DEPARTMENT OF JUSTICE
Antitrust Division

United States v. Smiths Group plc, et al.

Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in United States of America v. Smiths Group plc, et al., Civil Action No. 1:17-cv-00580. On March 30, 2017, the United States filed a Complaint alleging that Smiths Group plc's ("Smiths') proposed acquisition of Morpho Detection, LLC and Morpho Detection International, LLC ("Morpho") from Safran S.A. would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires Smiths to divest Morpho's global explosive trace detection business.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at http://www.justice.gov/atr and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the Federal Register. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section,

Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 8700, Washington, DC 20530 (telephone: 202-307-0924).

Patricia A. Brink
Director of Civil Enforcement

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 8700
Washington, DC 20530,
Plaintiff,

v.

SMITHS GROUP PLC
4th Floor
11-12 St. James Square
London, SW1Y 4LB,
United Kingdom,

SAFRAN S.A.
2, boulevard du General-Martial-Valin
Paris Cedex 15
75724, France,

MORPHO DETECTION, LLC
7151 Gateway Boulevard
Newark, CA 94560, and

MORPHO DETECTION INTERNATIONAL, LLC
2201 W. Royal Lane
Suite 150
Irving, Texas 75063,

Defendants.

CASE NO.: 17-cv-00580
JUDGE: Rosemary M. Collyer
FILED: 03/30/2017

COMPLAINT

The United States of America ("United States"), acting under the direction of the Attorney General of the United States, brings this civil antitrust action to enjoin the proposed

acquisition of the global explosive detection business of Morpho Detection, LLC and Morpho Detection International, LLC (collectively "Morpho") from Safran S.A. by Smiths Group plc ("Smiths") and to obtain other equitable relief. The United States alleges as follows:

I. NATURE OF THE ACTION

1. Smiths proposes to acquire Morpho, a California-based wholly owned subsidiary of Safran S.A. Smiths and Morpho are two of the three leading providers of desktop explosive trace detection ("ETD") devices and related services in the United States. ETD devices are used to detect trace amounts of explosives or narcotics on persons or objects in airports and other high-risk critical infrastructure sites.

2. Smiths' acquisition of Morpho would eliminate competition between Smiths and Morpho for desktop ETD devices sold for passenger air travel or air cargo transport in the United States. The competition between Smiths and Morpho in the development, engineering, production, distribution, sales, and servicing of desktop ETD devices in the United States has benefitted customers. Smiths and Morpho compete directly on price, innovation, and quality of service. The proposed acquisition would give Smiths the ability and the incentive to raise prices or decrease the quality of service for desktop ETD devices sold for passenger air travel or air cargo transport to customers. The elimination of Morpho, an aggressive bidder and low-cost provider, would reduce Smiths' incentive to compete on price and service post merger. Further, because Morpho has actively worked to advance its ETD technology, it provides Smiths an incentive to innovate that will be lost as a result of this acquisition. As a result, the proposed acquisition likely would substantially lessen competition in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices sold for passenger air travel

or air cargo transport in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

II. THE DEFENDANTS AND THE TRANSACTION

3. Defendant Smiths Group plc is a London-based corporation with a U.S. subsidiary, Smiths Detection U.S., Inc. ("Smiths Detection"), headquartered in Edgewood, Maryland. Smiths is a globally diversified technology company that designs, manufactures and delivers products for the healthcare, energy and petrochemicals, threat and contraband detection, and telecommunications industries. Smiths' subsidiary, Smiths Detection, develops, engineers, produces, sells, and services a wide range of threat and contraband detection technologies, including X-ray, ETD devices, and infrared spectroscopy used at airports, ports and borders, and in critical infrastructure worldwide. Smiths is also the dominant supplier of aftermarket parts and service for its ETD devices. In 2015, Smiths' worldwide revenues were approximately $4.5 billion. Smiths Detection's worldwide revenues were approximately $730 million and U.S. revenues were approximately $225.7 million.

4. Defendant Morpho, headquartered in Newark, California, is a division of Safran S.A. ("Safran"), a $17.3 billion aerospace and defense company based in Paris, France. Morpho focuses on the development, engineering, production, distribution, sale, and servicing of two categories of threat and contraband detection technologies and devices – computed tomography explosive detection systems and ETD devices – used at airports, air cargo facilities, and other high-risk critical infrastructure sites worldwide. Morpho is also the dominant supplier of aftermarket parts and service for its ETD devices. In 2015, Morpho's worldwide revenues were approximately $325 million, and its U.S. revenues were approximately $262 million.

5. Pursuant to an agreement dated April 20, 2016, Smiths intends to purchase Morpho's explosive detection system and ETD device businesses. The value of the transaction is approximately $710 million.

III. JURISDICTION AND VENUE

6. The United States brings this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

7. Defendants Smiths and Morpho develop, engineer, produce, distribute, sell, and service desktop ETD devices in the flow of interstate commerce. Defendants' activities in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices substantially affect interstate commerce. The Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

8. Defendants have consented to venue and personal jurisdiction in the District of Columbia. Venue is therefore proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(c).

IV. TRADE AND COMMERCE

A. Explosive Detection Industry Overview

9. Equipment designed to detect and identify explosives is used across a broad spectrum of government agencies and private companies for security screening. This equipment includes ETD devices used at passenger checkpoints, visitor entry areas, or air cargo facilities throughout the United States. ETD devices may be stationary ("desktop" ETDs) or mobile ("handheld" ETDs).

10. Desktop ETD devices are a secondary screening method. Secondary screening methods are employed after an alert is made by a primary screening device, such as an X-ray scanner or an explosive detection system. Desktop ETD devices detect trace amounts of explosive residue or other contraband on hands, belongings, and cargo from a tiny sample swabbed from the object and placed inside the detector.

