UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff,* v. GRUPO BIMBO, S.A.B. de C.V., et al. *Defendants.*	CASE NO.: JUDGE:

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

The United States filed a civil antitrust Complaint on October 21, 2011, seeking to enjoin the proposed acquisition of the North American Fresh Bakery business of Defendant Sara Lee Corporation ("Sara Lee") by Defendants Grupo Bimbo S.A.B. de C.V. ("Grupo Bimbo") and BBU, Inc. (collectively "BBU"), alleging that the acquisition likely would substantially lessen competition in the market for sliced bread in eight relevant geographic markets in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The loss of competition caused by the acquisition likely would result in higher prices for consumers of sliced bread in those markets.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which will substantially eliminate the

anticompetitive effects that would result from the acquisition. Under the proposed Final Judgment, which is explained more fully below, BBU is required to divest certain brands of sliced bread and related assets to one or more acquirers approved by the United States, in the markets where anticompetitive effects are likely. Under the Hold Separate, BBU and Sara Lee must take certain steps to ensure that the assets being divested continue to be operated in a competitively and economically viable manner and that competition for the products being divested is maintained during the pendency of the divestiture.

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

II. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Acquisition

Defendant BBU is the largest sliced-bread baker and seller in the United States, operating 33 bakeries, 21 transportation depots, and more than 7,000 sales routes.[1] In 2009, BBU's sales in the United States totaled approximately $3.9 billion. BBU owns many of the major brand names in the sliced-bread industry, including Bimbo, Arnold, Brownberry, Oroweat, Mrs Baird's, Stroehmann, Freihofer, and Weber's.

Defendant Sara Lee's North American Fresh Bakery division is the third largest sliced-bread producer in the United States. Sara Lee operates 41 bakeries and approximately 4,800 sales routes in the United States. In fiscal year 2010, Sara Lee's North American Fresh Bakery division had $2.1 billion in sales. The majority of Sara Lee's bread sales are made under brands

[1] Defendant Grupo Bimbo, a Mexican corporation headquartered in Mexico City, operates in the United States through its subsidiary BBU, Inc.

in the "Sara Lee" brand family, but Sara Lee also has substantial sales under its EarthGrains brand and various regional brands, including Milton's, Mother's, Grandma Sycamore's, Rainbo, San Luis Sourdough, Old Home, and Holsum.

On or about November 9, 2010, BBU entered into an agreement to acquire Sara Lee's North American bread-baking business by acquiring all of the shares of Sara Lee Bakery Group, Inc. and Sara Lee Vernon LLC (the "Acquisition").

B. Relevant Markets

1. The Relevant Product Market Is No Broader than Sliced Bread

The Complaint alleges that the relevant product market is no broader than sliced bread. Sliced bread is fresh sliced and bagged loaf bread sold by supermarkets, mass merchandisers (such as Wal-Mart), club stores (such as Costco), other grocery stores, and convenience stores. There is substantial variety and differentiation among sliced-bread products. Sliced breads vary in price, brand, flavor, texture, nutritional content, ingredients (*e.g.*, the inclusion or exclusion of sweeteners or artificial ingredients), and other factors. Sliced breads range from traditional white bread to a wide variety of wheat and whole grain breads, rye, sourdough, and other varieties.

Sliced breads also vary in shape. "Traditional" breads are baked in longer, narrower loaf pans and often used as sandwich bread. "Wide pan" breads are shorter and wider (and typically denser) than traditional breads. Traditional breads are often targeted to families with younger children. Wide-pan breads are marketed as having greater nutritional value, and are typically sold at higher prices than traditional breads.

Sliced breads include branded products, which bear a brand owned by or licensed to the baker (such as BBU's Arnold or Sara Lee's EarthGrains), and private-label products, which bear

a brand owned by the retailer (such as Wal-Mart's Great Value). Most large baking companies, including BBU and Sara Lee, make and sell branded and private-label bread.

There are no adequate substitutes for sliced bread for most consumers. Most consumers purchase sliced bread to make sandwiches or toast, among other uses, and are unlikely to substitute other bakery or food products for sliced bread for these and other uses. Therefore, a hypothetical monopolist producer of sliced bread would find it profitable to increase its prices by a small but significant and non-transitory amount. Accordingly, sliced bread is a relevant product market and a line of commerce within the meaning of Section 7 of the Clayton Act.

