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

United States District Judge.

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Google Inc. and ITA Software Inc., 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, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Google Inc. and ITA Software Inc.,* Civil Case No. 1:11–cv–00688. On April 8, 2011, the United States filed a Complaint alleging that Google's proposed acquisition of ITA Software Inc. would substantially reduce competition in the online travel planning industry, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment would require Google to continue licensing ITA Software's products for a period of five years following the merger.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site 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, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to James J. Tierney, Chief, Networks and Technology Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 7100, Washington, DC 20530 (telephone: 202–307–6200).

Patricia A. Brink,

Director of Civil Enforcement.

In the United States District Court for the District of Columbia

United States of America, United States Department of Justice, Antitrust Division, 450 Fifth Street, NW., Suite 7100, Washington, DC 20530, Plaintiff, v. *Google Inc., 1600 Amphitheatre Parkway, Mountain View, CA 94043, and ITA Software, Inc., 141 Portland Street, Cambridge, MA 02139,* Defendants.

Civil Action No. 1:11–cv–00688.

Filed: 4/8/2011.

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action against Google Inc. ("Google") and ITA Software, Inc. ("ITA") pursuant to the antitrust laws of the United States to enjoin Google's proposed acquisition of ITA, and to obtain such other equitable relief as the Court deems appropriate. The United States alleges as follows:

I. Nature of Action

1. On July 1, 2010, Google, a significant provider of general Internet search and search advertising in the United States, entered into a merger agreement to acquire ITA, the provider of the leading independent airfare pricing and shopping system ("P&S system"), for $700 million. P&S systems provide flight pricing, schedule and seat availability information to Internet travel sites.

2. Online travel represents a significant share of e-commerce in the United States. Consumers rely on the Internet to make their travel plans, and often begin by shopping for airfare. Online travel intermediaries ("OTIs") such as Orbitz, Kayak and Expedia allow consumers to compare flight prices, schedules, and seat availability on multiple airlines simultaneously. OTIs, and the flight search services they offer, have become very popular with consumers who want to ensure they are getting the best deal. Indeed, most U.S. consumers compare flight options on an OTI Web site before purchasing a ticket online.

3. ITA's P&S system, QPX, powers a significant share of the domestic comparative flight searches conducted by U.S. consumers. ITA licenses QPX to many of the most popular and innovative OTI's providing comparative flight search services, including Orbitz, Kayak, and Microsoft's Bing Travel. QPX is a critical flight search tool for many of its licensees, as other P&S systems cannot match its speed and flexibility, and are not poised to do so in the near future. Thus, these OTIs currently have no adequate alternatives to QPX and will not have any following the merger.

4. Google has the most widely used general Internet search engine in the United States and is the leading seller of Internet search advertising. Google seeks to expand its search services by launching an Internet travel site to offer comparative flight search services.

5. The proposed merger will give Google the means and incentive to use its ownership of QPX to foreclose or disadvantage its prospective flight search rivals by degrading their access to QPX, or denying them access to QPX altogether. As a result, the proposed merger is likely to result in reduced quality, variety, and innovation for consumers of comparative flight search services.

II. Jurisdiction, Venue and Commerce

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

7. Google is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Mountain View, CA. In 2009, Google earned more than $23 billion in revenues in the United States. Google is engaged in interstate commerce and in activities substantially affecting interstate commerce. It sells online search advertising throughout the United States. Its sales of online search advertising in the United States represent a regular, continuous and substantial flow of interstate commerce, and have had a substantial effect upon interstate commerce.

8. ITA is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Cambridge, MA. ITA is engaged in interstate commerce and in activities substantially affecting interstate commerce. It makes sales throughout the United States. Its sales in the United States represent a regular, continuous and substantial flow of interstate commerce, and have had a substantial effect upon interstate commerce.

9. The Court has subject-matter jurisdiction over this action and these defendants pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

10. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(b)(1) and

(c). Defendants Google and ITA transact business and are found within the District of Columbia. Google and ITA have submitted to personal jurisdiction in this District.

III. The Merger Is Likely To Lessen Competition Substantially in the Market for Comparative Flight Search Services in the United States

A. Overview of Comparative Flight Search Services and P&S Systems

11. Major airlines developed the first flight search systems in the 1950s and 1960s for their own internal use. In the 1970s, the airlines started releasing specialized versions of these systems for use by professional "brick and mortar" travel agents. These systems provided both flight search and booking functionality. They were known first as "computer reservation systems" ("CRSs"), and later as "global distribution systems" ("GDSs") as airlines divested their ownership interests and the companies expanded their presence outside of the United States. The GDS firms function as intermediaries between the airlines looking to sell tickets and travel agents with customers looking to buy tickets.

12. The early flight search systems were relatively limited in their search capabilities. They generated a limited set of results per query, and did not present the list of flight options in a user-friendly format. Travel agents received special training in order to use the systems, and brought their training and experience to bear both in performing flight queries and interpreting the results for consumers. Consumers made travel decisions based on information extracted from these systems by professional travel agents.

13. With the advent of the Internet, two different types of OTIs emerged that allow U.S. consumers to search for domestic flight prices, schedules, and seat availability on multiple airlines simultaneously: Online travel agencies ("OTAs") such as Expedia, Travelocity and Priceline, and travel meta-search engines ("Metas") such as Kayak, TripAdvisor and Bing Travel. Like the "brick and mortar" travel agencies, OTAs provide both flight search and booking services. Also like the "brick and mortar" travel agencies, OTAs split booking fees with the GDSs. They supplement this revenue by selling advertising on their Web sites to airlines, hotels and other companies offering travel-related products and services.

14. Metas enable consumers to search for flights but do not offer booking services. When a consumer on a Meta travel site enters a flight query, the Meta provides a set of flight options, and for each option, a set of links to various airline and OTA Web sites. To purchase a ticket, the consumer must click a link to an airline or OTA Web site. In contrast to OTAs, which generate revenue primarily through booking fees and secondarily through advertising sales, Metas generate revenue through advertising sales and referral fees collected from the airlines and OTAs.

15. To attract traffic, Metas generally offer innovative flight search features that capture the consumer's attention, and provide an array of attractive flight options in response to each query. Metas also prioritize quick response times because consumers on their sites are often at an earlier stage of the travel planning process, and are less likely to endure a prolonged wait for search results. Although Metas are the newcomers, they are driving competition in comparative flight search services through innovation, and are progressively gaining ground.

16. To perform a flight search on an OTA or a Meta, a consumer typically enters an origin and destination city and desired travel dates and times. The travel site then provides a number of options on different airlines with varying routes and pricing. Some travel sites—particularly the Metas—also offer more sophisticated and innovative flight search features, for example, a fare predictor that allows consumers to identify the best time to buy a ticket for a particular trip, or an "anywhere" feature that allows them to explore different destinations by specifying a price range, desired activity (*e.g.,* beach, golf, skiing) and desired temperature (*e.g.,* average high of 80).

17. To provide flight search functionality, OTAs and Metas rely on P&S systems such as ITA's QPX. A system includes not only the P&S engine software, but also on-going access to seat and fare class availability data. When a consumer on a Meta or OTA Web site submits a flight query (*e.g.,* Boston to San Francisco, March 1, 2011, returning March 14, 2011), the Web site sends the query to the P&S system. The P&S system accesses the fare, schedule, and seat availability information of multiple airlines, and uses a sophisticated algorithm to analyze the flight possibilities and convert the query into a list of available flight options. It sends these options back to the OTA or Meta, which presents the available flight options to the consumer in a format that facilitates comparison (*e.g.,* organized by price, departure or arrival time, or number and length of connections). P&S systems differ in their speed; flexibility; ability to find the lowest price itinerary; ability to obtain accurate seat availability information; and breadth of results presented.

18. Although the flight queries submitted on OTA and Meta Web sites are often simple, the computing challenges involved in providing the underlying flight search functionality are quite significant. Airfare pricing and seat availability change from moment to moment, and are governed by a complex system of fare rules that vary by airline. There are thousands of possible flight paths that can be used to travel between any two cities on a given day; when different airlines, departure and arrival times, and fare codes are taken into account, the number of possible flight combinations can number in the billions. In order to present consumers with flight options that are actually available for purchase, the billions of possible combinations must be checked against seat availability data and fare rules.

B. Relevant Product Market

1. Comparative Flight Search Services

19. One of the markets affected by this transaction is comparative flight search services. Comparative flight search service providers enable consumers to search online for flight prices, schedules, and seat availability on multiple airlines simultaneously. Comparative flight search services is a relevant antitrust product market because no other flight search service is as useful and convenient to consumers.

20. Current competitors in this market include Metas (*e.g.,* Kayak and Bing Travel), and OTAs (*e.g.,* Expedia, Orbitz and Travelocity) whose comparative flight search services can be consumed separately from their flight booking and other travel services.

21. Airline Web sites and reservation lines are not reasonable substitutes for comparative flight search services because they do not allow consumers to compare prices and schedules across multiple airlines simultaneously. It is significantly more cumbersome for a consumer to compare flight prices and schedules by going to many different airlines' Web sites separately, and even then the consumer might not find the best fare.

22. Using a "brick and mortar" travel agent is also not a reasonable substitute for comparative flight search services online because travel agents do not provide the same sort of user control, instantaneous response, and flight search flexibility as OTAs and Metas.

23. There are no reasonable substitutes for comparative flight search services, and thus, a small but significant degradation in the quality of comparative flight search services or increase in price to consumers of these services would not cause a significant number of users to switch to other services, such as airline Web sites or "brick and mortar" travel agents. Accordingly, comparative flight search services is a relevant product market for purposes of Section 7 of the Clayton Act.

2. P&S Systems

24. This transaction also impacts the P&S systems market. P&S systems have two main components: a continuously-updated database of airline pricing, schedule and seat availability information, and a software algorithm used to search the database for flight options that best match consumers' search criteria. The significant competitors in this market include ITA, Travelport, Sabre, Amadeus, and Expedia.