11. Desktop ETD devices used at airport checkpoints and air cargo facilities need an external power source and a controlled environment, but are considered more reliable and accurate than handheld ETD devices, and are capable of greater throughput. Generally, an ETD device's operational performance is evaluated on sensitivity, selectivity or identification, and speed.

12. U.S. customers require desktop ETD vendors to have a local service network, with a ready supply of consumables and components. A local service presence allows vendors to provide training to new employees who operate their devices and provide timely repair and maintenance. Likewise, desktop ETDs require regular service, maintenance, and a ready supply of consumables, so having a local service presence enables vendors to respond expeditiously when a device requires attention, and reduces downtime that can slow the pace of passenger and baggage screening at airports and other critical facilities.

B. Desktop ETD Device Industry Regulation

13. The Transportation Security Administration ("TSA") mandates separate security performance screening standards for desktop ETD devices used for passenger air travel and for air cargo transport. Desktop ETD devices that meet the TSA threat certification standards are listed either on: (a) the Qualified Product List ("QPL") for desktop ETD devices purchased by the TSA for checkpoint screening of passengers, carry-on bags and hold baggage at airports;

and/or (b) the Air Cargo Screening Technology List ("ACSTL"), for desktop ETD devices purchased by air cargo companies for screening of air cargo. In addition, desktop ETD devices purchased by the TSA for passenger air travel include customized software that is exclusively available to the TSA.

14. U.S. sales of desktop ETD devices to the TSA for passenger air travel depend upon a small number of large, infrequent TSA procurements that typically arise when the TSA updates its certification standards to meet emerging threats. Annual sales of desktop ETD devices used for passenger air travel in the United States averaged about $13 million over the last six years. Sales to air cargo companies follow a similar pattern, with large procurements occurring infrequently as air cargo carriers respond to evolving threats and new technology. Annual sales of desktop ETD devices used to screen air cargo averaged approximately $5.5 million over the last six years.

15. QPL qualification is a multi-step process that can take up to two years. Labs under the direction of the Department of Homeland Security test devices to ensure the necessary threats are detected. The TSA then conducts operational testing on-site at airports to confirm that its performance standards are met. If a desktop ETD device makes it through these steps, it will be qualified and placed on the QPL.

16. When the TSA opens a solicitation for desktop ETD devices, only vendors with desktop ETD devices on the QPL can participate. The TSA is currently conducting an expedited evaluation of desktop ETD devices to be qualified for inclusion on the QPL, in anticipation of an upcoming procurement likely in the second half of 2017. The TSA does not publish the QPL, but does issue a press release when a contract is awarded, which identifies the name of the winning vendor and its desktop ETD device.

17. The ACSTL qualification process generally is the same as the qualification process for the QPL, but the mandated threat detection standards differ in order to account for a wider range of air cargo packaging material.

18. The current ACSTL threat detection standard expires in the next two years. The TSA has begun testing and qualifying new desktop ETD devices to meet a new ACSTL threat detection standard. Grandfathered devices may still be used by air cargo carriers until the expiration date, but any new purchases of such devices require a TSA waiver.

V. RELEVANT MARKETS

19. The merger is likely to lead to a substantial lessening of competition for the sale of desktop ETD devices for two applications in the United States: passenger air travel and air cargo transport. Both desktop ETD device applications have unique customers with different technical and service requirements.

A. Desktop ETD Devices for Passenger Air Travel in the United States

20. Desktop ETD devices for passenger air travel is a relevant product market. These devices are purchased exclusively by the TSA. The TSA may purchase only desktop ETD devices that are listed on the QPL, and QPL qualification requires that devices meet specific criteria and successfully complete rigorous testing. Further, as these devices may not be sold outside of the United States, the relevant geographic market is the United States. A hypothetical profit-maximizing monopolist of desktop ETD devices sold for passenger air travel in the United States likely would impose a SSNIP that would not be defeated by substitution away from desktop ETD devices with QPL certification or by the TSA purchasing desktop ETD devices outside the United States. Accordingly, the development, engineering, production, distribution, sale, and servicing of desktop ETD devices sold for passenger air travel in the United States is a

relevant market within the meaning of Section 7 of the Clayton Act.

B. Desktop ETD Devices for Air Cargo Transport in the United States

21. Desktop ETD devices used to screen air cargo is a relevant product market. Air cargo transport companies operating in the United States require that desktop ETD devices meet certain performance standards, which typically include ACSTL qualification by the TSA. Desktop ETD devices on the ACSTL must undergo significant, multi-step testing to ensure they meet and deliver the required technical standards and performance. As these devices are purchased for use at airports located in the United States, and because their sale involves a significant service component, the relevant geographic market is the United States. A hypothetical profit-maximizing monopolist of desktop ETD devices sold for air cargo transport in the United States likely would impose a SSNIP that would not be defeated by substitution away from desktop ETD devices in the relevant market or by air cargo companies purchasing the desktop ETD devices outside the United States. Accordingly, the development, engineering, production, distribution, sale, and servicing of desktop ETD devices for air cargo transport in the United States is a relevant product market within the meaning of Section 7 of the Clayton Act.

VI. ANTICOMPETIVE EFFECTS OF THE PROPOSED TRANSACTION

22. Smiths' acquisition of Morpho would eliminate head-to-head competition between Smiths and Morpho in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices for passenger air travel and air cargo transport in the United States. For their most significant customers, Smiths and Morpho are two of only three suppliers which historically have qualified to provide desktop ETD devices and related services for these two applications in the United States.

A. Desktop ETD Devices for Passenger Air Travel in the United States

23. The TSA historically has qualified three suppliers to meet its QPL standards for desktop ETD devices for passenger air travel. Smiths and Morpho are two of those three suppliers and, in the past, the two companies have competed on price and other terms of sale. That competition has led to lower prices, better service, and more innovative products for the TSA.

