EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL PAPER COMPANY and TEMPLE-INLAND INC.,

Defendants.

Case: 1:12-cv-00227
Assigned To : Collyer, Rosemary M.
Assign. Date : 2/10/2012
Description: Antitrust

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 lawsuit on February 10, 2012, seeking to enjoin Defendant International Paper Company ("International Paper") from acquiring Defendant Temple-Inland Inc. ("Temple-Inland"), and alleging that the merger would likely substantially lessen competition in the market for containerboard in North America in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The loss of competition would likely result in higher containerboard prices and lower containerboard output in the United States.

At the same time the Complaint was filed, the United States filed an Asset Preservation Stipulation and Order and a proposed Final Judgment, which are designed to preserve competition for the production and sale of containerboard in North America. Under the

proposed Final Judgment, which is explained more fully below, Defendants are required to divest one International Paper mill and two Temple-Inland mills that manufacture containerboard. Pursuant to the Asset Preservation Stipulation and Order, International Paper and Temple-Inland must ensure that the assets being divested continue to be operated as ongoing, economically viable, and competitive assets until the divestitures required by the proposed Final Judgment have been accomplished.

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. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendants and the Proposed Transaction

On September 6, 2011, International Paper agreed to acquire Temple-Inland for $4.3 billion. International Paper and Temple-Inland are, respectively, the largest and third-largest producers of containerboard in the United States and Canada (which the containerboard industry and the Complaint refer to collectively as "North America"). Containerboard is the type of paper that is used to make corrugated boxes.

International Paper, a New York corporation headquartered in Memphis, Tennessee, owns and operates 12 containerboard mills and 133 plants that convert containerboard into corrugated boxes ("box plants") in the United States. International Paper controls approximately 26 percent of North American containerboard capacity. In 2010, International Paper's revenues were approximately $25.2 billion, with its North American Industrial Packaging Group, which produces containerboard and corrugated products, accounting for $8.4 billion.

Temple-Inland, a Delaware corporation headquartered in Austin, Texas, owns and operates seven containerboard mills and 53 box plants in the United States. Temple-Inland controls approximately 11 percent of North American containerboard capacity. In 2010, Temple-Inland's annual revenues were approximately $3.8 billion, with its corrugated-packaging business accounting for $3.2 billion. The proposed merger would have created a single firm in control of approximately 37 percent of North American containerboard capacity.

B. Competitive Effects of the Proposed Merger

1. Containerboard is the Relevant Product Market.

The Complaint alleges that containerboard is a relevant product market within the meaning of Section 7 of the Clayton Act. There are two types of containerboard: (1) linerboard, the paper that forms the inner and outer facings of a corrugated sheet; and (2) medium, the paper that is inserted between the inner and outer linerboards in a wavy, fluted pattern. Linerboard is made from virgin wood fiber, recycled fiber (usually "old corrugated containers," or "OCC"), or a combination of both virgin and recycled fibers. Medium is typically made from recycled fiber, but can also be made from virgin fibers or a combination of recycled and virgin fibers.

Linerboard and medium are relatively undifferentiated products. The linerboard made by one North American producer is substantially the same as the linerboard made by other producers. The medium made by the various producers is also substantially the same.

Although linerboard and medium are typically produced on different machines and have different performance characteristics, it is appropriate to view them as a single relevant product market because (1) containerboard producers and their customers generally regard competition in terms of a single containerboard market, not separate markets for linerboard and medium, and (2)

analyzing them as separate products would not significantly alter the market shares or the analysis of the proposed merger's competitive effects.

Producers manufacture containerboard at mills and then ship it to box plants. At box plants, a large machine called a corrugator combines the linerboard and medium into rigid corrugated sheets. Box plants then convert the sheets into corrugated packaging, including corrugated boxes and displays. The work performed at box plants is sometimes divided between separate facilities called sheet feeders (which combine linerboard and medium into corrugated sheets) and sheet plants (which convert the sheets into corrugated boxes). Containerboard typically is the largest cost component of a corrugated box, accounting for a majority of the price.

For box manufacturers, there is no reasonable substitute for containerboard: boxes made from other types of paper lack the required performance characteristics, such as the necessary strength, basis weight, and thickness. Furthermore, for box customers, there is no reasonable substitute for corrugated boxes: other products used to carry and transport goods, such as returnable plastic containers, are typically too expensive or lack the required performance characteristics to serve as a commercially viable alternative.

Therefore, a small but significant increase in the price of containerboard in North America is unlikely to cause a sufficient number of containerboard or corrugated box customers to switch to other types of products such that the price increase would be unprofitable. Accordingly, containerboard is a relevant product market and a "line of commerce" within the meaning of Section 7 of the Clayton Act.