25. P&S systems is a relevant antitrust product market because no other comparative flight search technology is as fast or as reliable. The closest alternative to P&S systems is screen-scraping software which pulls or "scrapes" airline pricing and scheduling information from airline Web sites and other OTIs instead of accessing a centralized database of flight pricing, schedule, and seat availability information. Screen-scraping technology is not a reasonable substitute for P&S systems because it is significantly slower and less reliable.

26. A small but significant increase in the licensing fees charged to OTIs for use of P&S systems would not cause a sufficient number of these sites to substitute to screen scraping technology to make such price increases unprofitable. Accordingly, P&S systems is a relevant product market for purposes of Section 7 of the Clayton Act.

C. Relevant Geographic Market

1. Comparative Flight Search Services

27. The relevant geographic market for comparative flight search services is the United States. All the major OTIs that allow consumers to compare domestic flight prices and schedules are optimized for use by U.S. consumers. While some of the Web sites have foreign versions (*e.g., http://www.expedia.co.uk*), the foreign versions are not adequate substitutes for most U.S. consumers because they list flight prices in their local currency, and sell tickets in that currency, requiring a currency conversion fee.

2. P&S Systems

28. The relevant geographic market for P&S systems is the United States. In order for a P&S system to serve U.S. consumers, it must have access to comprehensive and reliable seat and fare class availability data on routes with at least one U.S. endpoint, and software which provides fare, tax, and fee calculations denominated in U.S. dollars. Accordingly, OTIs serving U.S. consumers cannot reasonably substitute software that is optimized for a different geographic market (*e.g.,* Europe) and not the United States.

D. Anticompetitive Effects

29. The acquisition of ITA by Google is likely to lessen competition substantially in the market for comparative flight search services in the United States. After acquiring ITA, Google intends to use QPX as the back-end technology for its forthcoming comparative flight search services. Google's travel service will compete with OTIs. As Google has recognized, QPX is a unique P&S system because it has superior features that cannot be quickly replaced or replicated. After acquiring QPX, Google will have the ability and incentive to foreclose competing OTIs' access to QPX and thereby weaken the ability of its rivals to compete.

1. ITA's QPX Is Dominant in P&S Systems and Serves as the Leading Platform for Web Sites Offering the Most Innovative Flight Search Services

30. Since its entry into the P&S systems market in 2001, ITA has dramatically expanded its portfolio of customers. ITA has won virtually every competition for business in the United States in which the customer did not already have a P&S system provider or product. At the same time, ITA has lost very few customers. Today, QPX powers all major Metas and three major OTAs and handles more domestic flight comparison queries than any other P&S system. QPX is widely recognized as the best P&S system in the U.S. market due to its superior speed and flexibility.

31. QPX has a significant speed advantage because it can more quickly determine seat availability using its proprietary Dynamic Availability Calculating System ("DACS"). ITA's DACS is a unique system which can quickly estimate seat availability without polling the airlines' systems (which slows the process) or relying on data from prior queries (which is sometimes stale and inaccurate). Speed is important because the longer it takes to respond to a query, the greater the likelihood that the consumer will abandon the search and switch to another flight search site.

32. QPX is also highly configurable. QPX has more than a thousand different parameters that can be adjusted or "tuned" to meet the needs of individual travel site customers. QPX's flexibility also allows it to more efficiently handle the complex queries demanded by more innovative flight search features such as Bing Travel's Fare Predictor, which predicts whether prices for a particular route are trending up or down.

33. ITA also leads in P&S system innovation. For example, ITA is developing a new product called InstaSearch which relies on cutting-edge computing techniques to significantly reduce query response times. ITA expects InstaSearch to be particularly useful in reducing the response times for more innovative flight search features such as "calendar" features which allow consumers to search for the lowest fares for a particular route over a period of weeks or months; and "anywhere" features which enable consumers to explore different destinations by specifying a price range, desired activity (*e.g.,* beach, golf, skiing) and desired temperature.

34. QPX's flexible design makes it the tool of choice for Metas. Indeed, ITA is the only P&S system currently capable of supporting many of the innovative comparative flight search services that are the core attraction for these travel sites.

2. Currently Available P&S System Alternatives Are Not Adequate Substitutes for QPX

35. The three GDSs—Sabre, Travelport and Amadeus—license P&S systems to third-parties (generally OTAs), but usually as part of a broader software package that includes booking and ticketing functionality. In addition, one of the OTAs, Expedia, has a proprietary P&S system to support its own travel Web site, which is based on a GDS product, but it has never licensed its system to third parties.

36. QPX's significant qualitative advantages have prompted some OTIs with ready access to a GDS or proprietary P&S system to license QPX. For example, Hotwire, an OTA, and TripAdvisor, a Meta, license QPX even though their corporate affiliate, Expedia, owns and operates its own proprietary P&S system. Similarly, Orbitz and Cheaptickets are part-owned (48%) by Travelport, one of the GDS firms, but have opted to license ITA's QPX

because it provides superior flight search functionality.

37. ITA has a superior flight search tool and is driving innovation in P&S system technology. Although the GDS firms and Expedia have responded by improving their P&S systems, they continue to be followers rather than leaders. As competition both in P&S systems and comparative flight search services is driven increasingly by innovation, the GDS firms have been unable to close the gap allowing ITA to progressively grow its share.

3. Google Will Have the Incentive To Foreclose Rivals' Access to QPX

38. The proposed merger will eliminate ITA as an independent and unique source of P&S system technology for competing OTIs, potentially stripping these sites of the technology needed to support their existing comparative flight search services, and delaying or deterring their efforts to develop new flight search features. After the merger, Google would have the ability to use its ownership of QPX to foreclose or disadvantage rivals of Google's travel service. For example, Google could refuse to renew existing QPX contracts, refuse to enter into new QPX contracts, enter into contracts on less favorable terms than ITA would have, or degrade the speed or quality of QPX offered to licensees. Unlike ITA, Google plans to develop a travel Web site. Therefore, Google will have the incentive to weaken competing OTIs by denying or degrading their access to QPX because increased profits from driving customers to its new travel service from rival OTIs will likely outweigh any lost profits from reduced licensing revenues from QPX.

39. The elimination of an independent ITA will also reduce travel site innovation. ITA partners with many different travel sites, and consumers have benefitted from the variety of flight search features that these collaborations have produced. Thus, consumers are likely to be harmed through reduced innovation and diminished consumer choice in the comparative flight search services market.

40. Finally, the proposed merger will provide Google access to competitively sensitive information from competing OTIs relating to their use of QPX, including tuning parameters and plans to offer new or improved services. Disclosure of such competitively sensitive information from competitors to Google will likely harm competition in the market for comparative flight services.

E. Difficulty of Entry in the Comparative Flight Search Services Market

41. The proposed merger would raise entry barriers into the comparative flight search market by placing QPX into Google's hands and beyond the reach of potential entrants. P&S systems are a critical input to the provision of comparative flight search services. No other firm offers a P&S system that is comparable to QPX.

42. The entry barriers associated with developing a new P&S system are extremely high. Indeed, two firms, Vayant and Everbread, have been developing P&S systems for several years, but have yet to garner any significant U.S.-based OTIs as customers. In addition, Google looked at developing its own P&S system as an alternative to acquiring ITA but concluded it would take several years and require numerous engineers due to the complexity of the algorithms.

VI. Violation Alleged

43. The United States incorporates the allegations of paragraphs 1 through 41 above.

44. The proposed transaction between Google and ITA would likely substantially lessen competition in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, in the market for comparative flight search services in the United States.

VII. Relief Requested

45. The United States request that:

a. The proposed merger of Google and ITA be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

b. Google and ITA be enjoined from carrying out the proposed merger or carrying out any other agreement, understanding, or plan by which Google and ITA would acquire, be acquired by, or merge with each other;

c. The United States be awarded their costs of this action; and

d. The United States receive such other and further relief as the case requires and the Court deems just and proper.

Dated: April 8, 2011.

Respectfully submitted,

For Plaintiff United States:

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Deputy Assistant Attorney General.

Joseph F. Wayland,
Deputy Assistant Attorney General.

Patricia A. Brink,
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James J. Tierney,
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Attorneys for the United States.

Certificate of Service

I, Aaron D. Hoag, hereby certify that on April 8, 2011, I caused a copy of the Complaint to be served on defendants Google Inc. and ITA Software, Inc. by mailing the document via e-mail to the duly authorized legal representatives of the defendants, as follows:

For Google:

John D. Harkrider,
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Michele Sasse Harrington, *Hogan Lovells US LLP, 555 Thirteenth Street, NW., Washington, DC 20004. E-mail: michele.harrington@hoganlovells.com.*

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Aaron D. Hoag, *Attorney, U.S. Department of Justice, Antitrust Division, 450 Fifth Street, NW., 7th Floor, Washington, DC 20530. Tel: (202) 307–6153. Fax: (202) 616–8544. E-mail: aaron.hoag@usdoj.gov.*

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Google Inc., and ITA Software, Inc.,* Defendants.

Civil Action No. 1:11-cv-00688.
Filed: 4/8/2011.

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 This Proceeding

On July 1, 2010, Google Inc. ("Google") entered into a merger agreement to acquire ITA Software Inc. ("ITA") for $700 million. ITA develops and licenses a software product called "QPX." QPX is used by many airlines, online travel agents and online travel search sites to provide extremely complex and customized flight search functionality to consumers. QPX has unique capabilities and acts as a type of mini-search engine for travel sites. When a customer wants to know the availability and cost of flights from Boston to San Francisco, for example, QPX is the tool that provides the answer.

