LLC, Defendants.	**CASE NO.** **JUDGE:** **FILED:**

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

Defendants Gannett Co., Inc. ("Gannett"), and Belo Corp. ("Belo") entered into an Agreement and Plan of Merger, dated June 12, 2013, pursuant to which Gannett will acquire Belo for approximately $1.5 billion, with a total transaction value of $2.2 billion, including assumed debt. Gannett has also entered into an Asset Purchase Agreement and other related agreements with Sander Holdings Co. LLC, a wholly-owned subsidiary of defendant Sander Media LLC ("Sander"), which would sell KMOV-TV in St. Louis, Missouri, and five other Belo broadcast television stations to Sander for considerably below market price and would create a

close, ongoing business relationship between Gannett and Sander. This merger, asset purchase, and other related agreements are referred to herein collectively as "the Transaction."

The United States filed a civil antitrust Complaint on December 16, 2013, seeking to prevent the Transaction. The Complaint alleges that the Transaction's likely effect would be to increase broadcast television spot advertising prices in the St. Louis Designated Market Area ("DMA") in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act, 15 U.S.C. §§ 1, 18.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment designed to eliminate the anticompetitive effects of the Transaction. The proposed Final Judgment, which is explained more fully below, requires Defendants to divest KMOV-TV to an Acquirer approved by the United States in a manner that preserves competition in the St. Louis DMA. The Hold Separate requires Defendants to take certain steps to ensure that KMOV-TV is operated as a competitively independent, economically viable business that is uninfluenced by Gannett so that competition is maintained until the required divestiture occurs.

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

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

A. The Defendants and the Proposed Transaction

1. The Defendants

Gannett, a Delaware corporation with headquarters in McLean, Virginia, owns and operates 23 broadcast television stations nationwide, 12 in top-25 markets. Belo, a Delaware corporation with headquarters in Dallas, Texas, owns and operates 20 broadcast television stations nationwide, 9 in top-25 markets. Sander, a Delaware limited liability company with headquarters in Scottsdale, Arizona, has no current business activity other than preparing to acquire six Belo stations, including KMOV-TV in St. Louis, as part of the Transaction.

2. The Proposed Transaction

Federal Communications Commission ("FCC") rules prohibit Gannett from acquiring the Belo stations in five markets where Gannett already owns television stations or newspapers. To comply with these rules, Gannett has agreed to transfer six Belo stations in five DMAs, including KMOV-TV in St. Louis, to Sander simultaneously with the merger of Gannett and Belo. Although Gannett will formally transfer KMOV-TV to Sander, the Transaction includes additional agreements between Gannett and Sander that would likely give Gannett significant influence over Sander's operation of the stations, including KMOV-TV, and would likely diminish Gannett's incentives to compete vigorously against Sander in the sale of broadcast television spot advertising in St. Louis. These agreements include: (1) eight-year assignable options permitting Gannett to reacquire any of the stations (should existing FCC prohibitions be eliminated) or to transfer the options to a third party; (2) eight-year Shared Services Agreements under which Gannett will provide a variety of services (excluding joint advertising sales and negotiation of retransmission consent rights in DMAs such as St. Louis where Gannett also has

television stations) to help Sander operate the stations, in return for substantial payments from Sander to Gannett; (3) a financing guarantee obligating Gannett to repay the balance of the $101 million loan Sander is obtaining to purchase the stations should Sander default; and (4) Joint Sales Agreements (only in DMAs where Gannett does not own television stations) giving Gannett control of advertising sales.

The Transaction, as initially agreed to by Defendants on June 12, 2013, and as subsequently amended, would lessen competition substantially and restrain trade in the sale of broadcast television spot advertising in the St. Louis DMA, which includes parts of Missouri and Illinois. This Transaction is the subject of the Complaint and proposed Final Judgment filed by the United States on December 16, 2013.

B. Anticompetitive Consequences of the Transaction

1. The Relevant Product

The Complaint alleges that the sale of broadcast television spot advertising constitutes a relevant product market for analyzing this acquisition under the Clayton and Sherman Acts. Television stations attract viewers through their programming and then sell advertising time to businesses wanting to advertise their products to those television viewers. Broadcast television "spot" advertising is purchased by advertisers seeking to target potential customers in specific geographic markets. It differs from network and syndicated television advertising, which are sold on a nationwide basis by major television networks and by producers of syndicated programs and are broadcast in every market where the network or syndicated program is aired.