24. In particular, Morpho has a history of bidding aggressively for contracts to supply and service desktop ETD devices in the passenger air travel market. By underbidding its rivals, Morpho delivered to the TSA a lower-priced option, while also incentivizing competitors to respond with more competitive prices and terms of sale. Absent the merger, Morpho is expected to continue to be an aggressive competitor. Accordingly, the proposed acquisition would give Smiths the ability and the incentive to raise prices and decrease the quality of its service.

25. The TSA is expected to issue a new solicitation to supply desktop ETD devices in the second half of 2017. Smiths and Morpho likely will continue to be two of only three competitors qualified to bid for this significant supply contract. The acquisition would reduce from three to two the number of suppliers for the TSA's upcoming procurement, likely leading to higher prices and less advantageous terms for that agency.

26. Smiths and Morpho each have sizable and active research and development operations and teams of engineers and technical staff working on desktop ETD devices for the passenger air travel market. Each firm has provided the other with the incentive to improve current products and develop new desktop ETD devices. A merged Smiths and Morpho would eliminate that competition depriving customers of more innovative future products and services.

27. The proposed transaction, therefore, likely would substantially lessen competition in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices in the passenger air travel market in the United States, lead to higher prices, decreased innovation, and poorer quality of service in violation of Section 7 of the Clayton Act.

B. Desktop ETD Devices for Air Cargo Transport in the United States

28. Smiths' acquisition of Morpho would eliminate head-to-head competition between Smiths and Morpho in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices for the air cargo transport market in the United States. Smiths and Morpho are two of only three suppliers which are qualified to provide desktop ETD devices and a local service network.

29. As in the passenger air transport market, Morpho has a history of bidding aggressively for contracts to supply and service desktop ETD devices in the air cargo transport market, which is likely to result in lower bids from Morpho and its rivals once new ACSTL solicitations are announced in the next two years. The proposed acquisition would, therefore, give Smiths the ability and the incentive to raise prices and decrease the quality of its service for air cargo transport customers.

30. The sizable research and development operations, engineers, and technical staff of Smiths and Morpho, respectively, which work on desktop ETD devices for the passenger air travel market, also work to improve and develop new desktop ETD devices for the air cargo transport market. Each firm has provided the other with the incentive to improve current products and develop new desktop ETD devices for the air cargo transport market. A merged Smiths and Morpho would eliminate that incentive, potentially depriving customers of more innovative future products and services.

31. The proposed transaction, therefore, likely would substantially lessen competition in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices in the air cargo transport market in the United States, lead to higher prices, decreased innovation, and poorer quality of service in violation of Section 7 of the Clayton Act.

VII. DIFFICULTY OF ENTRY

32. Entry into the development, engineering, production, distribution, sale, and servicing of desktop ETD devices in the United States is difficult, and unlikely to be timely or sufficient to prevent the harm to competition caused by the elimination of Morpho as an independent supplier.

A. Desktop ETD Devices for Passenger Air Travel in the United States

33. Firms attempting to enter into the development, engineering, production, distribution, sale, and servicing of desktop ETD devices in the passenger air travel market face substantial entry barriers in terms of time and technology. The TSA process for qualification of a new desktop ETD device normally takes from 12 to 24 months. Testing includes multiple steps, each of which must be passed to proceed: (1) submission and corresponding review of a data package; (2) two rounds of functional testing of the unit in a controlled environment; and (3) operational testing of the unit on-site at an airport. As a result of these barriers, entry would not be timely, likely, or sufficient to defeat a price increase arising from the substantial lessening of competition that likely would result from Smiths' acquisition of Morpho.

B. Desktop ETD Devices for Air Cargo Transport in the United States

34. Firms attempting to enter into the development, engineering, production, distribution, sale, and servicing of desktop ETD devices in the air cargo transport market likewise face substantial entry barriers in terms of time and technology. Air cargo companies typically require desktop ETD device providers to meet ACSTL standards, which demand an investment of time and money similar to that required under the TSA's QPL-testing process. Setting up a local network of service and training personnel and equipment is likewise a cost- and time-intensive endeavor. As a result of these barriers, entry would not be timely, likely, or sufficient to defeat a price increase arising from the substantial lessening of competition from Smiths' acquisition of Morpho.

VIII. VIOLATION ALLEGED

35. The acquisition of Morpho by Smiths likely would substantially lessen competition in the market for the development, engineering, production, distribution, sale, and servicing of desktop ETD devices sold for passenger air travel or air cargo transport in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

36. Unless enjoined, the transaction likely would have the following anticompetitive effects, among others:

a. actual and potential competition between Smiths and Morpho in the market for the development, engineering, production, distribution, sale, and servicing of desktop ETD devices sold for passenger air travel or air cargo transport in the United States would be eliminated;

b. competition generally in the market for the development, engineering, production, distribution, sale, and servicing of desktop ETD devices sold for passenger air travel or air cargo transport in the United States would be substantially lessened;

c. prices for desktop ETD devices in the United States likely would be less favorable, and innovation and quality of service relating to desktop ETD devices sold for passenger air travel or air cargo transport in the United States likely would decline.