Google intends to offer an online travel search product that will compete with existing travel search sites that provide the ability to search for airfares across a range of airlines, many of whom use QPX; these Web sites are referred to as Online Travel Intermediaries ("OTIs"). In essence, Google is acquiring a critical input not previously owned by a company that is a horizontal competitor to users of ITA. This transaction therefore posed a significant risk that Google could use the acquisition to foreclose rivals or unfairly raise their costs. Accordingly, the United States brought this lawsuit against Google and ITA on April 8, 2011, seeking to enjoin the proposed transaction. Following a thorough investigation, the United States believes that, unless enjoined, the likely effect of the transaction as proposed by the parties would be to lessen competition substantially for comparative flight search services in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. This loss of competition likely would result in reduced innovation and reduced consumer choice in the comparative flight search market.

Simultaneous with the filing of the Complaint, the United States also filed a proposed Final Judgment designed to remedy the Section 7 violation. The Final Judgment does not settle any claims which may arise under any other provisions of the laws, including Section 2 of the Sherman Act.

Under the proposed Final Judgment, which is explained more fully below, Defendants are subject to a variety of affirmative obligations, all of which are designed to ensure ongoing access to QPX for current ITA licensees and to enable new entrants or new licensees to obtain the QPX software on fair, reasonable, and non-discriminatory terms. The licensing provisions require Google to honor existing QPX licenses for OTIs, renew existing licenses under similar terms and conditions, and offer licenses to any OTIs not under contract on fair, reasonable, and non-discriminatory terms, judged in reference to similarly situated entities. Google must continue with the development of ordinary course upgrades and enhancements to QPX, and must devote substantially as many resources to research and development for QPX as ITA did prior to the acquisition. Google must license InstaSearch, an add-on to QPX which enables consumers to enter more flexible and creative queries in searching for flights. Google must observe strict firewall commitments to ensure the confidentiality of licensee information. In addition, Google must report certain complaints that it has directly or indirectly treated OTIs unfairly. This obligation will enable OTIs who believe that Google has acted in an unfair manner with respect to flight search advertising [1] to make complaints and have written complaints brought directly to the attention of the Department of Justice.

Google's affirmative obligations ensure that OTIs will have continued access to QPX after the merger, while preserving Google's ability to use QPX and ITA's engineering talent as a platform for developing new and innovative flight search services for consumers. The proposed Final Judgment therefore strikes an appropriate balance between competing interests by preserving the potential significant efficiencies from the combination of Google's and ITA's complementary expertise while redressing the potential for anticompetitive foreclosure that could result from the acquisition.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

[1] Google has the largest online search engine and generates revenue through the sale of online advertising.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Comparative Flight Search Industry

Over the past decade, consumer access to direct search and booking of air travel has been revolutionized. The Internet has provided consumers with tools that enable them directly to search for customized itineraries. Innovation in flight search tools has provided consumers with quick and convenient access to the most responsive and useful itineraries and prices. Two different types of Web sites enable U.S. consumers to conduct Internet searches for domestic flight prices, schedules, and seat availability on multiple airlines simultaneously: Online travel agencies ("OTAs") and travel meta-search engines ("Metas"). In many respects, OTAs function like the online equivalent of brick and mortar travel agents, assisting users in identifying travel options and then in booking the consumer's choice. Examples of OTAs are Expedia, Travelocity, and Priceline. By contrast, the so-called Metas, such as Kayak, TripAdvisor, and Bing Travel, provide highly differentiated products with broad search capabilities—functioning almost like mini-search engines to enable consumers to search for flights. The Metas, however, do not offer direct booking services (*i.e.,* to purchase a ticket, consumers must click a link to an airline's Web site or to an OTA). The largest Metas are all powered by QPX. In addition to providing comparative flight search services, both Metas and OTAs often enable consumers to search for other travel products and services such as hotel rooms, rental cars, and vacation packages. When described together, OTAs and Metas constitute OTIs.

To perform a flight search on any OTI, a consumer typically enters an origin and destination city and desired travel dates. The OTI then provides a number of options on different airlines with varying routes and pricing. Some travel sites—particularly the Metas powered by QPX, which has some unique capabilities and advantages—also offer more sophisticated and innovative flight search features, such as a fare predictor that allows consumers to identify the best time to buy a ticket for a particular trip, or an "anywhere" feature that allows them to explore different destinations by specifying a desired price range, activity, and/or temperature at the destination.

To provide flight search functionality, OTIs rely on pricing and shopping ("P&S") systems. ITA's QPX is a sophisticated P&S system that is

differentiated in several respects from its competitors. P&S systems include not only the engine that performs the search, but also on-going access to seat and fare class availability data. When a consumer on a OTI Web site submits a flight query (*e.g.,* Boston to San Francisco, departing March 1, 2011, returning March 14, 2011), the Web site sends the query to the P&S system. The P&S system accesses the fare, schedule, and seat availability information of multiple airlines, and uses a sophisticated algorithm to analyze the flight possibilities and convert the query into a list of available flight options. It sends these options back to the OTI, which presents the available flight options to the consumer in a format that facilitates comparison (*e.g.,* organized by price, departure or arrival time, or number and length of connections). QPX is a highly accurate and well developed P&S system.

B. The Defendants and the Proposed Transaction

Google's principal business is an online search engine. Measured by the number of search queries or advertising revenue, Google is the largest search engine by far. *See Author's Guild* v. *Google,* No. 05 Civ. 8136 (DC), 2011 WL 986049, at *12 (S.D.N.Y. Mar. 22, 2011) (recognizing "Google's market power in the online search market"). In 2009, Google earned more than $23 billion in revenues in the United States. Google derives nearly all of its revenue from online search advertising, or the ads accompanying search engine results.

Google's only significant online search engine competitor is Bing, which has a much smaller share of both queries and advertising revenue. In addition to providing general purpose search engines, Google and Bing also provide specialized search sites, known as "vertical" sites. Bing, for example, offers a travel site that utilizes QPX to provide comparative flight search services. In conjunction with its acquisition of QPX, Google has announced its intention to launch new travel search functionality on its Web sites.

ITA is the leading producer of P&S systems in the United States. ITA's software is widely used by airlines and OTIs to search for, price, and display results for airline travel queries.

On July 1, 2010, Google and ITA entered into a merger agreement. Unremedied, this transaction would provide Google with the incentive and ability to foreclose rivals (actually or effectively) from the comparative flight search market. This could be accomplished by preventing licensees and potential licensees access to the leading comparative flight search product, QPX, or by hobbling them by failing to continue development at levels commensurate with the pre-merger environment. This would diminish competition in this market and effectively diminish consumer choice. The transaction would substantially lessen competition in the comparative flight search market and is the subject of the Complaint and proposed Final Judgment filed by the United States in this matter.

C. Relevant Markets

Antitrust law, including Section 7 of the Clayton Act, protects consumers from anticompetitive conduct, such as firms' acquisition of the ability to raise prices or reduce choice. Market definition assists antitrust analysis by focusing attention on those markets where competitive effects are likely to be felt. Well-defined markets encompass the economic actors including both sellers and buyers whose conduct most strongly influences the nature and magnitude of competitive effects. To ensure that antitrust analysis takes account of a broad enough set of products to evaluate whether a transaction is likely to lead to a substantial lessening of competition, defining relevant markets in merger cases frequently begins by identifying a collection of products or set of services over which a hypothetical monopolist profitably could impose a small but significant and non-transitory increase in price.

Here, the United States's investigation revealed that all OTIs rely on a P&S system, such as ITA's QPX, to drive the comparative airfare search offerings such Web sites offer their users. Should one company control all P&S systems, OTIs would have no alternative products to which they could turn to defeat a price increase. As such, the market for P&S systems is a relevant product market.

The comparative flight search market is an additional relevant market implicated by this merger. The market participants are OTIs that offer the ability for users to compare flights and prices across different airlines. Comparative flight search is a relevant market because there are no reasonable substitutes consumers could turn to if a company controlling all comparative flight search Web sites reduced the quality of its service. Airline Web sites and reservation lines are not reasonable substitutes because they do not offer the comparative aspect of OTIs. Brick and mortar travel agents are also not reasonable substitutes because travel agents do not provide the same sort of user control, instantaneous response, and flight search flexibility as OTIs. Accordingly, comparative flight search services is a relevant product market.

Antitrust analysis must also consider the geographic dimensions of competition. Here, the relevant markets exist within the United States and are not affected by competition outside the United States. The competitive dynamics for both markets is distinctly different outside the United States.

D. Competitive Effects

Since its introduction to the market in 2001, ITA has been the leader in P&S systems. ITA has won nearly every competition for business in the United States in which the customer did not already have a P&S system in place. ITA has also lost very few customers due to its ability to provide highly and uniquely customized P&S functionality. ITA's customers include two of the five largest OTAs in the United States, and all five of the largest Metas. ITA's P&S system, QPX, has an advantageous position against its competitors in terms of speed, configurability, and accuracy. QPX consistently leads the industry in innovation. In short, ITA has a leading position in P&S systems. From a competition perspective, ITA's corporate independence from any particular OTI ensures that all of its customers receive the benefits of ITA's cutting edge innovation—*i.e.,* there is currently no vertically integrated OTI owned by ITA that receives favorable treatment relative to ITA's other customers.

This will not be the case once Google purchases ITA. Google intends to launch a new service after completing the transaction that will compete directly with other OTIs by providing flight search results. Because so many OTIs rely on ITA as an input to their services, Google will have the ability and incentive to either shut off access to ITA to those competitors, or degrade the quality of QPX that is available to those competitors. Such actions in the upstream pricing and shopping market would substantially reduce competition in the downstream comparative flight search market.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment sets forth: (1) Requirements regarding the parties' continued licensing and improvement of QPX; (2) requirements regarding the parties' licensing of InstaSearch, a new flight search technology under development by ITA; (3) procedures for resolving disputes

between OTIs and the parties regarding licensing of QPX or InstaSearch; (4) requirements for the creation of a firewall at the parties' business regarding use of competitively sensitive information gained through provision of QPX or InstaSearch services; and (5) oversight procedures the United States may use to ensure compliance with the proposed Final Judgment. Section IX of the proposed Final Judgment states that these provisions will expire five years after entry of the proposed Final Judgment.