Broadcast television spot advertising possesses a unique combination of attributes that sets it apart from advertising using other types of media. Television combines sight, sound, and motion, thereby creating a more memorable advertisement. Broadcast television spot advertising

reaches the largest percentage of potential customers in a targeted geographic market and is therefore especially effective in introducing and establishing a product's image.

Because of this unique combination of attributes, broadcast television spot advertising has no close substitute for a significant number of advertisers. Cable television spot advertising and Internet-based video advertising lack the same reach; radio spots lack the visual impact; and newspaper and billboard ads lack sound and motion, as do many internet search engine and website banner ads. Through information provided during individualized price negotiations, stations can readily identify advertisers with strong preferences for using broadcast television advertising and ultimately can charge different advertisers different prices. Consequently, a small but significant increase in the price of broadcast television spot advertising is unlikely to cause enough advertising customers to switch enough advertising purchases to other media to make the price increase unprofitable.

2. The Relevant Market

The Complaint alleges that the St. Louis DMA constitutes a relevant geographic market for analyzing this acquisition under the Clayton and Sherman Acts. DMAs are geographic units defined by A.C. Nielsen Company for advertising purposes. The St. Louis DMA is the 21st largest in the United States, containing over 1.2 million television households. Signals from full-powered television stations in the St. Louis area reach viewers throughout that DMA, so advertisers use television stations in the St. Louis DMA to target the largest possible number of viewers within the entire DMA. Some of these advertisers are located in the St. Louis area and trying to reach customers there; others are regional or national businesses wanting to target consumers in the St. Louis area. Advertising on television stations outside the St. Louis DMA is not an alternative for either group, because signals from television stations outside the St. Louis

DMA reach few viewers in the St. Louis DMA. Thus, advertising on those stations does not reach a significant number of potential customers in the St. Louis DMA.

3. Harm to Competition in the St. Louis DMA

The Complaint alleges that the Transaction likely would lessen competition substantially in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and unreasonably restrain interstate trade and commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Based on advertising sales revenues, Gannett's NBC-affiliated KSDK-TV and Belo's CBS-affiliated KMOV-TV are two of the three largest commercial broadcast television stations in the St. Louis DMA. Broadcast station ownership in the St. Louis DMA is already significantly concentrated, with more than 80% of gross advertising revenues in 2012 attributable to only three stations. Together, KMOV-TV and KSDK-TV have approximately 50% of all television station gross advertising revenues in the St. Louis DMA. The St. Louis Fox affiliate is the only significant advertising competitor to these stations. The St. Louis ABC and CW affiliates each have gross advertising revenue shares of less than 10%. If KSDK-TV and KMOV-TV were to coordinate their competitive behavior, then the market structure would operate as if the two stations were commonly owned in a highly concentrated market.[1]

KMOV-TV and KSDK-TV are not only two of the largest stations in St. Louis, they are also close substitutes for one another in this concentrated market with its limited alternatives. KMOV-TV and KSDK-TV appeal to similar demographic groups, making them close substitutes

[1] Using the Herfindahl-Hirschman Index ("HHI"), a standard measure of market concentration, the post-acquisition HHI (combining KMOV-TV's and KDSK-TV's shares) would be about 3592, an increase of about 1161 points. Under the Horizontal Merger Guidelines issued by the Department of Justice and Federal Trade Commission, mergers resulting in highly concentrated markets (i.e., HHI over 2500) with an increase in the HHI of more than 200 points are presumed to be likely to enhance market power.

for many viewers and advertisers. The programming on the CW affiliate tends to appeal to a younger demographic, and neither the ABC nor the CW affiliate has strong local news programming, which is an important differentiator to advertisers in the St. Louis DMA. As a result, advertisers view the St. Louis ABC and CW affiliates as much less acceptable substitutes for KDSK-TV and KMOV-TV. The presence of the Fox affiliate alone would not be sufficient to enable enough advertisers to "buy around" KMOV-TV and KSDK-TV to defeat any price increase imposed by these two stations through coordinated action.