2. North America is a Relevant Geographic Market.

The Complaint alleges that North America is a relevant geographic market for the production and sale of containerboard within the meaning of Section 7 of the Clayton Act. Containerboard produced outside of North America is not a commercially viable substitute for containerboard produced in North America due to higher transportation costs, unfavorable currency exchange rates, lower-quality fiber, and other disadvantages to producers of containerboard outside of North America seeking to import containerboard into North America. Therefore, a small but significant increase in the price of containerboard produced in North America is unlikely to cause a sufficient number of customers of containerboard or corrugated boxes to switch to containerboard produced outside of North America to make such a price increase unprofitable. Accordingly, North America is a relevant geographic market for the production and sale of containerboard and a "section of the country" within the meaning of Section 7 of the Clayton Act.

3. Likely Anticompetitive Effects of the Proposed Merger

The Complaint alleges that the proposed merger would likely substantially lessen competition in the production and sale of containerboard in North America. International Paper controls approximately 26 percent of North American containerboard capacity, and Temple-Inland controls approximately 11 percent. Therefore, the proposed merger would give International Paper control over approximately 37 percent of North American containerboard capacity. Post-merger, the four largest producers would control approximately 74 percent of that capacity. A number of smaller producers, none with a share higher than three percent, account for the remainder of the market.

Using a standard measure of concentration called the Herfindahl–Herschman Index ("HHI"), the proposed merger would significantly raise market concentration and result in a moderately concentrated market, producing an HHI increase of approximately 605 and a post-merger HHI of approximately 2,025. The defendants' combined market share (approximately 37 percent), coupled with the significant increase in market concentration (605), exceed the levels that courts have found to create a presumption that a proposed merger likely would substantially lessen competition.

The proposed merger is likely to cause International Paper to engage in unilateral conduct that would raise the market price of containerboard. The competitive effects analysis described in Section 6.3 of the 2010 Horizontal Merger Guidelines ("Merger Guidelines") is applicable to analyzing the unilateral competitive effects of this transaction. U.S. Dept. of Justice & FTC, *Horizontal Merger Guidelines* §6.3 (2010) ("Merger Guidelines"). Section 6.3 of the Merger Guidelines provides that "[i]n markets involving relatively undifferentiated products, the Agencies may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price. A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities."

In the containerboard industry, there is a close relationship between the market price and industry output. All else equal, when industry output grows, the market price of containerboard falls, and as industry output shrinks, the market price of containerboard rises. Because of this close relationship, a containerboard producer can raise the market price of containerboard by strategically reducing output, for example, by idling containerboard machines or closing mills.

When a producer significantly reduces output, it loses profits on the output that it removed, but it gains profits (from the resulting higher price) on the output that remains.

A producer's willingness to raise the market price by reducing output depends on its size: as a producer grows larger, it is more likely to profit from strategically reducing output because it will have more sales at the higher price to offset the lost sales on the reduced output. In contrast, a small producer is unlikely to profit from reducing output because it will not have sufficient remaining sales at the higher price, making the reduction unprofitable.

As alleged in the Complaint, by combining the containerboard capacity of International Paper and Temple-Inland, the proposed merger would significantly expand the volume of containerboard over which International Paper would benefit from a price increase. With that additional volume, International Paper would likely find it profitable to strategically reduce containerboard output, for example, by idling containerboard machines or closing mills. Although International Paper would lose profits on the output that it removed, it would gain even greater profits on the output that remains.

The proposed merger would also likely cause International Paper to engage in parallel accommodating conduct. As described in Section 7 of the Merger Guidelines, "[p]arallel accommodating conduct [involves] situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms."

Due to its additional containerboard volume obtained as a result of the merger, International Paper would benefit more from a price increase after the proposed merger. Thus, if a large rival attempted to raise the market price by reducing output, International Paper would

likely accommodate its rival's actions by reducing or not increasing its own output. The rival would thus be likely to increase the market price by reducing output after International Paper and Temple-Inland complete the proposed merger.

4. Neither Supply Responses Nor Entry Would Constrain the Likely Anticompetitive Effects of the Proposed Merger.

The Complaint alleges that supply responses from competitors or potential competitors will not prevent the likely anticompetitive effects of the proposed merger. Virtually all existing North American containerboard producers are capacity-constrained and have other operational limitations that would prevent them from significantly expanding output using their existing machines in response to a post-merger increase in the price of containerboard. Further, North American producers are also unlikely to respond to a domestic price increase by diverting a significant amount of their containerboard exports to the North American market.

Entry and expansion in the containerboard market through the construction of new containerboard mills or machines also are unlikely to occur in a timely manner or on a scale sufficient to undo the competitive harm that the proposed merger would produce. New entry typically requires investing hundreds of millions of dollars in equipment and facilities, obtaining extensive environmental permits, and establishing a reliable distribution system. Competitors are unlikely to build new containerboard mills or install new containerboard machines in response to a small but significant price increase, or do so quickly enough to defeat one. Moreover, Defendants cannot demonstrate cognizable, merger-specific efficiencies that are sufficient to reverse the proposed merger's anticompetitive effects.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment requires Defendants to divest two of Temple-Inland's containerboard mills and all associated mill assets and one of International Paper's

containerboard mills and all associated mill assets. Defendants must divest (1) both the Temple-Inland mill in Waverly, Tennessee (the "New Johnsonville Mill"), with an annual containerboard production capacity of approximately 372,900 tons, and the Temple-Inland mill in Ontario, California (the "Ontario Mill"), with an annual containerboard production capacity of approximately 360,200 tons; and (2) either the International Paper mill in Oxnard, California (the "Port Hueneme Mill"), with an annual containerboard production capacity of approximately 210,300 tons, or the International Paper mill in Henderson, Kentucky (the "Henderson Mill"), with an annual containerboard production capacity of approximately 222,400 tons, but not both of those mills. The New Johnsonville Mill, the Ontario Mill, the Port Hueneme Mill, and the Henderson Mill are referred to collectively as the "Divestiture Mills." It will be in Defendants' discretion to decide whether to divest either the Port Hueneme Mill or the Henderson Mill unless a divestiture trustee is appointed pursuant to Section V of the proposed Final Judgment.