IX. REQUESTED RELIEF

37. The United States requests that this Court:

a. adjudge and decree Smiths' proposed acquisition of Morpho to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. preliminarily and permanently enjoin and restrain defendants and all persons acting on their behalf from consummating the proposed acquisition of Morpho by Smiths from entering into or carrying out any contract, agreement, plan, or understanding, the effect of which would be to combine Morpho with the operations of Smiths;

c. award the United States its costs of this action; and

d. award the United States such other and further relief as the Court deems just and proper.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

_____/s/_____
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_____/s/_____
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Dated: March 30, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. SMITHS GROUP PLC, SAFRAN S.A., MORPHO DETECTION, LLC, and MORPHO DETECTION INTERNATIONAL, LLC, *Defendants*.	CASE NO.: 17-cv-00580 JUDGE: Rosemary M. Collyer FILED: 03/30/2017

PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on March 30, 2017, the United States and defendants, Smiths Group plc, Safran S.A., Morpho Detection, LLC, and Morpho Detection International, LLC (collectively, "defendants"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires defendants to make a certain divestiture for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, defendants have represented to the United States that the divestiture required below can and will be made and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II. DEFINITIONS

As used in this Final Judgment:

A. "Acquirer" means the entity to which defendants divest the Divestiture Assets.

B. "Smiths" means defendant Smiths Group plc, a United Kingdom public liability company headquartered in London, England, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Safran" means defendant Safran S.A., a French corporation with its headquarters in Paris, France, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Morpho" means defendants Morpho Detection, LLC, a Delaware limited liability company with its headquarters in Newark, California, and Morpho Detection International LLC, a Delaware limited liability company with its headquarters in Irving, Texas, their respective successors and assigns, and their respective subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their respective directors, officers, managers, agents, and employees. Morpho is a wholly owned subsidiary of Safran.

E. "ETD devices" means explosive trace detection equipment, which is used to detect trace amounts of explosive residue on hands, belongings, or cargo or in the air after an alert is triggered from a primary screening device.

F. "Desktop ETD devices" means stationary ETD devices used for secondary screening of passengers and cargo traveling by air.

G. "Divestiture Assets" means Morpho's global explosive trace detection ("ETD") business including, but not limited to:

(1) Morpho's leases or subleases to the following facilities:

(a) Morpho's R&D, manufacturing, sales, and service facility located at 23 Frontage Road, Andover, Massachusetts 01810 ("Andover facility");

(b) Morpho's ETD device R&D facility located at 1251 East Dyer Avenue, Suite 140, Santa Ana, California 92705 ("Santa Ana facility");

(c) Morpho's sales and service depot located at Granary House, Station Road, Great Shelford, Cambridge, England CB22 5LR;

(d) Morpho's service depot located at 1585 Britannia Road

East, Unit B3, Mississauga, Ontario L4W 2M4, Canada; and

(e) Morpho's service depot located at 7-9 Orion Road, Unit 1, Lane Cove NSW 2066, Australia.

(2) All tangible assets used in connection with Morpho's global ETD business, including, but not limited to, all research and development assets; all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies, and other tangible property; all licenses, permits and authorizations issued by any governmental organization; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, including service contracts, service subcontracts, and supply agreements or contracts; all customer lists, customer records, contracts, accounts, and credit records; all repair and performance records and all other records; and

(3) All intangible assets used in connection with Morpho's global ETD business, including, but not limited to, all patents, licenses and sublicenses, intellectual property (including the ionization process technology, the high-volume particle vapor sampling technology, and the mass spectrometry technology), copyrights, trademarks and trade names (excluding trademarks and trade names related to the words "Morpho" or "Morpho Detection"), service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, customization and design of new algorithms, engineering specifications, specifications for materials, specifications for parts and components, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information defendants provide to their own employees,

customers, suppliers, agents or licensees, and all research data relating to Morpho's global ETD business, including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments.

H. "Transaction" means Smiths' proposed acquisition of Morpho's explosive detection systems and ETD device businesses.

III. APPLICABILITY

A. This Final Judgment applies to Smiths, Safran, and Morpho, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

IV. DIVESTITURE

A. Defendants are ordered and directed, within ninety (90) calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such

circumstances. Defendants agree to use their best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privileges or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide the Acquirer and the United States information relating to the personnel involved in the development, engineering, production, distribution, sale, or servicing of Morpho ETD devices to enable the Acquirer to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer to employ any defendant employee whose primary responsibility is the development, engineering, production, distribution, sale, or servicing of Morpho ETD devices.

D. Defendants shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of Morpho's global ETD business; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. For the defendants' employees who elect employment by the Acquirer, defendants shall waive all non-compete agreements and all non-disclosure agreements, vest all unvested pension and other equity rights, and provide all benefits to which the defendants' employees would generally be provided if transferred to a buyer of an ongoing business. For a period of twelve (12) months after the Acquirer has hired the defendants' employees, the defendants shall not solicit to hire, or hire any employee hired by the Acquirer, unless (1) such individual is terminated or laid off by the Acquirer, or (2) the Acquirer agrees in writing that defendants may solicit or hire that individual.

F. Defendants shall warrant to the Acquirer that each asset will be operational on the date of sale.

G. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

H. At the option of the Acquirer, defendants shall enter into a transition services agreement with the Acquirer sufficient to meet the Acquirer's needs for assistance in matters relating to the development, engineering, production, distribution, sale, or servicing of Morpho ETD devices. The Acquirer may exercise this option for a period no longer than twelve (12) months following completion of the divesture required by this Final Judgment

I. Defendants shall warrant to the Acquirer that there are no material defects in the environmental, zoning or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

J. By no later than thirty (30) days after the date the Transaction is closed, Smiths shall remove all of the PhotoMate-related and Quadrupole-related employees and equipment located at the Santa Ana facility.

K. By no later than thirty (30) days after the Transaction is closed, Smiths shall remove all of the Source ID-related and Raman Spectroscopy-related employees and equipment located at the Andover facility.

L. At the option of Smiths, the Acquirer shall enter into an agreement to provide Smiths with a non-exclusive, worldwide, royalty-free, non-transferable, irrevocable license for the intangible assets described in Paragraph II(G)(3), that, prior to the filing of the Complaint in this matter, were related to the development, engineering, production, distribution, sale and/or service of ETD devices (i.e., the ionization process technology, the high-volume particle vapor sampling technology, and the mass spectrometry technology); provided, however, that any license for ionization process technology and mass spectrometry technology may not be used in connection with the development, engineering, production, distribution, sale and/or service of ETD devices. Such licenses will not be subject to any requirement to grant back to the defendants any improvement or modifications made to these assets.

M. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by Divestiture Trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business in the development, engineering, production, distribution, sale, and servicing of Desktop ETD devices. The divestiture, whether pursuant to Section IV or V of this Final Judgment:

(1) shall be made to an Acquirer that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the development, engineering, production, distribution, sale, and servicing of Desktop ETD devices; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and defendants give defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

V. APPOINTMENT OF DIVESTITURE TRUSTEE

A. If defendants have not divested the Divestiture Assets within the time period specified in Paragraph IV(A), defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, and V of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Paragraph V(D) of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture. Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions

as the United States approves including confidentiality requirements and conflict of interest certifications.

C. Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the Divestiture Trustee within ten (10) calendar days after the Divestiture Trustee has provided the notice required under Section V.

D. The Divestiture Trustee shall serve at the cost and expense of defendants pursuant to a written agreement, on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee shall account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. If the Divestiture Trustee and defendants are unable to reach agreement on the Divestiture Trustee's or any agent's or consultant's compensation or other terms and conditions of engagement within fourteen (14) calendar days of appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee shall, within three (3)

business days of hiring any other professionals or agents, provide written notice of such hiring and the rate of compensation to defendants and the United States.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other agents retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such report~~s~~ contains information that the Divestiture Trustee deems confidential, such report~~s~~ shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Divestiture Trustee.

VI. NOTICE OF PROPOSED DIVESTITURE

A. Within two (2) business days following execution of a definitive divestiture agreement, defendants or the Divestiture Trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer, any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the Divestiture Trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to defendants and the Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Paragraph V(C) of this Final Judgment.

Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or V shall not be consummated. Upon objection by defendants under Paragraph V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. FINANCING

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. HOLD SEPARATE

Until the divestiture required by this Final Judgment has been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

IX. AFFIDAVITS

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, defendants shall deliver to the United States an affidavit as to the fact and manner of their compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken

to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

X. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

(1) access during defendants' office hours to inspect and copy, or at the option of the United States, to require defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal

Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. NOTIFICATION

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), during the term of this Final Judgment, Smiths, without providing advance notification to the Antitrust Division, shall not directly or indirectly acquire any assets of or any interest, including, but not limited to, any financial, security, loan, equity, or management interest, in any entity engaged in the development, engineering, production, distribution, sales, and servicing of Desktop ETD devices in the United States; provided that notification pursuant to this Section shall not be required where the purchase price of the assets or interest being acquired is less than $30 million.

B. Such notification shall be provided to the Antitrust Division in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions must be provided only about desktop ETD devices thereof described in Section IV of the Complaint filed in this matter. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the

agreement, and any management or strategic plans discussing the proposed transaction. If within the thirty-day period after notification, representatives of the Antitrust Division make a written request for additional information, Smiths shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XII. NO REACQUISITION

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XV. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

_____
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. SMITHS GROUP PLC, SAFRAN S.A., MORPHO DETECTION, LLC, MORPHO DETECTION INTERNATIONAL, LLC, *Defendants*.	CASE NO.: 17-cv-00580 JUDGE: Rosemary M. Collyer FILED: 03/30/2017

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

On April 20, 2016, defendants Smiths Group plc ("Smiths"), Safran S.A. ("Safran"), Morpho Detection, LLC and Morpho Detection International, LLC ("Morpho") entered into an agreement, pursuant to which Smiths intends to acquire Morpho's global explosive detection business from Safran. The value of the transaction is approximately $710 million.

The United States filed a civil antitrust Complaint on March 30, 2017, seeking to enjoin

the proposed acquisition. The Complaint alleges that the likely effect of the acquisition would be to lessen competition substantially for the development, engineering, production, distribution, sales, and servicing of desktop explosive trace detection ("ETD") devices sold for passenger air travel or air cargo transport in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would give Smiths the ability and incentive to raise prices, decrease the quality of service, and lessen innovation for customers in the United States.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, defendants are required to divest Morpho's global ETD business. These assets collectively are referred to as the "Divestiture Assets." Under the terms of the Hold Separate Stipulation and Order, defendants will take certain steps to ensure that the Divestiture Assets are operated as a competitive, independent, economically viable, and ongoing business concern, that the Divestiture Assets 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 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 Transaction

Smiths is a London-based corporation with a U.S. subsidiary, Smiths Detection U.S., Inc. ("Smiths Detection"), headquartered in Edgewood, Maryland. Smiths is a globally diversified technology company that provides products for the healthcare, energy and petrochemicals, threat and contraband detection, and telecommunications industries. Smiths Detection develops, engineers, produces, distributes, sells, and services a wide range of threat and contraband detection technologies, including x-ray, explosive trace detection ("ETD"), and infra-red spectroscopy used at airports, ports and borders, and in critical infrastructure worldwide. In 2015, Smiths' worldwide revenues were approximately $4.5 billion. Smiths Detection's worldwide revenues were approximately $730 million and its U.S. revenues were approximately $225.7 million.

Morpho Detection, LLC, based in Newark, California, and Morpho Detection International, LLC, based in Irving, Texas, (collectively "Morpho") are subsidiaries of Safran, a Paris-based $17.3 billion aerospace and defense company. Morpho develops, engineers, produces, distributes, sells, and services two categories of threat detection devices, explosive detection systems and ETD devices, which are used at airports, air cargo facilities, and other high-risk critical infrastructure sites worldwide. In 2015, Morpho's worldwide revenues were approximately $325 million and its U.S. revenues were approximately $262 million.

Pursuant to an agreement dated April 20, 2016, Smiths intends to purchase Morpho's explosive detection system and ETD device businesses for approximately $710 million.