As discussed earlier, the United States' concerns regarding the proposed transaction revolve around Google's ability and incentive to weaken its competitors in the comparative flight search market by denying or degrading their access to QPX. Denying or degrading rivals' access to QPX would potentially diminish competition in the comparative flight search market. Therefore, as discussed in more detail below, the key remedies embodied within the proposed Final Judgment include guarantees that the key products on which OTIs rely will continue to be available in a robust fashion for at least five years after the entry of the Final Judgment. Five years will provide those OTIs that do not wish to be dependent on Defendants' P&S system a sufficient period of time to switch to an alternative system.

A. Licensing and Improving of QPX

Section IV.A–G of the proposed Final Judgment preserves competition for OTIs by creating a legally enforceable commitment that Defendants will continue to license and improve QPX. Sections IV.A–C require Defendants to honor the terms of all QPX agreements in effect as of the entry of the Final Judgment, negotiate extensions to existing QPX agreements with any OTI on the terms set forth in the OTI's existing contract for up to five years from the entry of the Final Judgment, and negotiate new QPX agreements with any OTI who is not party to an existing QPX agreement on terms that are fair, reasonable, and non-discriminatory.

Section IV.D prohibits Defendants from entering into any new QPX agreement that would prevent an OTI from using alternative products to QPX. Defendants and an OTI, however, are free to enter into an exclusive QPX agreement if Defendants offer a non-exclusive agreement on fair, reasonable, and non-discriminatory terms.

Section IV.E requires Defendants to make available to OTIs ordinary course upgrades to QPX at the same price those upgrades are made available to other customers. Section IV.F requires Defendants to devote substantially the same resources to the research and development and maintenance of QPX for the use of customers as ITA did in the average of the two years prior to the filing of the Complaint. This requirement eases concerns that post-merger Defendants will let the QPX product languish without committing resources to improve it over time.

Finally, Google intends to introduce a new travel search service that will include airfare pricing and shopping functionality. Section IV.G provides that Defendants are not required to offer OTIs any product, service or functionality that Google develops exclusively for its new travel search service.

B. Licensing of InstaSearch

Prior to the proposed transaction, ITA was developing a product, called InstaSearch, for license to customers that promised to be the next generation in pricing and shopping services. InstaSearch was being developed to use a cache of results to provide instantaneous or near-instantaneous results to airfare search queries. One concern of the proposed transaction is that Google will prevent this innovative product from being made available to its OTI competitors. As such, the decree aims to ensure InstaSearch is available for license.

Sections IV.H–J of the proposed Final Judgment preserves competition for OTIs by requiring Defendants to negotiate InstaSearch agreements for terms up to five years from the entry of the Final Judgment. While ITA developed InstaSearch for future sale, it has not sold a commercial version of the product to any customers. ITA, however, has entered into a contract with one customer to deliver a "proof of concept" implementation of InstaSearch. The proposed Final Judgment requires Defendants to offer OTIs at least the same functionality as contained in the proof of concept attached to the proposed Final Judgment, and requires Defendants to make commercially reasonable efforts to ensure that the InstaSearch implementation conforms to the proposed technical specifications. Should Defendants provide an InstaSearch implementation to any of their customers that is superior to the version envisioned by the proof of concept, the proposed Final Judgment requires Defendants to make that improved product available to all OTIs. Finally, the proposed Final Judgment allows Defendants to charge fair, reasonable and non-discriminatory fees for InstaSearch.

C. Arbitration Provisions

The proposed Final Judgment requires that the Defendants negotiate in good faith with any OTI, but also sets forth certain procedures by which Defendants and OTIs can resolve disputes over the fees charged for any type of service should Defendants and an OTI not reach agreement over fees. As described in Sections IV.K–M, Defendants shall submit to binding arbitration over the disputed fees once certain conditions have been met. The Defendants and the OTI must, prior to submitting a matter to arbitration, designate a person at each company with the authorization to resolve the dispute in a final and binding fashion, and those individuals must meet in an attempt to resolve a dispute. Additionally, prior to Defendants' being obligated to enter into binding arbitration with an OTI, that OTI must certify to the United States that it negotiated in good faith with Defendants, and further receive consent of the United States to initiate arbitration. Upon receiving consent of the United States to initiate arbitration, the OTI may commence arbitration through the American Arbitration Association. The parties may agree to suspend the arbitration proceedings to attempt to resolve the dispute.

These procedures ensure that Defendants negotiate in good faith with all OTIs, and that if an agreement cannot be reached between the OTI and Defendants on a price term, that a resolution can be had quickly by an impartial third party using clear benchmarks from existing contracts. For non-price terms, the traditional decree enforcement provisions will provide the mechanism for resolving disputes.

D. Additional Provisions

Section V of the proposed Final Judgment prohibits Google from taking certain actions that could undermine the purpose of the proposed Final Judgment. Access to airline seat and booking class information is a critical input to a P&S system. To ensure that Defendants do not restrict access to this crucial information, Section V.A prohibits Defendants from entering into agreements with an airline that restricts the airline's right to share seat and booking class information with Defendants' competitors, unless one or more airlines enter into exclusive agreements with a competitor. Subject to certain limitations, Sections V.B–C require Google to make available to OTIs any seat and booking class information Defendants obtain for use in Google's new flight search service. Finally, Section V.D prohibits Defendants from

conditioning the provision of QPX or InstaSearch on whether or how much an OTI spends on other products or services sold by Google.

E. Firewall Requirements

As alleged in the Complaint, Defendants could use information and data gained through contracts with OTIs to then compete with those OTIs. Section VI of the proposed Final Judgment requires Defendants to establish a firewall at the company to prevent the misappropriation of competitively sensitive information and data. That section requires that Defendants only use an OTI's confidential information for the provision of any product or service to that specific OTI, for routine administrative or financial purposes, or for the continued development and improvement of QPX or InstaSearch. Google may use more limited query information, which does not include data regarding how OTIs configure the QPX product, for the improvement of Defendants' airfare pricing and shopping engines. Section VI.A prohibits, subject to a small list of exclusions, employees working on Google's travel search product from accessing confidential OTI information. Section VI.D requires Defendants to implement procedures to prevent confidential information from being used or accessed by employees other than those having a legitimate need for such information. Finally, Section VI.E requires the Defendants to submit its proposed procedures to the United States for its approval or rejection of those procedures.

F. Compliance

To facilitate monitoring of Defendants' compliance with the proposed Final Judgment, Section VII grants the United States access, upon reasonable notice, to Defendants' records and documents relating to matters contained in the proposed Final Judgment. Defendants must also make their employees available for interviews or depositions about such matters. Moreover, upon request, Defendants must answer interrogatories and prepare written reports relating to matters contained in the proposed Final Judgment.

In addition, Sections IV.N–O requires Google to create a Web site where OTIs can access a copy of the proposed Final Judgment and submit complaints that Google is violating the terms of the proposed Final Judgment or is acting, directly or indirectly, in an unfair manner in connection with flight search advertising in the United States. Google must provide copies of these complaints to the United States for a period of time from the earlier of five years from entry of the proposed Final Judgment, or two years from the date Google launches its new travel flight search service.

IV. Remedies Applicable 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 Applicable for Approval or Modification of the Proposed Final Judgment

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

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

Written comments should be submitted to: James J. Tierney, Chief, Networks & Technology Enforcement Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 7100, 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, seeking preliminary and permanent injunctions against Defendants' transaction and proceeding to a full trial on the merits. The United States is satisfied, however, that the relief in the proposed Final Judgment will preserve competition in the comparative flight search market. Thus, the proposed Final Judgment would protect competition as effectively as would any remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the United States 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 (DC Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1

(D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").[1]

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

In addition, "a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft,* 56 F.3d at 1459; *see also InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he '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. 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). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 *Cong. Rec.* 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the Court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns,* 489 F. Supp. 2d at 11.[3]

VIII. Determinative Documents

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

Dated: April 8, 2011.

Respectfully submitted,

For Plaintiff United States of America,

Aaron D. Hoag, *Attorney, U.S. Department of Justice, Antitrust Division, 450 Fifth Street, NW., 7th Floor, Washington, DC 20530, Tel: (202) 307–6153, Fax: (202) 616–8544, E-mail: aaron.hoag@usdoj.gov.*

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

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

[3] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

Certificate of Service

I, Aaron D. Hoag, hereby certify that on April 8, 2011, I caused a copy of the Competitive Impact Statement to be served on defendants Google Inc. and ITA Software, Inc. by mailing the document via e-mail to the duly authorized legal representatives of the defendants, as follows:

For Google:

John D. Harkrider,
Axinn, Veltrop & Harkrider LLP, 114 West 47th Street, New York, NY 10036, E-mail: jdh@avhlaw.com.

For ITA:

Michele Sasse Harrington, *Hogan Lovells U.S. LLP, 555 Thirteenth Street, NW., Washington, DC 20004, E-mail: michele.harrington@hoganlovells.com.*

For Plaintiff United States of America

Aaron D. Hoag, *Attorney, U.S. Department of Justice, Antitrust Division, 450 Fifth Street, NW., 7th Floor, Washington, DC 20530, Tel: (202) 307–6153, Fax: (202) 616–8544, E-mail: aaron.hoag@usdoj.gov.*

United States District Court for the District of Columbia

United States of America, Plaintiff v. *Google Inc.* and *ITA Software, Inc.* Defendants.

[Proposed] Final Judgment

Whereas, Plaintiff United States of America ("United States") filed its Complaint on April 8, 2011, the United States and Defendants Google Inc. and ITA Software, Inc., by their respective attorneys, have consented to 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 the Final Judgment pending its approval by the Court;

And whereas, the United States requires that Defendants agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, Defendants have represented to the United States that the actions and conduct restrictions can and will be undertaken and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the 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 Defendants, it is *ordered, adjudged and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and 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. "AAA" means the American Arbitration Association.

