IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. FIRST DATA CORPORATION, and CONCORD EFS, INC., *Defendants.*	CASE NUMBER: 1:03CV02169 (RMC)

COMPETITIVE IMPACT STATEMENT

Plaintiff, the United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("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

On October 23, 2003, the United States and the states of Connecticut, Illinois, Louisiana, Massachusetts, New York, Ohio, Pennsylvania and Texas and the District of Columbia ("Plaintiff States") filed a civil antitrust complaint seeking to enjoin the proposed acquisition by First Data Corporation ("First Data") of Concord EFS, Inc. ("Concord"). The Complaint alleges that the acquisition would substantially reduce competition in the PIN debit network services market by combining Concord's STAR and First Data's NYCE PIN debit networks, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

PIN debit networks provide a fast and secure payment mechanism that is used at more than one million merchant locations. The acquisition would have significantly increased the concentration levels in the already concentrated PIN debit network services market by combining the largest and third-largest PIN debit networks in the United States, STAR and NYCE, respectively. This significant increase in market concentration would likely have substantially reduced competition among PIN debit networks for merchant customers, resulting in thousands of merchants paying higher prices and receiving poorer levels of service for PIN debit network services. Merchants would have passed on at least some of these higher costs by raising the prices of their goods and services, to the detriment of tens of millions of consumers throughout the United States. Accordingly, the Complaint sought: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) permanent injunctive relief that would prevent the Defendants from carrying out the acquisition or otherwise combining their businesses or assets; (3) an award of costs to the United States and the Plaintiff States; and (4) as the Court might deem appropriate, an award of reasonable attorneys' fees and costs as permitted by law to the Plaintiff States.

On December 15, 2003, the United States, the Plaintiff States and the Defendants filed a proposed Final Judgment and Hold Separate Stipulation and Order, which will eliminate the anticompetitive effects of the acquisition. Upon the filing of the proposed Final Judgment and Hold Separate Stipulation and Order, the Defendants announced that they had extended the date for closing the transaction until April 30, 2004. On January 9, 2004, the parties filed an

Amended Hold Separate Stipulation and Order.[1]

The proposed Final Judgment requires First Data, within 150 calendar days after the Court's signing of the original Hold Separate Stipulation and Order, or five days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest all of its governance rights in NYCE and its entire 64 percent ownership interest in NYCE (collectively "NYCE Holdings").[2] The requirement that First Data divest its NYCE Holdings is equivalent to the relief the United States would likely have obtained had it prevailed at trial.

The terms of the Amended Hold Separate Stipulation and Order require First Data to take certain steps to ensure that NYCE is operated as a competitively independent, economically viable and ongoing business concern, that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The United States, the Plaintiff States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Tunney Act. Entry of the

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[1] The original Hold Separate Stipulation and Order signed by the Court on December 15, 2003 prohibited any First Data officer, director, manager, employee, or agent from serving on the NYCE Board of Directors after December 30, 2003. This deadline would have required six First Data employees who were serving on the NYCE Board to resign. On December 30, 2003, with the consent of all parties, the Court issued an order extending First Data's deadline concerning participation on the NYCE Board until January 9, 2004. On January 9, the parties filed a consent motion requesting that the Court enter the Amended Hold Separate Stipulation and Order, which the Court signed on January 13, 2004. The Amended Hold Separate Stipulation and Order allows First Data to retain its NYCE Board seats for certain limited and specifically enumerated purposes unless the United States, in its sole discretion, in consultation with the Plaintiff States, requires First Data's representatives on the NYCE Board to resign.

[2] The term "NYCE Holdings" is defined at ¶ II.G of the Final Judgment.

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

First Data is a Delaware corporation headquartered in Greenwood Village, Colorado. In 2002, First Data reported total worldwide revenues of $7.6 billion. First Data owns 64 percent of NYCE, which operates the nation's third-largest PIN debit network. Citicorp, J.P. Morgan Chase & Co., FleetBoston Financial and HSBC USA Inc. own the remaining 36 percent of NYCE. First Data also owns substantial merchant processing and card issuing operations, as well as Western Union, the leading provider of consumer-to-consumer money transfer services.

Concord is a Delaware corporation headquartered in Memphis, Tennessee. Concord's revenues in 2002 totaled nearly $2 billion. Concord operates STAR, the nation's largest PIN debit network. STAR is comprised of a number of PIN debit networks that Concord acquired over the last five years. Concord bought MAC in 1999, Cash Station in 2000, and then STAR in 2001, merging it with the MAC network. Shortly before Concord acquired STAR, STAR bought the HONOR network, which had recently acquired the MOST network. Concord also is a leading merchant processor and provides an array of services to debit card issuers and ATM owners.