B. Explosive Detection Industry Overview

Equipment designed to detect and identify explosives is used across a broad spectrum of government agencies and private companies for security screening. This equipment includes desktop ETD devices used at passenger checkpoints or air cargo facilities throughout the United States. ETD devices may be stationary ("desktop" ETDs) or mobile ("handheld" ETDs). Desktop ETD devices are a secondary screening method employed after an alert is made by a primary screening device, such as an X-ray scanner or an explosive detection system. Desktop ETD devices detect trace amounts of explosive residue or other contraband on hands, belongings, and cargo from a tiny sample swabbed from the object and placed inside the detector.

Desktop ETD devices used at airport checkpoints and air cargo facilities need an external power source and a controlled environment, but are considered more reliable and accurate than handheld ETD devices, and are capable of greater throughput. Generally, an ETD device's operational performance is evaluated on sensitivity, selectivity or identification, and speed.

U.S. customers require desktop ETD vendors to have a local service network, with a ready supply of consumables and components. A local service presence allows vendors to provide training to new employees who operate their devices and provide timely repair and maintenance. Likewise, desktop ETDs require regular service, maintenance, and a ready supply of consumables, so having a local service presence enables vendors to respond expeditiously when a device requires attention, and reduces downtime that can slow the pace of passenger and baggage screening at airports and other critical facilities.

C. Desktop ETD Device Industry Regulation

The Transportation Security Administration ("TSA") mandates separate security performance screening standards for passenger air travel and for air cargo transport. Desktop ETD devices that meet the TSA threat certification standards are listed either on: (a) the Qualified Product List ("QPL") for desktop ETD devices purchased by the TSA for checkpoint screening of passengers, carry-on bags and hold baggage at airports; and/or (b) the Air Cargo Screening Technology List ("ACSTL"), for desktop ETD devices purchased by air cargo companies for screening of air cargo. In addition, desktop ETD devices purchased by the TSA for passenger air travel include customized software that is exclusively available to the TSA.

U.S. sales of desktop ETD devices to the TSA for passenger air travel depend upon a small number of large, infrequent TSA procurements, which typically arise when the TSA updates its certification standards to meet emerging threats. Annual sales of desktop ETD devices used for passenger air travel in the United States averaged about $13 million over the last six years. Sales to air cargo companies follow a similar pattern, with large procurements occurring infrequently as air cargo carriers respond to evolving threats and new technology. Annual sales of desktop ETD devices used to screen air cargo averaged approximately $5.5 million over the last six years.

QPL qualification is a multi-step process that can take up to two years. Labs under the direction of the Department of Homeland Security test devices to ensure the necessary threats are detected. The TSA then conducts operational testing on-site at airports to confirm that its performance standards are met. If a desktop ETD device makes it through these steps, it will be qualified and placed on the QPL. The ACSTL qualification process generally is the same as the

qualification process for the QPL, but the mandated threat detection standards differ in order to account for a wider range of air cargo packaging material.

When the TSA opens a solicitation for desktop ETD devices, only vendors with desktop ETD devices on the QPL can participate. The TSA is currently conducting an expedited evaluation of desktop ETD devices to be qualified for inclusion on the QPL, in anticipation of an upcoming procurement likely in the second half of 2017. The TSA does not publish the QPL, but does issue a press release when a contract is awarded, which includes the name of the vendor and its desktop ETD device.

The ACSTL qualification process generally is the same as the qualification process for the QPL, but the mandated threat detection standards differ in order to account for a wider range of air cargo packaging material. The current ACSTL threat detection standard expires within the next two years. The TSA has begun testing and qualifying new desktop ETD devices to meet a new threat detection standard. Grandfathered devices may still be used by air cargo carriers until the expiration date, but any new purchases of such devices require a TSA waiver.

D. Relevant Markets Affected by the Proposed Acquisition

Defendants compete in the development, production, engineering, distribution, sales, and servicing of desktop ETD devices for passenger air travel and air cargo transport in the United States. The Complaint alleges that each of these desktop ETD device applications is a relevant product market in which competitive effects can be assessed. The different applications are recognized in the desktop ETD device industry as separate product lines; they have unique customers with different technical and service requirements. Competition would be reduced from three-to-two for the sale of desktop ETD devices in these highly concentrated markets in

the United States as a result of the proposed acquisition. For purchasers of desktop ETD devices for passenger air travel and air cargo transport in the United States, Smiths and Morpho are two of only three suppliers.

1. Desktop ETD Devices for Passenger Air Travel in the United States

The Complaint alleges likely harm in the market for desktop ETD devices for passenger air travel in the United States. The TSA may purchase only desktop ETD devices that are listed on the QPL, and QPL qualification requires that devices meet specific criteria and successfully complete rigorous testing. As these devices are purchased exclusively by the TSA and may not be sold outside of the United States, the relevant geographic market is the United States.

A hypothetical profit-maximizing monopolist of desktop ETD devices sold for passenger air travel in the United States likely would impose a small but significant non-transitory increase in price ("SSNIP") that would not be defeated by substitution away from desktop ETD devices with QPL certification or by the TSA purchasing desktop ETD devices outside the United States. Accordingly, the development, engineering, production, distribution, sale, and servicing of desktop ETD devices sold for passenger air travel in the United States is a relevant market within the meaning of Section 7 of the Clayton Act.

2. Desktop ETD Devices for Air Cargo Transport in the United States

The Complaint also alleges likely harm in the market for desktop ETD devices for air cargo transport in the United States. Air cargo transport companies operating in the United States require that desktop ETD devices meet certain performance standards, which typically include ACSTL qualification by the TSA. Desktop ETD devices on the ACSTL also must undergo significant testing to ensure they meet and deliver the required technical standards and

performance. As these devices are purchased for use at airports located in the United States, and because their sale involves a significant service component, the relevant geographic market is the United States.

A hypothetical profit-maximizing monopolist of desktop ETD devices sold for air cargo transport in the United States likely would impose a SSNIP that would not be defeated by substitution away from desktop ETD devices in the relevant market or by air cargo companies purchasing the desktop ETD devices outside the United States. Accordingly, the development, engineering, production, distribution, sale, and servicing of desktop ETD devices for air cargo transport in the United States is a relevant market within the meaning of Section 7 of the Clayton Act.