B. "Affiliate" means, with respect to any entity, another entity that controls, is controlled by or is under common control of the first entity.

C. "Airline Customer" means a Customer that operates an airline or is an Affiliate of an airline.

D. "Availability Information" means information about the availability of a seat at a specific booking class on a specific flight obtained by ITA as an input to QPX, including information in ITA's Dynamic Availability Calculating System and its system for processing other types of availability data, including Availability Status ("AVS") and Numeric Availability Status ("NAVS"), but excluding fully computed pricing and shopping results.

E. "Covered Employee" means an employee of a Defendant having as a job responsibility the day-to-day development of, or day-to-day strategic decision-making with respect to, the Google Consumer Flight Search Service, other than an Excepted Employee.

F. "Customer" means a company that has entered into a QPX Agreement or an agreement for InstaSearch with Defendants. Customer does not include Google or ITA.

G. "Customized Software" means any version of QPX or the InstaSearch Service that is modified specifically for a Customer in response to a request made by a Customer for particular features or functionality not included in the commercially available version of QPX or the InstaSearch Service. If the modified version is made available to other Customers (other than Affiliates of the requesting Customer), it no longer qualifies as "Customized Software" (provided that Customized Software that is provided in response to good faith requests from two or more Customers may be substantially similar).

H. "Database Query," with respect to any OTI, has the definition set forth in the QPX Agreement in effect between ITA and such OTI (or a definition given therein for "observation query").

I. "Defendants" means Google and ITA, as defined below, and any successor or assign to all or substantially all of the business or assets of Google and ITA involved in the provision of QPX, the InstaSearch Service, or the Google Consumer Flight Search Service.

J. "Embedded Software" means any version of QPX or the InstaSearch Service that is modified from the commercially available version for the purpose of integrating it into software that provides significantly greater functionality than QPX or the InstaSearch Service, such as a passenger reservation system or Internet booking engine. The software into which such version of QPX is integrated shall also be deemed "Excluded Software."

K. "EU" means an execution unit (a measure of the independent processing cores in a server). For example, a single core such as an Intel Pentium 4 has one EU, whereas a dual core chip such as the Intel Pentium D has two EUs. A dual Intel Pentium D server, in turn, would have four EUs.

L. "Excepted Employee" means an individual employed by ITA at the time of the complaint in this matter who has been designated in writing by Defendants and approved by the United States. With the consent of the United States, which shall not be unreasonably withheld, Defendants shall be entitled to designate a replacement for any Excepted Employee who is no longer employed by Defendants or ceases to have day-to-day job responsibilities involving QPX or InstaSearch.

M. "Excluded Information" means:

(1) Information available to the public or obtained by a Defendant from a third-party not under an obligation of confidentiality to the OTI licensee of QPX who disclosed such information to a Defendant;

(2) Information obtained by Google as part of its Web search business;

(3) Information provided to a Defendant in connection with a product or service other than QPX or the InstaSearch Service; and

(4) Schedule, fare, flight or availability information of any airline.

N. Nothing in any QPX Agreement shall be read as modifying the definition of Excluded Information so as to require Defendants to treat any Excluded Information as OTI Confidential Information pursuant to this Final Judgment.

O. "Excluded Software" means (i) Customized Software; (ii) Embedded Software; and (iii) Experimental Software.

P. "Experimental Software" means a beta or test version of QPX or the InstaSearch Service that is made available to a limited number of customers, for a limited period of time,

specifically for the purpose of testing new or modified features prior to the commercial release of those new or modified features as part of QPX or the InstaSearch Service. While Defendants remain free to determine whether a new or modified feature is ever ultimately incorporated into the commercially available version of QPX or the InstaSearch Service that must be licensed pursuant to this Final Judgment, Defendants may not use the exclusion of Experimental Software to circumvent the licensing obligation set forth in Section IV.E.

Q. "Final Offer" means the proposed pricing terms for a QPX Agreement and/or InstaSearch Agreement, pursuant to which Defendants will provide QPX and/or InstaSearch to the OTI.

R. "Google" means Defendant Google Inc., a Delaware corporation headquartered in Mountain View, California, any successor to all or substantially all of its business or assets, and its subsidiaries (whether partially or wholly owned), divisions, groups, Affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees (but excluding in all cases ITA, as defined below).

S. "Google Consumer Flight Search Service" means a publicly available Web site, product or service owned or operated by a Defendant that provides airfare price, schedule or Availability Information to consumers based on results returned from an airfare pricing and shopping engine, as well as any syndicated versions thereof.

T. "Google Services" means Web sites, products or services owned or operated by a Defendant, including but not limited to the Google Consumer Flight Search Service.

U. "InstaSearch" means a technology under development by ITA prior to the date of the Complaint herein in which specified pricing and shopping queries are pre-computed using QPX, stored in a cache and made available to one or more Customers from the cache.

V. "InstaSearch Agreement" means an agreement between a Defendant and an OTI, negotiated pursuant to the terms of this Final Judgment, providing such OTI the right to submit queries to the InstaSearch Service, subject to the terms and conditions set forth in Section IV.H of this Final Judgment.

W. "InstaSearch Proof of Concept" means a specific implementation of InstaSearch, incorporating a QPX cache and associated interfaces, that ITA, prior to the date of the Complaint herein, agreed to deliver as a proof-of-concept to a Customer, as more fully defined in a Solution Document/Interface Definition Document (the "InstaSearch POC Solution Document"), attached to this Final Judgment as Exhibit 1.

X. "InstaSearch Service" means the service to be offered by Defendants to OTIs as required by this Final Judgment having the same InstaSearch functionality as the InstaSearch Proof of Concept but permitting an OTI to vary the number of covered markets and the targeted refresh rate.

Y. "ITA" means Defendant ITA Software, Inc., a Delaware corporation headquartered in Cambridge, Massachusetts, and its subsidiaries (whether partially or wholly owned), divisions, groups, Affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees (but excluding in all cases Google, as defined above.)

Z. "Level 1 Query" means a specific type of pricing and shopping query, with the definition and input and output data definitions specified in the InstaSearch POC Solution Document, which, when submitted to the InstaSearch Service, returns certain cached results. As explained in detail in the InstaSearch POC Solution Document, a Level 1 Query will return data that enables the OTI to populate a map showing to the user the best price to a range of destinations from a particular origin over a particular range of dates.

AA. "Level 2 Query" means a specific type of pricing and shopping query, with the definition and input and output data definitions specified in the InstaSearch POC Solution Document, which, when submitted to the InstaSearch Service, is passed through to QPX and is not intended to return cached results. As explained in detail in the InstaSearch POC Solution Document, a Level 2 Query narrows the result set to the particular destination selected during the user's Level 1 Query, and returns the cheapest solution for a range of departure days and stay lengths.

BB. "Level 3 Query" means a query submitted to the InstaSearch Service other than a "Level 1 Query" or "Level 2 Query."

CC. "Live Query," with respect to any OTI, has the definition set forth in the QPX Agreement in effect between ITA and such OTI (or a definition given therein for "user query").

DD. "OTI," or online travel intermediary, means a Web site offering (or proposing to offer) airfare search functionality to consumers in the United States, other than a Web site owned or operated by an airline. Provided, however, that in the case of an OTI that is a line of business, business unit, subsidiary, or Affiliate of a company that also has non-OTI lines of business, business units, subsidiaries or Affiliates, the provisions in this Final Judgment that apply to OTIs will only apply to that line of business, business unit, subsidiary or Affiliate that offers airfare search services to consumers, and not to lines of business, business units, subsidiaries or Affiliates that do not offer airfare search services to consumers.

EE. "OTI Confidential Information" means confidential and proprietary inventions, products, designs and ideas (including computer software), functionality, concepts, processes, internal structure, external elements, user interfaces, technology, and documentation belonging to an OTI, OTI Configuration Information, as well as confidential and proprietary information relating to the OTI's operations, plans, opportunities, finances, research, technology, developments, know-how, and personnel, that is disclosed to a Defendant by an OTI pursuant to a QPX Agreement or an InstaSearch Agreement to which such OTI is a party, except to the extent that such information is Excluded Information.

FF. "OTI Configuration Information" means information related to an OTI's configuration or tuning of QPX or the InstaSearch Service or the parameters used by the OTI for particular types of queries.

GG. "OTI Plan Information" means confidential information related to an OTI's current or future product or marketing plans that is disclosed by such OTI to a Defendant pursuant to a QPX Agreement or InstaSearch Agreement to which such OTI is a party, except to the extent that such information is necessary to implement a feature or features for the OTI or represents Excluded Information.

HH. "QA Information" means Query Information or other information related to the performance, quality or accuracy of any software or service provided by a Defendant in connection with a QPX Agreement or InstaSearch Agreement, or one or more results generated by any such software or service, including:

(1) Reports of bugs or defects;

(2) Information related to the success or failure of an attempt to book or otherwise use a pricing and shopping solution provided by Defendants;

(3) Information related to the existence of solutions which potentially should have been, but were not, included in the results provided by Defendants; and

(4) Information related to instances in which other sources of information or

methods of calculation lead to a different fare than that calculated by Defendants' products or services for a particular pricing and shopping solution (without regard to the merits of the different calculations).

(5) QA Information may include OTI Configuration Information to the extent that it is associated with a particular query, result, report or request, provided that Defendants may not access the information in order to separate OTI Configuration Information from the QA Information as a whole, or to use the OTI Configuration Information for a purpose prohibited by Section VI.