First Data and Concord entered into an Agreement and Plan of Merger on April 1, 2003, pursuant to which First Data would acquire Concord in an all-stock transaction then valued at

approximately $7 billion. The transaction, which would increase concentration in the already concentrated PIN debit network services market, precipitated the government's lawsuit.

B. Product Market: PIN Debit Network Services

The Complaint alleges that PIN debit network services is a line of commerce and a relevant antitrust product market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18. During the 1970s, bank consortiums formed numerous regional electronic funds transfer ("EFT") networks to enable their customers to withdraw funds from ATMs owned by multiple banks. EFT networks were first used for PIN debit transactions in the early 1980s. It was not until the mid-1990s, however, that PIN debit transactions became a popular method of payment for consumers to purchase goods and services at retail stores. PIN debit transaction volume grew substantially over the past five years due to merchant and consumer recognition of the advantages of PIN debit as a form of payment. Today, consumers make over 500 million PIN debit transactions every month.

A PIN debit network provides the telecommunications and payments infrastructure that connects a network's participating financial institutions with merchant locations throughout the United States. A PIN debit network also performs a number of related functions necessary for the efficient operation of the network. For example, PIN debit networks: (1) promote their brand names among consumers, merchants and financial institutions; (2) establish rules and standards to govern their networks; and (3) set fees and assessments for use of the network's products and services.

To execute a PIN debit transaction, a customer swipes a debit card at a point-of-sale terminal and enters a personal identification number, or PIN, on a numeric keypad. After the PIN

is entered, the transaction and card information is sent over the PIN debit network to the card-issuing financial institution for authorization. The financial institution sends an electronic message to the PIN debit network, accepting or rejecting the transaction. The PIN debit network switches this reply back to the merchant to complete the transaction. The entire process takes place electronically in several seconds.

A transaction can only be routed over a particular PIN debit network if the customer's bank issues a debit card that participates in that network. This participation is signified by placing the network's logo, or "bug," on the card. To provide their customers with seamless access to the widest array of merchants, a significant number of banks place the bug of more than one PIN debit network on their cards. Many networks, including NYCE, have a "priority routing" rule that allows the card issuer to designate which debit network will serve as the primary network for PIN debit transactions when the bank bugs its cards with two or more networks. STAR, by contrast, imposes a network routing rule, requiring most transactions on cards bearing the STAR bug to be routed over the STAR network, regardless of whether there are other bugs on the card.

PIN debit networks charge both the merchant and the card-issuing financial institution a per transaction "switch" fee for the network's routing services. PIN debit networks also set an "interchange" fee. The interchange fee is paid by the merchant to the PIN debit network and then passed through to the card-issuing financial institution. Generally, the merchant's total charge from the PIN debit networks for each transaction is the switch fee plus the interchange fee.

PIN debit transactions are distinct from other payment methods, such as signature debit transactions. Many cards used for PIN debit transactions can also execute signature debit transactions, which are authenticated like credit card transactions, with the customer signing a

receipt instead of entering a PIN. PIN debit networks offer a number of substantial advantages to merchants, however. PIN debit networks are generally significantly less expensive to merchants than signature debit networks. PIN debit networks also often provide a more secure method of payment than signature debit networks because it is easier to forge a person's signature than to obtain an individual's PIN. Because of the increased security of PIN debit network services, there is generally no need for the charge-back procedures that allow consumers to challenge signature debit transactions, thereby saving merchants additional time and money. PIN debit transactions also generally settle more quickly than signature debit transactions, providing the merchant ready access to its receipts. Finally, PIN debit networks often allow for faster execution at the point of sale than signature debit networks.

Significant numbers of consumers also prefer to use PIN debit transactions over other forms of payment, particularly at supermarkets, mass merchandisers and drug stores. Many consumers value the security and speed of PIN debit transactions, as well as the "cash back" feature that allows them to receive cash at the register when making a purchase. Consumers cannot receive cash back when making a signature debit purchase. Today, consumers request cash back in approximately 20 percent of all PIN debit transactions. Consequently, many merchants would risk causing substantial customer backlash if they stopped offering or discouraged PIN debit transactions.

Because of the advantages PIN debit transactions offer merchants and consumers, a small but significant increase in the price of PIN debit network services would not cause a sufficient number of merchants to require or encourage their customers to switch to other payment methods, including signature debit network services, so as to make such a price increase unprofitable and

unsustainable.