2. The Relevant Geographic Markets are Local

The Complaint alleges that the San Francisco, San Diego, Sacramento, Los Angeles, Harrisburg/Scranton, Kansas City, Kansas, Omaha, and Oklahoma City metropolitan and surrounding areas each constitute relevant geographic markets for the sale of sliced bread. Each geographic market is defined with respect to the location of customers (e.g., grocery stores), rather than the location of manufacturers (i.e., bakeries), because, as the Complaint alleges, sliced-bread suppliers can price discriminate across local geographic markets.

The appropriateness of defining the geographic market as a price-discrimination market based on the location of the customers is explained in the 2010 Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. Under the Guidelines analysis, "[f]or price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage." U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines § 3 (2010) (hereinafter "Horizontal Merger Guidelines"). If these conditions are met, "a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region would impose at least a [small price increase] on some

customers in the specified region." Horizontal Merger Guidelines § 4.2.2. So long as this price increase would not be defeated by arbitrage, the targeted region constitutes a relevant geographic market. *Id.*

Sliced-bread suppliers can charge different prices for the same product (net of transportation costs) in different metropolitan areas. Sliced-bread suppliers compete for retailers' business and for shelf and display space in retailers' stores by, among other things, offering lower wholesale list prices and larger promotional discounts, which lower the prices paid by consumers of sliced bread. List prices and promotional activity are regularly determined after a consideration of the competitive conditions in a particular geographic area. Even with larger retailers that have a national or regional footprint, there are different pricing and promotional strategies that are influenced by the degree of competition in a particular area.

Geographic price discrimination by sliced-bread suppliers is possible because the cost of arbitrage is prohibitively expensive. Arbitrage would occur if a retailer in a higher-priced area were supplied with goods previously sold to a retailer in a lower-priced area. Arbitrage of sliced bread between metropolitan areas is very costly because the retailer would incur substantial transportation costs to ship bread from another retailer to its store locations. In addition, arbitrage would require retailers to forego the "direct store delivery" ("DSD") services provided by the bread manufacturer, which include delivering bread to their stores up to five times a week, stocking their shelves and displays, and removing stale or dated loaves. Accordingly, arbitrage of sliced bread is unlikely to occur or to eliminate disparities in wholesale prices between metropolitan areas. Therefore, a hypothetical monopolist seller of sliced bread to retailers in each of the geographic areas identified above would find it profitable to increase its prices by a small but significant and non-transitory amount. Therefore, the eight geographic areas identified

in the Complaint are relevant geographic markets and "sections of the country" within the meaning of Section 7 of the Clayton Act.

C. The Acquisition is Likely To Substantially Lessen Competition in the Sale of Sliced Bread in Each of the Relevant Geographic Markets

The Complaint alleges that the Acquisition is likely to substantially lessen competition in the sale of sliced bread in the relevant geographic markets. The Acquisition would result in the relevant markets being highly concentrated, giving BBU a dominant share of the sliced bread market. In San Diego, BBU would have 63 percent of the sliced bread market; in Sacramento 59 percent; in Los Angeles 58 percent; in San Francisco 56 percent; in Omaha 52 percent; in Oklahoma City 53 percent; in Kansas City 52 percent; and in Harrisburg/Scranton 56 percent.[2]

In addition, BBU and Sara Lee are among each other's most important competitors in the relevant markets, and in some relevant markets are particularly close competitors within certain market segments, such as wide-pan and traditional sliced bread. The Defendants regularly set prices and offer promotions in response to competition from each other, or to win market share from each other. Consumers benefit from this competition in the form of lower prices, innovative and healthier products, and a greater variety of choices of sliced-bread products. As discussed below, new entry is unlikely to eliminate the Acquisition's anticompetitive effects.

1. The Loss of Competition Between the Defendants in the Relevant Geographic Markets is Likely to Lead to Post-Acquisition Price Increases.

For a substantial number of consumers in the relevant markets, BBU and Sara Lee branded sliced-bread products are close substitutes. BBU's wide-pan variety breads, sold under the Oroweat and Arnold brands in the relevant markets, are similar in shape, flavor, texture,

[2] All of the market shares in the following paragraphs are rounded off to the nearest percentage point. As a consequence, the post-Acquisition market share of BBU need not be exactly equal to the sum of the pre-Acquisition shares of the BBU brands and the Sara Lee brands minus the pre-Acquisition share attributable to the divested brands.

image, and price to Sara Lee's wide-pan variety breads sold under the Sara Lee Hearty & Delicious and EarthGrains brands in the relevant geographic markets. Similarly, Sara Lee sells traditional soft white and wheat bread in the relevant markets under the Sara Lee Soft & Smooth brand and other brands, which are similar in shape, flavor, texture, image, and price to traditional soft white bread sold by BBU under the Bimbo, Mrs Baird's, Stroehmann, Freihofer's, Weber's, and other brands in the relevant geographic markets. BBU and Sara Lee recognize that many of their sliced-bread products are close substitutes for each other's products, and they engage in substantial head-to-head competition for sales of these substitute products.