After the Transaction closes, KSDK-TV and KMOV-TV will continue to have different owners and maintain separate sales forces. Still, the Transaction would alter the competitive landscape in the St. Louis DMA and likely harm competition there by creating an ongoing, intertwined relationship between Gannett and Sander that did not exist between Gannett and Belo. In this new relationship, Gannett will have significant influence over Sander and Sander's operation of KMOV-TV. This could reduce competition between KSDK-TV and KMOV-TV in at least three ways:

1. Through the eight-year assignable option, which gives Gannett the practical ability to sell KMOV-TV to any other person, Gannett can displace Sander at any time. Losing KMOV-TV would end Sander's income stream from the station, so Sander's knowledge that Gannett could exercise the option would create an incentive for Sander not to upset Gannett by competing vigorously with KSDK-TV going forward. Exercising the option also effectively lets Gannett choose its competitor in St. Louis.

2. Through the financing guarantee, which requires Gannett to repay the loan financing Sander's purchase of the Belo stations if Sander defaults, Gannett has a reduced incentive to compete aggressively with Sander. Aggressive competition from Gannett could push Sander into default, in which case Gannett would have to pay off the loan.

3. Through the eight-year Shared Services Agreements, Sander will be dependent on a competitor for key services that Sander needs to run KMOV-TV successfully. This dependence on Gannett creates an incentive for Sander not to compete too strongly with KSDK-TV.

In sum, the sale of KMOV-TV to Sander does not adequately address the competitive problem that would exist in the St. Louis DMA from the Gannett-Belo merger without the sale to Sander. With these entanglements, Sander is not sufficiently separate from Gannett to be an effective competitor. The agreements give both Gannett and Sander the incentive and the means to work together cooperatively to maximize their joint profits at the expense of their customers.

Currently, KSDK-TV and KMOV-TV vigorously compete for the business of local, regional, and national firms seeking to advertise on St. Louis television stations. Advertisers benefit from this competition. During individual price negotiations between advertisers and St. Louis television stations, advertisers are able to "play off" KSDK-TV and KMOV-TV against each other and obtain competitive rates for programs that target similar demographics. The Transaction is likely to attenuate this competition and thereby adversely affect a substantial volume of interstate commerce. It likely would have the following effects, among others:

a. Competition in the sale of broadcast television spot advertising in the St. Louis DMA likely would be lessened substantially;

b. Actual and perceived potential competition between Gannett and Sander in the sale of broadcast television spot advertising time in the St. Louis DMA likely would be diminished; and

c. Prices for spot advertising time on television stations in the St. Louis DMA likely would increase, and the quality of services likely would decline.

After the Transaction, a significant number of St. Louis DMA advertisers would not be able to reach their desired audiences with equivalent efficiency without advertising on stations controlled or significantly influenced by Gannett. The Transaction, therefore, is likely to enable Gannett to raise prices unilaterally.

4. Lack of Countervailing Factors

The Complaint alleges that entry or expansion in the St. Louis DMA broadcast television spot advertising market would not be timely, likely, or sufficient to prevent anticompetitive effects. New entry in the St. Louis DMA is unlikely since a new station would require an FCC license, which is difficult to obtain. Even if a new station became operational, commercial success would come over a period of many years at best. Other television stations in the St. Louis DMA could not readily increase their advertising capacity or change their programming in response to a price increase by KDSD-TV and KMOV-TV. The number of 30-second spots available at a station is generally fixed, and additional slots cannot be created. Adjusting programming in response to a pricing change is risky, difficult, and time-consuming. Programming schedules are complex and carefully constructed, and television stations often have multi-year contractual commitments for individual shows or are otherwise committed to programming provided by their affiliated network.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the Transaction in the St. Louis DMA by maintaining KMOV-TV as an independent, economically viable competitor. The proposed Final Judgment requires Defendants to divest KMOV-TV to an Acquirer selected by Defendants and approved by the United States. To achieve this result, Gannett will divest its option on KMOV-TV to the Acquirer, and Sander will divest its interests in the station and the assets used to operate KMOV-TV.