C. Geographic Market: United States

While certain PIN debit networks are stronger in particular areas of the country, the largest networks, including STAR and NYCE, are accepted at many merchant locations throughout the United States. Merchants in the United States could not switch to providers of PIN debit network services located outside the United States in the event of a small but significant increase in the price of those services. Accordingly, the United States is a relevant geographic market for the provision of PIN debit network services within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

D. Harm to Competition in the PIN Debit Network Services Market

The Complaint alleges that First Data's acquisition of Concord is likely to substantially reduce competition in the PIN debit network services market by combining the nation's largest and third-largest PIN debit networks, STAR and NYCE. The loss of this significant competition would have caused higher prices and reduced levels of service to merchants and consumers. The PIN debit network services market is already very concentrated. As of March 2003, STAR routed approximately 56 percent of all PIN debit transactions, while Interlink and NYCE accounted for approximately 15 percent and 10 percent of the PIN debit network services market, respectively. Although recent contract losses may reduce STAR's market share (and increase Interlink's), under the most conservative estimates, STAR will remain the largest PIN debit network in the United States, with at least a 35 percent market share. Thus, if the transaction were completed, the combined STAR/NYCE network would be the largest PIN debit network, with at least a 45 percent market share. Together, the combined STAR/NYCE network and Interlink would form a

near duopoly, accounting for approximately 80 percent of all PIN debit transactions.

This highly concentrated market structure would have enabled PIN debit networks to increase prices and reduce levels of service to merchant customers. PIN debit networks compete for merchants' business by convincing merchants to accept their networks and to route debit transactions to their networks when there is a choice of routing options. PIN debit networks also compete for merchants by improving their networks' transmission speed, limiting network down-time and reducing the number of improperly rejected transactions. Merchants' ability to choose which PIN debit networks to accept at their stores, and to control the routing of some PIN debit transactions, constrains the prices that merchants pay for PIN debit network services and helps to ensure high quality levels of service.

1. Merchant Threats to Drop PIN Debit Networks

The Complaint alleges that combining STAR and NYCE would have harmed competition in the PIN debit network services market because it would have been harder for merchants to drop the combined network than it is for merchants to drop either STAR or NYCE separately today. The PIN debit networks take merchants' threats to drop their networks seriously. The loss of merchant customers can significantly reduce a PIN debit network's profits. In addition to the lost switch fees from merchants, the loss of merchant business can make a PIN debit network less attractive to its financial institution customers. PIN debit networks compete for financial institution members based in part on the number of merchants that accept their networks.

Merchants have prevented or caused a reduction in some attempted large price increases from STAR, NYCE and Interlink by credibly threatening to discontinue acceptance of the networks. During the past two years, STAR, NYCE and Interlink each reduced planned price

increases by more than one third because of concerns that merchants would drop their networks. This reduction in the amount of the three leading networks' planned price increases resulted in more than $100 million in annual savings to merchant customers.

Merchants' ability to drop a PIN debit network, or to credibly threaten to do so, depends on several factors, including: (1) a network's market share; and (2) the number of the network's PIN debit transactions that are routed over "single-bugged" debit cards. Generally, it is riskier for a merchant to drop a PIN debit network with a larger market share because of the increased likelihood of rejected transactions, delays at check-out lines, customer confusion and embarrassment, lost sales and customers' use of more costly forms of payment for merchants. Dropping a PIN debit network with a large market share is particularly risky if many of the debit cards that can connect to that network are "single-bugged" with only that network. A single-bugged debit card can connect to only one PIN debit network. For example, some debit cards are single-bugged with STAR. If a merchant does not accept STAR, then card holders with debit cards that are single-bugged with STAR cannot execute a PIN debit transaction at that merchant. In contrast, if a debit card is bugged with STAR and other PIN debit networks, then a merchant's decision to drop STAR may not prevent the card holder from making PIN debit transactions at the merchant if the merchant accepts at least one of the other PIN debit networks on the debit card.

Combining STAR and NYCE would have made it substantially harder for merchants to prevent future price increases in PIN debit network services. It would have been significantly harder for merchants to drop or credibly threaten to drop the combined STAR/NYCE network than it is for merchants to drop or threaten to drop STAR or NYCE separately today. The merged network would have had a large combined market share of at least 45%, a significant increase

over each network's individual market share. In addition, combining STAR and NYCE would have increased substantially the number of STAR and NYCE PIN debit transactions executed with debit cards that were single-bugged.