The loss of the head-to-head competition between the Defendants is likely to produce unilateral anticompetitive effects. *See* Horizontal Merger Guidelines § 6.0. Because a substantial number of consumers view BBU and Sara Lee breads as closest substitutes, BBU is likely to increase prices post-transaction. Prior to the Acquisition, a price increase by BBU in a relevant market likely would result in the loss of substantial sales to Sara Lee. BBU would have lost the profits on the sales it loses to Sara Lee (and others) as a result of the price increase. Following the Acquisition, however, BBU would own the Sara Lee products, and would retain the profits that it would otherwise lose when consumers switch to Sara Lee products, in addition to earning higher profits on the sale of BBU products, which it would retain. Because those sales of Sara Lee products likely are profitable, a price increase by BBU likely would be profitable after the Acquisition. The same profit motive would apply to an increase in the prices of Sara Lee bread, recaptured through sales of BBU bread. Therefore, BBU likely would raise prices unilaterally as a result of the Acquisition.

For a unilateral price increase to be profitable, the brands at issue need not be the *closest* substitutes for all consumers. A merger "may produce significant unilateral effects for a given

product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner." Horizontal Merger Guidelines § 6.1. All that is required is that a significant proportion of customers regard the breads as their first and second choices. *Id.* The Complaint alleges that this condition is met in each of the relevant geographic markets with respect to the BBU and Sara Lee brands.

2. Entry is Unlikely to Prevent the Acquisition's Anticompetitive Effects.

The Complaint alleges that entry by new firms is not likely to prevent the Acquisition's anticompetitive effects. Entry by new firms will not prevent an acquisition's anticompetitive effects unless that entry is likely to occur in a timely manner and is sufficient to deter those anticompetitive effects. Horizontal Merger Guidelines § 9.

Entry into the sliced-bread business is unlikely to prevent anticompetitive effects because there are substantial barriers to entry in a timely manner. First, a well-established brand is crucial to the sale of sliced bread, and developing that brand equity is difficult and time-consuming. Consumers are reluctant to try new brands unless they are heavily promoted through advertising and especially aggressive pricing. In addition, constructing a new bakery is time-consuming. From the time a decision to build a new bakery is made, it can take six months to acquire the land; construction can then take 12 to 18 months.

Nor is it likely that any existing competitors in the relevant markets would expand their output or reposition their products to constrain a price increase by the leading firms. The other competitors either lack sufficient brand equity, or their production capacity serving the relevant markets is too small to constrain a post-merger price increase.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment requires significant divestitures that will preserve competition

in the market for sliced bread. Within 90 calendar days after filing of the Complaint (subject to up to two 30-day extensions) or five calendar days after entry of a Final Judgment by the Court, whichever is later, the Defendants are required to divest a perpetual, royalty-free, assignable, transferable, exclusive license to use the following brands and associated assets to an acquirer or acquirers that has or have the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the manufacture and sale of sliced bread in each geographic market. To prevent the splitting of a divested brand between BBU and the acquirer within a relevant market, in most instances the proposed Final Judgment provides that for each brand of sliced bread required to be divested, the divestiture will include additional fresh bread products sold under that brand, *i.e.*, buns, rolls, sandwich thins, thin buns, etc.

In Los Angeles, San Diego, San Francisco, and Sacramento, California, the Defendants are required to divest the Sara Lee family of brands (which includes Sara Lee, Sara Lee Classic, Sara Lee Soft & Smooth, Sara Lee Hearty & Delicious, and Sara Lee Delightful) and the EarthGrains brand. In Harrisburg/Scranton, Pennsylvania, the Defendants are required to divest the Holsum and Milano brands. In Kansas City, Kansas, the Defendants are required to divest the EarthGrains and Mrs Baird's brands. In Omaha, Nebraska, the Defendants are required to divest the EarthGrains and Healthy Choice brands. In Oklahoma City, Oklahoma, the Defendants are required to divest the EarthGrains brand. These divestitures target the loss of competition between BBU and Sara Lee in each particular market and will prevent or significantly reduce the increase in concentration that the transaction would otherwise produce in the relevant markets.