Defendants' divestiture of the Divestiture Mills would result in the sale of approximately 943,400 to 955,400 tons of containerboard production capacity to a competitor or competitors of Defendants. Under the proposed Final Judgment, the Divestiture Mills may be sold to one or more buyers, with the approval of the United States in its sole discretion. In addition, Defendants are required to satisfy the United States in its sole discretion that the divested assets will be operated as viable ongoing businesses that will compete effectively in the North American containerboard market.

In evaluating the likely competitive effects of the proposed merger, the United States considered market shares; costs of production; current and historical industry capacity, utilization rates, margins, and market pricing; historical and projected market demand for containerboard; and the likelihood of supply responses to increased containerboard prices. The United States

concluded that allowing the merger as proposed would give the merged firm control of a sufficiently large amount of industry capacity that the firm would likely (a) strategically reduce its containerboard output, raising containerboard prices throughout North America, and (b) likely accommodate its large rivals' efforts to raise containerboard prices by reducing their own output, making such price increases more likely. The divestitures required by the proposed Final Judgment will decrease this incentive by reducing the merged firm's capacity and output and transferring that capacity to a competitor or competitors. As a result, the divestitures will reduce the incentive of the merged firm to raise price by reducing output and capacity.

At the option of the Acquirer(s), the proposed Final Judgment requires Defendants to enter into an agreement pursuant to which Defendants shall purchase containerboard produced by the Divestiture Mills that are sold to the Acquirer(s). Under the agreement, the Acquirer(s) shall have the right to require Defendants to purchase up to 100 percent of the volume of containerboard supplied by the particular Divestiture Mill in 2011 to Defendants' box plants or other facilities in the first year of the contract, up to 75 percent of this volume during the second year, and up to 50 percent during the third year. Any such agreement shall have a term of no longer than three years. Similarly, at the option of the Acquirer(s), and upon the approval of the United States, the proposed Final Judgment requires Defendants to provide certain transition services for up to 12 months as part of the divestiture. Both provisions ensure that the Acquirer(s) will be able to profitably operate the Divestiture Mills, and that they will remain a competitive constraint on Defendants.

Section IV of the proposed Final Judgment requires Defendants to complete the divestiture within 120 days after the filing of the Complaint in this matter with one or more 30-day extensions not to exceed 60 calendar days in total, which extensions shall be granted at the

sole discretion of the United States. If Defendants do not accomplish the divestiture within the period prescribed in the proposed Final Judgment, the proposed Final Judgment provides for the Court to appoint a trustee, upon application of the United States, to accomplish the divestitures. If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all of the 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. If any of the requisite divestitures has not been accomplished at the end of the trustee's term, the trustee and the United States will make recommendations to the Court, which may enter such orders as appropriate to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The proposed Final Judgment also provides that the United States may appoint a monitoring trustee, subject to the approval of the Court, to ensure that Defendants expeditiously comply with all of their obligations and perform all of their responsibilities under the Final Judgment and the Asset Preservation Stipulation and Order. The monitoring trustee shall serve at the cost and expense of Defendants, on customary and reasonable terms and conditions agreed to by the monitoring trustee and the United States.

Pursuant to the Asset Preservation Stipulation and Order, until the divestitures under the proposed Final Judgment have been accomplished, Defendants are required to preserve, maintain, and operate all four Divestiture Mills as ongoing businesses, and are prohibited from taking any action that would jeopardize the divestitures required by the proposed Final Judgment.

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 FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the 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, Esq.
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 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 initiated a civil action in federal district court seeking a judicial order enjoining International Paper's acquisition of Temple-Inland. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will preserve competition in the production and sale of containerboard in North America.

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

> (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").[1]

A court considers under the APPA, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' 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

[1] 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).

456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the 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

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

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 relation to the violations that the United States has alleged in its complaint, and the APPA 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 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 to the Tunney Act, 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). This language effectuates 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.[3]

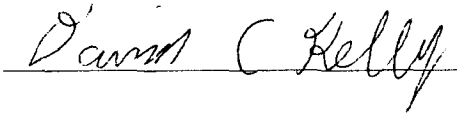
VIII. DETERMINATIVE DOCUMENTS

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.

[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 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."); H.R. Rep. No. 93-1463, at 4 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6535, 6539 ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized.").

Dated: February 10, 2012

Respectfully submitted,



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