E. Anticompetitive Effects of the Proposed Transaction

Smiths' acquisition of Morpho would eliminate head-to-head competition between these two firms in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices for passenger air travel and air cargo transport in the United States. For their most significant customers, Smiths and Morpho are two of only three suppliers which historically have qualified to provide desktop ETD devices and related services for these two applications in the United States.

1. Desktop ETD Devices for Passenger Air Travel in the United States

The TSA historically has relied on three suppliers qualified to meet its QPL standards for desktop ETD devices for passenger air travel. Smiths and Morpho are two of those three suppliers that have competed on price and other terms of sale. Such competition has led to lower prices, better service and more innovative products for the TSA.

In particular, Morpho has a history of bidding aggressively for contracts to supply and service desktop ETD devices in this market. By underbidding its rivals, Morpho delivered to the TSA a lower-priced option while also incentivizing competitors to respond with more competitive prices and terms of sale. Absent the merger, Morpho was expected to continue to be an aggressive competitor. As a result, the proposed acquisition would give Smiths the ability and the incentive to raise prices and decrease the quality of its service.

The TSA is expected to issue a new solicitation to supply desktop ETD devices in the second half of 2017. Smiths and Morpho likely will continue to be two of only three competitors qualified to bid for this significant supply contract. Again, the acquisition would reduce from three-to-two the number of suppliers for the TSA's upcoming procurement, likely leading to higher prices and less advantageous terms for that agency.

Additionally, Smiths and Morpho each have sizable and active research and development operations and teams of engineers and technical staff working on desktop ETD devices for the passenger air travel market. Each firm has provided the other with the incentive to improve current products and develop new desktop ETD devices. A merged Smiths and Morpho would eliminate that competition depriving customers of more innovative future products and services.

Without the required divestiture of assets, Smiths' acquisition of Morpho's desktop ETD devices for passenger air travel would have eliminated an aggressive competitor in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices. Thus, the elimination of Morpho likely would result in significant harm from higher prices, decreased innovation, and poorer quality of service in violation of Section 7 of the Clayton Act.

2. Desktop ETD Devices for Air Cargo Transport in the United States

Smiths' acquisition of Morpho also would eliminate head-to-head competition between these two firms in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices for the air cargo transport market in the United States. Smiths and Morpho are two of only three suppliers that are listed on the ACSTL and thus, can provide desktop ETD devices and a local service network.

As in the passenger air travel market, Morpho has a history of bidding aggressively for contracts to supply and service desktop ETD devices in the air cargo transport market, which is likely to result in lower bids from Morpho and its rivals once new ACSTL solicitation is announced in the next two years. The proposed acquisition would, therefore, give Smiths the ability and the incentive to raise prices and decrease the quality of its service for air cargo transport customers.

The sizable research and development operations, engineers, and technical staff of Smiths and Morpho, respectively, which work on desktop ETD devices for the passenger air travel market, also work to improve current and develop new desktop ETD devices for the air cargo transport market. Each firm has provided the other with the incentive to improve current products and develop new desktop ETD devices for the air cargo transport market. A merged Smiths and Morpho would eliminate that incentive, potentially depriving customers of more innovative future products and services.

The proposed transaction, therefore, likely would substantially lessen competition in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices

in the air cargo transport market in the United States, leading to higher prices, decreased innovation, and poorer quality of service in violation of Section 7 of the Clayton Act.

F. Difficulty of Entry

Given the substantial time and particular technology and software required to develop and qualify a desktop ETD device to be listed on the QPL or the ACSTL, timely and sufficient entry into either the passenger air travel market or the air cargo transport market is unlikely to mitigate the harmful effects of the proposed transaction caused by the elimination of Morpho as an independent supplier.

1. Desktop ETD Devices for Passenger Air Travel in the United States

Firms attempting to enter into the development, engineering, production, distribution, sale, and servicing of desktop ETD devices in the passenger air travel market face substantial entry barriers in terms of time and technology. The TSA process for qualification of a new desktop ETD device normally takes from 12 to 24 months. Testing includes multiple steps, each of which must be passed to proceed: (1) submission and corresponding review of a data package; (2) two rounds of functional testing of the unit in a controlled environment; and (3) operational testing of the unit on-site at an airport. As a result of these barriers, entry would not be timely, likely, or sufficient to defeat a price increase arising from the substantial lessening of competition that likely would result from Smiths' acquisition of Morpho.

2. Desktop ETD Devices for Air Cargo Transport in the United States

Firms attempting to enter into the development, engineering, production, distribution, sale, and servicing of desktop ETD devices in the air cargo transport market likewise face substantial entry barriers in terms of time and technology. Air cargo companies typically

require desktop ETD device providers to meet ACSTL standards, which demand an investment of time and money similar to that required under the TSA's QPL-testing process. Setting up a local network of service and training personnel and equipment is likewise a cost- and time-intensive endeavor. As a result of these barriers, entry would not be timely, likely, or sufficient to defeat a price increase arising from the substantial lessening of competition from Smiths' acquisition of Morpho.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing a new, independent, and economically viable competitor in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices. Paragraph II(G) of the proposed Final Judgment defines the Divestiture Assets to include Morpho's global ETD business, including leases or subleases to Morpho's R&D, manufacturing, sales, and service facility located at Andover, Massachusetts; its R&D facility at Santa Ana, California; its three sales and service depots located at Cambridge, England, Mississauga, Canada, and Sydney, Australia. The Divestiture Assets include all tangible assets used in connection with Morpho's global ETD business, including, but not limited to, all research and development assets; all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies, and other tangible property; all licenses, permits and authorizations issued by any governmental organization; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, including service contracts, service subcontracts, and supply agreements or

contracts; all customer lists, customer records, contracts, accounts, and credit records; all repair and performance records and all other records.