2. Reduced Least-Cost Routing Opportunities

The Complaint also alleges that combining STAR and NYCE would have reduced competition in the PIN debit network services market for merchant customers by limiting merchants' opportunities to route PIN debit transactions to the least expensive network ("least-cost routing"). Some large merchants, either directly or through their processors, always route PIN debit transactions to the least expensive PIN debit network when a debit card is bugged with multiple PIN debit networks. Other merchants and processors least-cost route when there are conflicts in the networks' routing rules. Conflicts occur when two networks both claim "priority" status for a particular debit card. For example, both STAR and NYCE may require merchants (or their processors) to route PIN debit transactions executed with a particular debit card over their networks. In such instances, some merchants (and processors) will route to the less expensive network.

Least-cost routing opportunities constrain PIN debit networks from increasing prices to merchants, or reducing levels of service, because they permit merchants, in some circumstances, to route around more expensive networks, or networks that offer poorer levels of service. In recent years, major supermarkets and mass merchandisers have obtained superior prices and levels of service by routing, or threatening to route, transactions away from one PIN debit network to another network.

Merchants currently have a substantial number of opportunities to least-cost route PIN

debit transactions between STAR and NYCE. A large number of debit cards can connect to both STAR and NYCE. Further, STAR and NYCE's routing rules often conflict. The merger would have prevented merchants from obtaining lower prices and improved levels of service from STAR and NYCE by leveraging their ability to route PIN debit transactions away from STAR to NYCE, and vice versa.

E. Timely and Sufficient Entry is Unlikely

The Complaint alleges that, in the near future, entry or expansion into the PIN debit network services market is unlikely to defeat the anticompetitive price increases that the combination of STAR and NYCE would have caused. There has been virtually no new entry in the PIN debit network services market for more than five years. Entry and expansion are difficult because the market is characterized by substantial "network effects." A network must attract a substantial number of financial institutions as members, while at the same time convince a large number of merchants to accept the network. Coordinated development of both financial institution members and merchant acceptance is critical because the utility of a particular PIN debit network to consumers, banks and merchants depends heavily on the breadth of its acceptance and use.

In addition, most PIN debit networks have adopted rules and policies that increase the cost of expansion by a small network or entry by a new market participant. Most significantly, network routing rules that specify the routing of transactions executed with multi-bugged cards sometimes can slow the degree to which a new PIN debit network can expand. Companies that own both merchant processing operations and PIN debit networks also potentially can make entry or expansion by PIN debit networks more difficult. When a PIN debit transaction is executed

with a multi-bugged card, in some circumstances, merchant processors can determine which of the multiple PIN debit networks receives the transaction. Accordingly, companies that own both merchant processing operations and PIN debit networks have some opportunities and incentives to favor their own PIN debit networks.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment's requirement that First Data divest its NYCE Holdings will eliminate the anticompetitive effects in the PIN debit network services market that the transaction would have produced. First Data's divestiture of its NYCE Holdings will prevent the combination of STAR and NYCE, the combination of First Data's and Concord's assets that would have violated Section 7 of the Clayton Act. By preventing the combination of STAR and NYCE, the proposed Final Judgment will ensure that merchants retain their current ability to obtain competitive prices and levels of service from the two networks, either by: (1) dropping, or credibly threatening to drop, STAR and/or NYCE; or (2) taking advantage of least-cost routing opportunities between the two networks.

The proposed Final Judgment requires First Data, within 150 calendar days after the Court's signing of the original Hold Separate Stipulation and Order,[3] or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest all of its NYCE Holdings. The NYCE Holdings consist of all of First Data's governance rights in NYCE, and First Data's entire 64 percent ownership interest in NYCE, including all tangible and intangible

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[3] The Court signed the original Hold Separate Stipulation and Order on December 15, 2003.

assets. The United States agreed to allow First Data 150 days to divest its NYCE holdings, rather than the 90- to 120-day time period typically required for divestitures to remedy Section 7 violations, because NYCE's minority shareholders, by contract, have up to 45 days to match any third-party offer to purchase First Data's interests in NYCE. Had the United States not agreed to extend the divestiture period, First Data effectively would have had substantially less time than normal to find a buyer for its NYCE Holdings.

The United States, in its sole discretion, after consultation with the Plaintiff States, may agree to one or more extensions of this time period, not to exceed in total 90 calendar days. The NYCE Holdings must be divested in such a way as to satisfy the United States in its sole discretion, after consultation with the Plaintiff States, that NYCE can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. First Data must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective acquirers.

If First Data has not accomplished the ordered divestiture within the prescribed time period, the Court, upon application of the United States, is to appoint a trustee to complete the divestiture. If a trustee is appointed, the proposed Final Judgment provides that First Data will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court, the United States and the Plaintiff States, setting forth his or her efforts to accomplish the divestiture. If First Data's NYCE Holdings have not been divested at the end of six months, the United States and the Plaintiff States will make recommendations to the

Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment. The Defendants must cooperate fully with the trustee's efforts to divest First Data's NYCE Holdings to an acquirer acceptable to the United States.