The “Divestiture Assets” are defined in Paragraph II.G of the proposed Final Judgment to cover all assets used primarily in the operation of KMOV-TV. These assets include real property,

equipment, FCC licenses, contracts, intellectual property rights, programming materials, and customer lists maintained by Belo or Sander in connection with KMOV-TV. These do not include assets that are not primarily used in the operation of KMOV-TV, but are maintained at the corporate level and used to support multiple stations. Thus, Defendants will be able to retain back-office systems or other assets and contracts used at the corporate level to support multiple broadcast television stations, which they would need to conduct their remaining operations, and which an Acquirer experienced in operating broadcast television stations could supply for itself. The Shared Services Agreement between Gannett and Sander, which Paragraph IV.A of the proposed Final Judgment requires to be terminated with respect to KMOV-TV upon divestiture, is also excluded from the Divestiture Assets.

To ensure that KMOV-TV is operated as an independent competitor after the divestiture, Paragraph IV.A and Section XI of the proposed Final Judgment prohibit Defendants from entering into any agreements during the term of the Final Judgment that create a long-term relationship with the Divestiture Assets after the divestiture is completed. Examples of prohibited agreements include options to repurchase or assign interests in KMOV-TV; agreements to provide financing or guarantees for financing; local marketing agreements, joint sales agreements, or any other cooperative selling arrangements; shared services agreements; and agreements to jointly conduct any business negotiations with the Acquirer with respect to KMOV-TV. Any such agreements that may exist between Gannett and Sander shall be terminated with respect to the KMOV-TV upon divestiture. This shared services prohibition does not preclude agreements limited to helicopter sharing and stock video pooling in the form that are customary in the industry. Gannett and Belo currently have a helicopter sharing agreement in St. Louis, and the Acquirer and Gannett may continue this arrangement after the divestiture.

These limited exceptions do not permit Defendants to enter into broader news sharing agreements with respect to KMOV-TV. To the extent the Acquirer needs Defendants to provide any transitional services that facilitate continuous operation of KMOV-TV until the Acquirer can provide such capabilities independently, the United States retains discretion to approve such arrangements.

Defendants are required to take all steps reasonably necessary to accomplish the divestiture quickly and to cooperate with prospective purchasers. Because transferring the KMOV-TV license requires FCC approval, Defendants are specifically required to use their best efforts to obtain all necessary FCC approvals as expeditiously as possible. This divestiture of KMOV-TV must occur within 120 calendar days after the filing of the Complaint in this matter (i.e., by April 15, 2013) or 5 days after notice that the Court has entered the Final Judgment, whichever is later. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed ninety (90) calendar days in total, and shall notify the Court in such circumstances.

If the divestiture does not occur within this prescribed timeframe, the proposed Final Judgment provides that the Court, upon application of the United States, will appoint a trustee selected by the United States to sell KMOV-TV. Gannett will pay all costs and expenses of the trustee. The trustee's commission will be structured to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. The trustee would file monthly reports with the Court and the United States describing efforts to divest KMOV-TV. If the divestiture has not been accomplished after 6 months, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, to carry out the purpose of the trust.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

comments will be posted on the United States Department of Justice, Antitrust Division's Internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Scott A. Scheele
Chief, Telecommunications and Media Enforcement Section
Antitrust Division
United States Department of Justice
450 5th Street, N.W. Suite 7000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and Defendants 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 United States could have continued the litigation and sought preliminary and permanent injunctions against consummation of the Transaction. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the sale of broadcast television spot advertising in the St. Louis DMA. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after

which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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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 mechanism to enforce the final judgment are clear and manageable.").[2]

[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004) *with*

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (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 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).[3] 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

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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).

[3] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also 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. 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 InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the

"court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). 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.[4]

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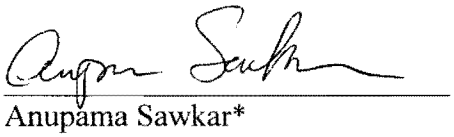
[4] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 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

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 16, 2013

Respectfully submitted,



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explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").