II. "QPX" means the airfare pricing and shopping engine and Related Software deployed in production by ITA for Customers as of the date of the Complaint herein (provided that nothing in this Final Judgment shall confer any rights to use the Related Software other than to the extent that such Related Software is used by QPX), together with any enhancements, upgrades, updates, or bug fixes thereto that Defendants must develop or license pursuant to Sections IV.E and IV.F of this Final Judgment, whether or not licensed under the name QPX, provided that in no event shall QPX include:

(1) Fare management capabilities that are part of ITA's Rule and Fare Display System;

(2) Refund/reissue capability using Airline Tariff Publishing Company ("ATPCO") Category 31 and Category 33;

(3) Award travel or frequent flyer related functionality;

(4) InstaSearch in any form (including but not limited to that comprised in the InstaSearch Proof of Concept or required to be licensed pursuant to this Final Judgment), or any other technology having substantially greater or different hardware requirements than QPX as deployed in production by ITA for Customers (other than any Excluded Software) as of the date of the Complaint herein that is not otherwise required to be licensed pursuant to existing QPX Agreements or the terms of this Final Judgment;

(5) Middleware or other applications that may be related to, but are separate from, the base airfare pricing and shopping engine;

(6) Any Web site or consumer-facing interface, application or technology, whether or not syndicated to multiple Web sites, including but not limited to the Google Services;

(7) Any product, service, application, technology, feature, or functionality not made available to Customers, whether or not derived from or based upon QPX, including, but not limited to, any product, service, application, technology, feature, or functionality that is exclusively used in or by one or more Google Services; or

(8) Excluded Software.

JJ. "QPX Agreement" means an agreement, other than an InstaSearch Agreement, between a Defendant and a Customer permitting the Customer to submit queries to or otherwise use QPX, whether denominated as a License Agreement, Services Agreement, or otherwise.

KK. "Qualifying Complaint" means a written complaint from an OTI that (i) identifies the OTI on behalf of whom the complaint is submitted; and (ii) alleges that Google is violating this Final Judgment or acting, directly or indirectly, in an unfair manner in connection with flight search advertising in the United States.

LL. "Query Information" means information related to the execution and results of a particular query, including the query submitted to such service, the results returned in response to such query, operational data related to the execution of the query (*e.g.* the particular server(s) on which it was executed, the time it was received, the length of time needed to execute it, *etc.*), any intermediate results or errors generated during the execution of the query, and any information that is known or received regarding the success or failure of the query for the Customer (*e.g.* bookability or pricing errors in the results).

MM. "Related Software" means availability management and other software operated by ITA in connection with the provision of pricing and shopping results to Customers as of the date of the Complaint herein.

NN. "Reporting Period" means the period beginning upon the entry of this Final Judgment and expiring at the earlier of (i) five years from the entry of the Final Judgment; or (ii) two years from the date that Google launches a Google Consumer Flight Search Service.

OO. "Similarly Situated OTIs" means, with respect to any particular OTI seeking to enter into a QPX Agreement or InstaSearch Agreement, other OTIs having actual, reasonably expected (in terms of the OTI's own projections of its expected volume), and/or minimum QPX or InstaSearch query volumes (in the aggregate and as to specific types of queries) and, for QPX Agreements, fee metrics (*e.g.* per-query, per-ticket or per-Passenger Name Record ("PNR")), that are similar to those of such OTI (but excluding the OTI itself and its Affiliates). This provision shall be interpreted broadly so as to avoid, where reasonably possible, the situation where an OTI has no or few Similarly Situated OTIs.

III. Applicability

This Final Judgment applies to Defendants, 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.

IV. Required Conduct

Licensing of QPX

A. Defendants shall honor the terms of all QPX Agreements in effect as of the entry of this Final Judgment (including terms related to customization and query tuning services for QPX), except and unless the terms of this Final Judgment provide additional rights to, or eliminate restrictions on, OTIs, in which case Defendants may not enforce such terms against the OTI.

B. At the request of any OTI who is a party to a QPX Agreement as of the entry of this Final Judgment, Defendants shall negotiate an extension of such OTI's QPX Agreement for a term set at the reasonable discretion of the OTI (but that shall be no less than one year and that need not extend beyond five years from the entry of this Final Judgment, provided that if such extension would commence more than four years from the entry of this Final Judgment, its term shall expire five years from the entry of this Final Judgment), on:

(1) Commercial terms (*e.g.* price, functionality, minimum query volumes and permitted uses of QPX, as well as customization and query tuning services for QPX) that are substantially similar to those governing such OTI's use of QPX as of the entry of the Final Judgment, and

(2) Other terms (*e.g.* audit rights, choice of law and indemnification) that are fair, reasonable, and non-discriminatory.

(3) Notwithstanding anything in this paragraph, Defendants shall not require an OTI to include in an extension any provision that Defendants would be prohibited from requiring in a new QPX Agreement pursuant to section IV.D of this Final Judgment, provided that, if an OTI elects to remove such a provision from the extension, or requests an extension with a different term than its QPX Agreement in effect as of the entry of the Final Judgment, the commercial terms of such extension shall be modified in a corresponding manner that is fair, reasonable and non-discriminatory in light of the commercial terms of QPX Agreements in effect between Defendants and

Similarly Situated OTIs as of or subsequent to the date of this Final Judgment.

C. At the request of any OTI who is not party to a QPX Agreement, or whose QPX Agreement will expire within one year of such request, Defendants shall negotiate a QPX Agreement with such OTI for a term set at the reasonable discretion of the OTI (but that shall be no less than one year and that need not extend beyond the date that is five years from the entry of this Final Judgment, provided that if such QPX Agreement would commence more than four years from the entry of this Final Judgment, its term shall expire five years from the entry of this Final Judgment), on:

(1) Commercial terms (*e.g.* price, functionality, minimum query volumes and permitted uses of QPX, as well as customization and query tuning services for QPX) that are fair, reasonable and non-discriminatory judged exclusively in relation to the OTI's chosen contract term, desired fee metrics (*e.g.* per-query, per-ticket, or per-PNR), reasonably expected query volume, the minimum query volume to be included in such QPX Agreement, and the commercial terms of QPX Agreements in effect between Defendants and Similarly Situated OTIs as of or subsequent to the date of this Final Judgment, and

(2) Other terms (*e.g.* audit rights, choice of law, and indemnification) that are fair, reasonable, and non-discriminatory.

D. Defendants may not require that a QPX Agreement entered into pursuant to Section IV.B or Section IV.C of this Final Judgment prevent the OTI from using alternative products to QPX sold by companies other than Defendants. Defendants and the OTI may, however, enter an exclusive QPX Agreement if Defendants offer the OTI a non-exclusive agreement on fair, reasonable, and non-discriminatory terms.

E. All QPX Agreements with OTIs shall include the right to use ordinary course upgrades to QPX that Defendants make available to Customers without additional charge during the term of such QPX Agreement. If Defendants make an ordinary course upgrade to QPX available to Customers, but require the payment of an additional charge, Defendants may condition the use of such upgrade pursuant to this paragraph upon the payment of an equivalent charge, provided that such charge is fair, reasonable, and non-discriminatory. Defendants shall make available to OTIs the same version of QPX as they make available to Customers, including but not limited to any version made available to Airline Customers. This paragraph does not require Defendants to make available to OTIs InstaSearch or any other product, feature or technology excluded from the definition of QPX above, including the Excluded Software.

F. Defendants shall, on an annual basis, devote substantially as many (or more) engineering resources (in terms of budget and full-time-equivalent employees) to the research and development and maintenance of QPX and the InstaSearch Service (other than resources devoted to the development of the InstaSearch Proof of Concept as required by agreements entered into by ITA prior to the date of the Complaint herein) for the use of Customers as ITA did in the average of the two years prior to the filing of the Complaint herein (excluding resources devoted by ITA to any aspect of its passenger service system, reservations system, inventory system or Internet booking engine, including but not limited to the integration of QPX into such system, and resources devoted to the development of products or services that are excluded from the definition of QPX in this Final Judgment, including but not limited to ITA's InstaSearch). Defendants shall make commercially reasonable efforts to respond to Customers' requests for development of QPX, consistent with ITA's past practice prior to the date of the Complaint herein. Provided, however, that:

(1) If the amount of revenue derived by Defendants from third-party licensing of QPX materially decreases during the term of the Final Judgment, Defendants shall be permitted to make a corresponding reduction in the amount of resources committed pursuant to this paragraph, provided that Defendants shall obtain the consent of the United States prior to making such reduction, which consent shall not be unreasonably withheld or delayed; and

(2) The degree to which particular efforts benefit Defendants or Google Services shall not be considered in evaluating whether such efforts qualify as "research and development and maintenance of QPX for the use of Customers," so long as those efforts are legitimately beneficial to Customers and not solely beneficial to Defendants or Google Services.

G. Nothing in this Final Judgment shall require Defendants to provide to any third party any product, service, or technology (or feature thereof) that Defendants develop exclusively for use in the Google Services, nor shall any such product, service, or technology, or the relative functionality of one or more Google Services (including, but not limited to, the Google Consumer Flight Search Service) when compared to third-party Web sites using QPX, be considered in determining Defendants' compliance with any provision of this Final Judgment.