The proposed Final Judgment filed in this case is meant to ensure the prompt divestiture by First Data of its NYCE Holdings. The purpose of the divestiture is to ensure the maintenance of a viable PIN debit network competitor capable of competing effectively to provide PIN debit network services and to remedy the anticompetitive effects that the United States and the Plaintiff States allege would otherwise result from First Data's acquisition of Concord.

The Amended Hold Separate Stipulation and Order will ensure that NYCE is maintained and operated as an independent competing PIN debit network until First Data divests all of its NYCE Holdings. The Order bars First Data from:

1. serving as an officer, manager, or employee, or in a comparable position with or for NYCE;
2. exercising any authority through its representatives on the NYCE Board of Directors, except for limited and specifically enumerated actions;
3. participating in, attending, or receiving any notes, minutes, or agendas of, information from, or any documents distributed in connection with, any nonpublic meeting of NYCE's Board of Directors or any committee thereof, or any other governing body of NYCE, except when necessary to carry out First Data's obligations under the Order;
4. voting or permitting to be voted any of First Data's NYCE shares, or using or

attempting to use any ownership interest in NYCE, except when necessary to carry out First Data's obligations under the Order; and

5. communicating to or receiving from any officer, director, manager, employee, or agent of NYCE any nonpublic information regarding any aspect of NYCE's business.

In addition, the Order authorizes the United States, in its sole discretion, in consultation with the Plaintiff States, to require all of First Data's representatives on the NYCE board to resign. If the United States exercises its discretion to require First Data's NYCE directors to resign, First Data may only nominate individuals to fill the vacant NYCE Board seats who are officers or managers of NYCE or a minority shareholder of NYCE.

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.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States, the Plaintiff States and the Defendants have stipulated that the proposed Final Judgment may be entered in the Court after compliance with the provisions of the Tunney Act, provided that the United States has not withdrawn its consent. The Tunney Act conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest. 15 U.S.C. § 16(e).

The Tunney Act 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. 15 U.S.C. § 16(b & d). 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*. The United States will evaluate and respond to the comments. All comments will be given due consideration by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. 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:

Renata B. Hesse
Chief, Networks & Technology Section
Antitrust Division
United States Department of Justice
600 E Street, N.W., Suite 9500
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 the Defendants. The United States could have continued the litigation and sought permanent injunctive relief against First Data's acquisition of Concord. The United States is satisfied, however, that the divestiture of all of First Data's interests in NYCE to an independent third party will achieve all of the relief the United States would likely have obtained had it prevailed in litigation and will preserve competition for the provision of PIN debit network services in the United States.

VII. STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR THE PROPOSED FINAL JUDGMENT

The Tunney Act 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). In making that determination, the Court may consider:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
> (2) the impact of entry of such judgment 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.

Id. The United States Court of Appeals for the District of Columbia Circuit has held that the

statute permits a court to consider, 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. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "[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).[4] Rather:

> [a]bsent 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.

United States v. Mid-America Dairymen, Inc., 1977 WL 4532, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. May 17, 1977).

Accordingly, 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

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[4] *See also United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the Tunney Act. Although the Tunney Act authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong., 2d Sess. 8-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Rather, the case law requires that:

> [t]he balancing act 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).[5]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard for a finding of liability. "[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. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (quoting *Gillette*, 406 F. Supp. at 716), *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).

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[5] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [Tunney Act] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (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'").

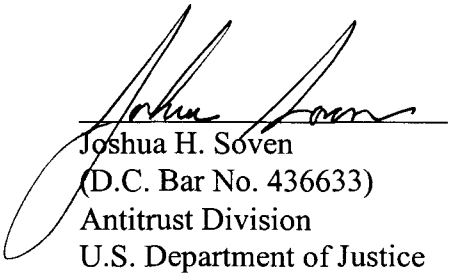
Morever, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. 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 might have but did not pursue. *Id.* at 1459-60.

VIII. DETERMINATIVE DOCUMENTS

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

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:



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Dated: January 23, 2004

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of COMPETITIVE IMPACT STATEMENT to be served by e-mail this 23rd day of January 2004, upon each of the parties listed below:

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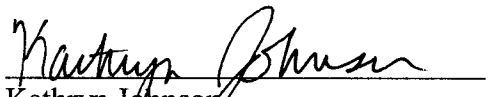

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