The Divestiture Assets also include all intangible assets used in connection with Morpho's global ETD business, including, but not limited to, all patents, licenses and sublicenses, intellectual property (including the ionization process technology, the high-volume particle vapor sampling technology, and the mass spectrometry technology), copyrights, trademarks and trade names (excluding trademarks and trade names related to the words "Morpho" or "Morpho Detection"),[1] service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, customization and design of new algorithms, engineering specifications, specifications for materials, specifications for parts and components, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information defendants provide to their own employees, customers, suppliers, agents or licensees, and all research data relating to Morpho's global ETD business, including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments.

Paragraph IV(A) requires Smiths, within ninety (90) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court,

[1] Morpho's parent, Safran, carved out from the sale of Morpho the "Morpho" and "Morpho Detection" trademarks and trade names, because Safran is the primary user of those trademarks and names. Safran also uses them for products and businesses other than ETD devices. Customers widely recognize Morpho's ETD devices by product and model names rather than by the company name, so excluding the Morpho and Morpho Detection trade names and trademarks will not adversely impact the viability or competitive significance of the Divestiture Assets as an ongoing business.

whichever is later, to divest the Divestiture Assets as a viable ongoing business. The Divestiture Assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

Pursuant to Paragraph IV(H), the Acquirer has the option to enter into a transition services agreement with Smiths sufficient to meet the Acquirer's need for assistance in matters relating the Divestiture Assets. The Acquirer may exercise this option for a period no longer than twelve (12) months following completion of the divestiture required by the Final Judgment.

The facilities located in Santa Ana, California and Andover, Massachusetts each currently contain assets that are unrelated to desktop ETD devices. Accordingly, pursuant to Paragraphs IV(J) and IV(K), Smiths is required to remove the non-desktop ETD device assets from these facilities no later than thirty (30) days after the date the Transaction is closed.

In accordance with Paragraph IV(L), at Smiths' option, the Acquirer shall enter into an agreement to provide Smiths with a non-exclusive, worldwide, royalty-free, non-transferable, irrevocable license for the intangible assets described in Paragraph II(G)(3) of the Final Judgment, that, prior to the filing of the Complaint in this matter, were being developed to be used in connection with ETD devices (i.e., the ionization process technology, the high-volume particle vapor sampling technology, and the mass spectrometry technology); provided, however, that any license for ionization and mass spectrometry technology may not be used in connection with the development, engineering, production, distribution, sale and/or service of ETD devices. Such licenses will not be subject to any requirement to grant back to the defendants any

improvement or modifications made to these assets.

Pursuant to Paragraph IV(M), final approval of the sale of the Divestiture Assets, including the identity of the Acquirer, is left to the sole discretion of the United States to ensure the continued independence and viability of the Divestiture Assets to compete in the relevant markets.

According to Section V, in the event that Smiths does not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a Divestiture Trustee selected by the United States to effect the divestiture. If a Divestiture Trustee is appointed, the proposed Final Judgment provides that Smiths will pay all costs and expenses of the trustee. The Divestiture 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 its appointment becomes effective, the Divestiture Trustee will file monthly reports with the Court and the United States setting forth its efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the Divestiture Trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

Section XI of the proposed Final Judgment requires Smiths to provide notification to the Antitrust Division of certain proposed acquisitions not otherwise subject to filing under the Hart-Scott Rodino Act, 15 U.S.C. 18a (the "HSR Act"), and in the same format as, and per the instructions relating to the notification required under that statute. The notification requirement applies in the case of any direct or indirect acquisitions of any assets of or interest in any entity

engaged in the development, engineering, production, distribution, sales, and servicing of desktop ETD devices in the United States; provided that notification pursuant to this Section shall not be required where the purchase price of the assets or interests being acquired is less than $30 million. Section XI further provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before such acquisitions can be consummated. The United States believes that Smiths may have an interest in acquiring other desktop ETD companies that have not yet qualified for either the QPL or ACSTL but which may attempt to qualify for the QPL or ASCTL in the future. Because some of these firms may not be large enough to trigger HSR reporting requirements, we are requiring this notification provision.

The Divestiture Assets are not limited only to desktop ETD devices but rather include Morpho's global ETD business, which includes desktop, handheld, and portal ETD products. These products share many commonalities, including intellectual property, research and development, patented technology, production processes, components, distribution, sales, and service support. Partitioning such closely related lines of business would be impractical and endanger the viability and competitiveness of an entity that consists solely of the desktop ETD business. The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the provision of desktop ETD devices used in the relevant markets by preserving the Divestiture Assets as an independent and vigorous competitor to Smiths.

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 U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W.
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 litigated and sought preliminary and permanent injunctions against Smiths' acquisition of Morpho. The United States is satisfied, however, that the divestiture of Morpho's global ETD business described in the proposed Final Judgment will preserve competition for the development, production, engineering, distribution, sales, and servicing of desktop ETD devices in the United States. 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
>
> (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, U.S. Airways Group, Inc.*, No. 13-cv-1236 (CKK), 2014-1 Trade Cas. (CCH) ¶ 78, 748, 2014 U.S. Dist. LEXIS 57801, at *7 (D.D.C. Apr. 25, 2014) (noting the court has broad discretion of the adequacy of the relief at issue); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, 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]

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) (quoting *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

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[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* 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

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 U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *16 (noting that a court should not reject the proposed remedies because it believes others are preferable); *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 U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *8 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461); *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

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[obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

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 U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable; *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); *see also U.S.*

Airways, 2014 U.S. Dist. LEXIS 57801, at *9 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[4] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9.

[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.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII. DETERMINATIVE DOCUMENTS

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

Dated: March 30, 2017

Respectfully submitted,

_____/s/_____
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[FR Doc. 2017-07099 Filed: 4/7/2017 8:45 am; Publication Date: 4/10/2017]