(1) Licensing of InstaSearch

H. At the request of any OTI, Defendants shall negotiate an InstaSearch Agreement with such OTI for a term set at the reasonable discretion of the OTI (but that shall be no less than one year and that need not extend beyond five years from the entry of this Final Judgment, provided that if such InstaSearch Agreement would commence more than four years from the entry of this Final Judgment, its term shall expire five years from the entry of this Final Judgment). Such InstaSearch Agreement shall:

(1) Offer the OTI the same functionality as the InstaSearch Proof of Concept, except that Defendants shall permit the OTI to increase the number of markets covered and contemplated cache refresh rate beyond that of the InstaSearch Proof of Concept, subject to the payment of appropriate fees as set forth below (and such InstaSearch Agreement shall expressly provide that Defendants shall have no obligation to implement any other functionality);

(2) At Defendants' option, disclaim any representations, warrantees, guarantees, or service level agreements as to the performance of the InstaSearch Service, or its fitness for any use, notwithstanding any statements to the contrary made by ITA in connection with the InstaSearch Proof of Concept, including but not limited to in the InstaSearch POC Solution Document, provided that if, during the term of such QPX Agreement, Defendants make any representations, warrantees, guarantees or service level agreements to any Customers as to the performance of the InstaSearch Service, Defendants shall offer the same representations, warrantees, guarantees or service level agreements to OTIs with equivalent projected usage of the InstaSearch Service (including the number and types of markets to be covered, refresh rate, provisioned hardware and total expected volume), subject to such OTI agreeing to pay a fair, reasonable and non-discriminatory fee for the receipt of such representation, warrantee, guarantee or service level agreement, which may differ from the pricing structure and limits set forth in Section IV.H.4 below.

(3) Provide that Defendants shall have no obligation to improve the InstaSearch Service, except that:

(a) If during the term of such InstaSearch Agreement, Defendants provide their Customers, including

solely Airline Customers, an implementation of InstaSearch with greater functionality than the InstaSearch Service described herein without requiring them to pay an additional charge (other than in Excluded Software), Defendants shall make reasonable commercial efforts to also make such improved version available to the OTI pursuant to its InstaSearch Agreement (recognizing that not all implementations will be suitable for all types of Customers even after the use of reasonable commercial efforts), under the same pricing terms provided for in such InstaSearch Agreement; and

(b) If Defendants require its Customers, including its Airline Customers, to pay an additional fee to obtain an upgrade which can be provided to OTIs with reasonable commercial efforts, Defendants shall offer the upgrade to OTIs with an InstaSearch Agreement, but may condition availability of the upgrade on payment of a fair, reasonable, and non-discriminatory charge (which may differ from the pricing structure and limits set forth in Section IV.H.4 below);

(4) Obligate the OTI to:

(a) Provision with Defendants a number of EUs for its InstaSearch Service that, in Defendants' discretion, which shall be applied in a fair, reasonable, and non-discriminatory manner, is reasonable given the OTI's intended covered markets and refresh rate, and to pay a monthly per-EU fee for each EU so provisioned (including any EUs used for computing, storing, managing or retrieving cached results) equal to the lesser of (i) for OTIs with a QPX Agreement in effect, the per-EU fee set forth in such QPX Agreement (giving effect to all volume discounts and aggregating EUs provisioned for InstaSearch with those provisioned for other purposes, including, but not limited to, QPX.); or (ii) a per-EU fee that is fair, reasonable, and non-discriminatory solely in light of the EU fees charged by Defendants to Similarly Situated OTIs in QPX Agreements then in effect.

(b) Pay a fair, reasonable and non-discriminatory per-query fee for each Level 1 and Level 2 Query it submits to the InstaSearch Service that shall be (i) greater than the effective per-query fee paid by such OTI for Database Queries (or, if no such rate exists, an amount that is fair, reasonable, and non-discriminatory in light of the effective per-query fees then charged by Defendants to Similarly Situated OTIs for Database Queries), and (ii) less than the effective per-query fee paid by such OTI for Live Queries (or, if no such rate exists, an amount that is fair, reasonable, and non-discriminatory in light of the effective per-query fees then charged by Defendants to Similarly Situated OTIs for Live Queries); and

(c) Pay a per-query fee for each Level 3 Query it submits equal to the effective per-query fee paid by such OTI for Live Queries (or, if no such rate exists, an amount that is fair, reasonable, and non-discriminatory in light of the effective per-query fees then charged by Defendants to Similarly Situated OTIs for Live Queries).

I. Defendants shall make commercially reasonable efforts to ensure that the InstaSearch Service conforms to the technical specifications set forth in the InstaSearch POC Solution Document, but it is specifically understood that, other than as set forth in any representations, warrantees, guarantees or service level agreements that Defendants are otherwise required to make pursuant to this Final Judgment, or that Defendants make in any particular InstaSearch Agreement, Defendants make no representation, either to the United States, the Court or to any Customer that the InstaSearch Service will prove commercially useful for any Customer.

J. Nothing in this Final Judgment shall be deemed to require Defendants to permit an OTI to host any portion of the InstaSearch Service, or the EUs used for such service, on the OTI's own hardware, notwithstanding any provisions of such OTI's QPX Agreement.

K. Arbitration

L. Defendants shall negotiate in good faith with any OTI seeking a QPX Agreement or an InstaSearch Agreement pursuant to this Final Judgment (including, but not limited to, existing licensees seeking to renew their agreements). If Defendants and the OTI are unable to reach agreement on the amount to be charged for any type of query pursuant to Sections IV.B.1, IV.C.1, or IV.H.4 of this Final Judgment, Defendants shall submit the matter to binding arbitration under the following conditions:

(1) Prior to submitting any matter to arbitration, Defendants and the OTI shall each designate a contact having the proper authorization to resolve the dispute in a final and binding fashion, who shall meet in person or by telephone for a period of 30 days (or such other period of time as Google and the OTI shall mutually agree) in an attempt to resolve the dispute. The contact for Defendants shall be Google's General Counsel or his or her designee.

(2) No arbitration shall be commenced unless the OTI (i) has certified to the United States that it negotiated in good faith, including participation in the resolution procedure described in the preceding paragraph; and (ii) has obtained the consent of the United States, in its sole discretion, to initiate arbitration.

(3) Arbitration pursuant to this Final Judgment shall be conducted in accordance with the AAA's Commercial Arbitration Rules and Expedited Procedures, except where inconsistent with specific procedures prescribed by this Final Judgment. As described below in Section IV.J.12, the arbitrator shall select the Final Offer of either the OTI or the Defendants and may not alter, or request or demand alteration of, any terms of those Final Offers. The decision of the arbitrator shall be binding on the parties as to the matters properly submitted to arbitration pursuant to this Final Judgment, and Defendants shall abide by the arbitrator's decision by offering an executable QPX Agreement or InstaSearch Agreement (as appropriate) to the OTI incorporating the pricing terms selected by the arbitrator.

(4) Defendants and an OTI may, by agreement, modify any time periods specified in this Section IV.J.

(5) Upon obtaining the consent of the United States to initiate arbitration, the OTI may commence arbitration by filing with the AAA and furnishing to the AAA and the United States its Final Offer. Within five business days of the commencement of an arbitration, Defendants shall file with the AAA and furnish to the United States their Final Offer. After the AAA has received Final Offers from the OTI and Defendants, it will immediately furnish a copy of each Final Offer to the other party.

(6) Within five business days of the commencement of an arbitration, the OTI and the Defendants each shall furnish a legally binding writing to the other and to the United States committing to maintain the confidentiality of the arbitration and of any Final Offers and discovery materials exchanged during the arbitration, and to limit the use of any Final Offers and discovery materials to the arbitration. The writing shall expressly state that all records of the arbitration and any discovery materials may be disclosed to the United States.

(7) At any time after the commencement of arbitration, the OTI and Defendants may agree to suspend the arbitration, for periods not to exceed 14 days in the aggregate, to attempt to resolve their dispute through negotiation. The OTI and the Defendants shall effectuate such suspension through a joint writing filed

with the AAA and furnished to the United States. Either the OTI or the Defendants may terminate the suspension at any time by filing with the AAA and furnishing to the United States a writing calling for the arbitration to resume.

(8) The AAA, in consultation with the United States, shall assemble a list of potential arbitrators, to be furnished to the OTI and Defendants as soon as practicable after commencement of the arbitration. Such potential arbitrators shall, to the greatest extent possible, be individuals familiar with the travel industry as well as this Final Judgment. Within five business days after receipt of this list, the OTI and Defendants each may submit to the AAA the names of up to 20 percent of the persons on the list to be excluded from consideration, and shall rank the remaining arbitrators in their orders of preference. The AAA, in consultation with the United States, will appoint as arbitrator the candidate with the highest ranking who is not excluded by the OTI or Defendants.

(9) The OTI and the Defendants shall exchange written discovery requests within five business days of receiving the other party's Final Offer, and shall exercise reasonable diligence to respond within 14 days. Discovery shall be limited to the following items in the possession of the parties: (i) previous agreements between the OTI and the Defendants; (ii) current and prior QPX Agreements and agreements relating to InstaSearch between the Defendants and other OTIs; and (iii) records of past arbitrations pursuant to this Final Judgment.

(10) The scope of the arbitration shall be limited to the determination of a fair, reasonable and non-discriminatory fee to be charged for each type of query in dispute, judged exclusively in light of the following factors:

(a) The OTI's actual or reasonably expected query volume;

(b) The minimum query volume to be required in the QPX Agreement or InstaSearch Agreement for such query type;

(c) The amounts charged for such queries to Similarly Situated OTIs pursuant to QPX Agreements in effect between Defendants and such OTIs, as appropriately adjusted for the change in the Consumer Price Index, for all Urban Consumers, Subgroup "All Items", U.S. City Average, for (base Year 1982–84=100) subsequent to the date of such agreements; and

(d) if applicable, the nature and extent of any representations, warrantees, guarantees or service level agreements offered to such OTI.

(11) In reaching his or her decision, the arbitrator may consider only documents exchanged in discovery between the parties, testimony explaining the documents and the parties' Final Offers, and briefs submitted and arguments made by counsel.

(12) Arbitrations under this Final Judgment shall begin within 30 days of the AAA furnishing to the OTI and to the Defendants, pursuant to Section IV.J.5, each party's Final Offer. The arbitration hearing shall last no longer than ten business days, after which the arbitrator shall have five business days to inform the OTI and the Defendants which Final Offer best reflects fair, reasonable, and non-discriminatory terms under this Final Judgment.

(13) The Arbitrator shall have no authority to consider or determine Defendants' compliance with the terms of this Final Judgment or with any other agreement, or to determine the reasonableness of any provision of a proposed or negotiated QPX Agreement or InstaSearch Agreement other than those for which arbitration was specifically provided for above.

(14) Any Arbitrator's fees and any costs payable to the Arbitrator shall be shared equally by the parties to the arbitration. Each party to the arbitration shall bear its own legal fees and expenses.

M. Nothing in Section IV.K shall prevent Defendants from agreeing with an OTI (i) on fees or other terms that are more favorable to the OTI than those required by this Final Judgment, (ii) to withdraw a matter from arbitration prior to decision; or (iii) to supersede a previously arbitrated rate as a part of a freely negotiated contract or amendment.

N. Nothing in Section IV.K shall limit the ability of the United States to enforce this Final Judgment in Court, including as to matters covered by an existing or potential arbitration proceeding.

O. Required Disclosures

P. Google shall, throughout the Reporting Period, make available a Web page at *http://itaqualifyingcomplaint.com* which shall contain a Web form permitting OTIs to submit Qualifying Complaints, as well as a link to this Final Judgment, and shall, on a semiannual basis during the Reporting Period, furnish copies of any Qualifying Complaints received via such form to the Department of Justice.

Q. To the extent that, during the Reporting Period, an attorney employed by Google's Legal Department (or an outside attorney retained by Google and acting at the direction of Google's Legal Department) communicates with an OTI with respect to a written complaint that the Google attorney reasonably believes would, if submitted as set forth in the preceding paragraph, be a Qualifying Complaint, such attorney shall take reasonable steps to ensure that the OTI is informed of its right to submit a Qualifying Complaint and the Web address at which it can do so.

V. Additional Provisions

A. Defendants shall not enter into any agreement with an airline that restricts that airline's right to share any Availability Information with parties other than Defendants, provided that this paragraph shall cease to apply to any type of Availability Information (regardless of source) if one or more airlines enters into an agreement with one or more of Defendants' competitors (either in the provision of airfare pricing and shopping services or in the provision of OTI services) that restricts that airline's right to share such Availability Information with parties other than such competitor(s).

B. To the extent that Defendants obtain Availability Information from any airline for use as an input to an airfare pricing and shopping engine used by the Google Consumer Flight Search Service, Defendants shall also incorporate such Availability Information into QPX results generated for all OTIs who are party to a QPX Agreement, unless the airline explicitly and unilaterally restricts the use of such Availability Information by or for one or more OTIs. Defendants shall not provide any incentive to an airline to restrict the use of Availability Information by another OTI.

C. Notwithstanding the foregoing, nothing in this Final Judgment shall (i) restrict Defendants' right to enter into agreements by which they become an authoritative source of an airline's Availability Information for third parties (including, but not limited to, agreements to provide passenger service systems, reservations systems, availability hubs or similar systems); or (ii) be deemed to prohibit Defendants from obtaining access to or using Availability Information merely because the providing airline has not provided it to any party other than Defendants, so long as the airline retains the right to provide such Availability Information to another party at any time, in its unilateral discretion.

D. Defendants shall not condition the provision of QPX or the InstaSearch Service on whether or how much an OTI spends on other products or services sold by Google.

E. Nothing in this Final Judgment shall be deemed to alter, in any way, the terms of any agreement Defendants may have with any customer related to any product or service other than QPX or the InstaSearch Service.

VI. Firewall

A. No Covered Employee shall access any OTI Configuration Information or any OTI Plan Information, except to the extent such information constitutes or is included within QA Information, or with the written consent of the OTI concerned.

B. Defendants shall not use OTI Confidential Information for any purpose other than:

(1) In connection with the marketing, sale, or provision of any product or service to such OTI (or, with the consent of such OTI, its Affiliates);

(2) In connection with billing, invoicing, financial reporting, financial or capacity forecasting, compensation, audit, legal, compliance, or similar administrative or financial purposes;

(3) In connection with the development, maintenance and improvement of QPX and the InstaSearch Service, in accord with ITA's past practices prior to agreeing to be acquired by Google; or

(4) As permitted by such OTI in writing.

C. Notwithstanding anything in this Final Judgment, Defendants shall be permitted to access and use QA Information in connection with the development, maintenance and improvement of Defendants' airfare pricing and shopping engines (including those not made available to any Customers), provided that Defendants shall not extract any customer identifiable OTI Configuration Information or use any OTI Configuration Information for the purpose of changing, improving or comparing the Google Consumer Flight Search Service's use of any airfare pricing and shopping engine.

D. Defendants shall implement reasonable procedures to prevent OTI Confidential Information from being used or accessed by employees other than those having a legitimate need for such information in connection with the permitted uses of such information set forth in this Section VI. Nothing in this Final Judgment shall restrict Defendants' right to assign any employee to any job responsibility, or otherwise to restrict the ability of employees who have previously had access to or used OTI Confidential Information in the course of prior job responsibilities from subsequently assuming additional or different responsibilities for Defendants, provided that such employees shall not use OTI Confidential Information for any purpose other than as permitted by this Final Judgment. An employee shall not be deemed to have "used" OTI Confidential Information solely on account of his or her prior access to OTI Confidential Information, absent evidence of intentional reliance on information other than information that is retained in the unaided memory of such employee (provided that memory is "unaided" if the employee has not intentionally memorized the information for the purpose of retaining and subsequently using or disclosing it) or an affirmative intention to violate or evade the terms of this Final Judgment. Defendants shall, upon the reasonable request of the United States, provide the United States with a list of employees who have had access to or used OTI Confidential Information at any point after the filing of the complaint in this matter who also have job responsibilities in addition to those set forth in Section VI.B, above.

E. Defendants shall, within thirty (30) calendar days of the entry of the Stipulation and Order, submit to the Department of Justice a document setting forth in detail the procedures implemented to effect compliance with Sections VI.A, VI.B, and VI.C of this Final Judgment. The Department of Justice shall notify Defendants within ten (10) business days whether it approves of or rejects Defendants' compliance plan, in its sole discretion. In the event that Defendants' compliance plan is rejected, the reasons for the rejection shall be provided to Defendants and Defendants shall be given the opportunity to submit, within ten (10) business days of receiving the notice of rejection, a revised compliance plan. If the parties cannot agree on a compliance plan, the United States shall have the right to request that the Court rule on whether Defendants proposed compliance plan is reasonable.

F. Defendants may at any time submit to the United States evidence relating to the actual operation of the firewall in support of a request to modify the firewall set forth in Section VI. In determining whether it would be appropriate for the United States to consent to modify the firewall, the United States, in its sole discretion, shall consider the need to protect OTI Confidential Information and the impact the firewall has had on Defendants' ability to efficiently support OTIs and the Google Consumer Flight Search Service.

VII. Compliance Inspection

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the Department of Justice, including consultants and other persons retained by the Department of Justice, 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 the Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide to the United States 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, the 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 respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, at the sole discretion of the United States, require Defendants to conduct, at their cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

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 a Defendant to the United States, the Defendant represents and identifies 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 the Defendant marks 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 the Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding). The United States will provide such notice electronically to an individual designated by Google to receive such notices.

VIII. 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.

IX. Expiration of Final Judgment

Unless modified by this Court, this Final Judgment shall expire five years from the date of its entry.

X. 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.

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

United States District Judge.

[FR Doc. 2011–9020 Filed 4–13–11; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–74,364]

International Business Machines (IBM), Sales and Distribution Business Unit, Global Sales Solution Department, Off-Site Teleworker in Centerport, New York; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated November 29, 2011, by a petitioner requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of International Business Machines (IBM), Sales and Distribution Business Unit, Global Sales Solution Department, off-site teleworker, Centerport, New York (subject firm). The determination was issued on October 29, 2010. The Department's Notice of Determination was published in the **Federal Register** on November 17, 2010 (75 FR 70296). The workers supply computer software development and maintenance services for the Sales and Distribution Business Unit.

The negative determination was based on the findings that Criterion I has not been met because fewer than three workers were separated and further separations are not threatened.

With respect to Section 222(c) of the Act, the investigation revealed that Criterion (1) has not been met because fewer than three workers were separated and further separations are not threatened. The investigation also revealed that the group eligibility requirements under Section 222(f) of the Act, 19 U.S.C. 2272(f), have not been satisfied because the workers' firm has not been identified in an affirmative finding of injury by the International Trade Commission.

In the request for reconsideration, the petitioner alleged that the subject firm outsourced their job as well as 2,544 other IBM jobs to India.

The Department has carefully reviewed the request for reconsideration and the existing record, and has determined that there may have been a misinterpretation of the worker group. The Department will conduct further investigation to determine if the petitioning workers meet the eligibility requirements of the Trade Act of 1974, as amended.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, on this 6th day of April 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–8980 Filed 4–13–11; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,192, TA–W–75,192A]

Core Industries, Inc., DBA Star Trac, Including On-Site Leased Workers From Aerotek, Helpmates, Mattson, and Empire Staffing, Irvine, CA and Core Industries, Inc., DBA Star Trac, Including On-Site Leased Workers From Aerotek, Helpmates, Mattson, and Empire Staffing, Murrieta, CA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on February 15, 2011, applicable to workers of Core Industries, Inc., DBA Star Trac, Irvine, California. The notice was published in the **Federal Register** on March 10, 2011 (75 FR 13230).

At the request of the company, the Department reviewed the certification for workers of the subject firm. The workers produce commercial fitness equipment.

The Murrieta, California location operated in conjunction with the Irvine, California location. Both locations were part of the overall production operation and were affected by the firm's acquisition of commercial fitness equipment from a foreign country.

Accordingly, the Department is amending the certification to include workers of the Murrieta, California location of Core Industries, Inc., DBA Star Trac, Irvine, California.

The amended notice applicable to TA–W–75,192 is hereby issued as follows:

All workers of Core Industries, Inc., DBA Star Trac, including on-site leased workers from Aerotek, Helpmates, Mattson, and