- In Los Angeles, BBU brands currently account for 41 percent of the sliced bread market and Sara Lee brands currently account for 18 percent. The divestiture in Los Angeles of EarthGrains and the Sara Lee family brands, which together account for

17 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 41 percent.

- In San Diego, BBU brands currently account for 46 percent of the sliced-bread market and Sara Lee brands currently account for 17 percent. The divestiture in San Diego of EarthGrains and the Sara Lee family of brands, which together account for 15 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 48 percent.
- In San Francisco, BBU brands currently account for 44 percent of the sliced-bread market and Sara Lee brands currently account for 12 percent. The divestiture in San Francisco of EarthGrains and the Sara Lee family of brands, which together account for 8 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 47 percent.
- In Sacramento, BBU brands currently account for 34 percent of the sliced-bread market and Sara Lee brands currently account for 25 percent. The divestiture in Sacramento of EarthGrains and the Sara Lee family of brands, which together account for 15 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 44 percent.
- In Kansas City, BBU brands currently account for 17 percent of the sliced-bread market and Sara Lee brands currently account for 35 percent. The divestiture in Kansas City of EarthGrains and Mrs Baird's, which together account for 9 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 43 percent.

- In Omaha, BBU brands currently account for 14 percent of the sliced-bread market and Sara Lee brands currently account for 38 percent. The divestiture in Omaha of EarthGrains and Healthy Choice, which together account for 5 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 47 percent.
- In Oklahoma City, BBU brands currently account for 7 percent of the sliced-bread market and Sara Lee brands currently account for 46 percent. The divestiture in Oklahoma City of EarthGrains, which accounts for 6 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 47 percent.
- In Harrisburg/Scranton, BBU brands currently account for 44 percent of the sliced-bread market and Sara Lee brands currently account for 12 percent. The divestiture in Harrisburg/Scranton of Holsum and Milano, which together account for 8 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 49 percent.

The United States' analysis of the proposed Acquisition indicates that the acquisition of all of the Sara Lee brands of sliced bread in each of these eight geographic areas would have created an incentive for BBU to raise prices on BBU and Sara Lee brands of sliced bread because, in the event of a price increase, a significant portion of the lost sales from either the BBU or the Sara Lee portfolio of brands would be diverted to the other. In each geographic area, the divestiture, by separating the ownership of several closely competing brands, prevents the Acquisition from creating any significant incentive for the merged firm to raise the price of sliced bread.

In addition, as stated above, without the required divestitures, the Acquisition would have created substantial increases in the merged firm's sliced-bread market share in multiple geographic markets. The divestitures reduce those increases to no more than 4 percentage points in all but three markets: Sacramento (10 points), Omaha (9 points), and Kansas City (9 points). These incremental share gains in these three geographic markets do not pose substantial competitive concerns because they will result from the combination of brands that are largely in different segments of the sliced-bread market—i.e., combining traditional breads and wide pan breads. Combining ownership of brands that consumers consider to be relatively distant substitutes for each other is less likely to raise competitive concerns than combining closer substitutes. The required divestitures mandate the sale of the Defendants' brands that most closely and directly compete in order to preserve competition in the segments of the market where they are very close substitutes for each other.

In Sacramento, the Sara Lee brands required to be divested are those that compete strongly with BBU brands. The Sara Lee brands that BBU will retain, in particular Rainbo, San Luis Sourdough, and Old Home, do not compete as directly with BBU brands, and thus present BBU with little incentive to increase prices post-Acquisition. In Omaha, BBU and Sara Lee primarily compete in the sale of wide-pan bread. BBU is not a significant competitor in Omaha in the traditional bread segment. Although wide-pan bread is a small part of the overall sliced-bread market, the divestiture of the EarthGrains and Healthy Choice brands protects the competition in this segment that the Acquisition would otherwise have reduced. The increased market share that BBU will retain in Omaha after the divestiture largely comes from BBU's acquisition of Sara Lee's traditional bread products, which is unlikely to reduce competition

because BBU has not been a significant competitor in the sale of traditional bread in the Omaha metropolitan area.

In Kansas City, BBU and Sara Lee compete in both the traditional and wide-pan segments. The required divesture of BBU's traditional Mrs Baird's brand and Sara Lee's wide-pan EarthGrains brand targets competition in each of these segments. The small increase in market share of sliced bread that BBU likely will retain after the divestitures in Kansas City largely comes from combining BBU's wide-pan bread brands with Sara Lee's traditional bread brands, which is unlikely to create a significant competitive concern.

In addition to a perpetual, royalty-free, assignable, transferable, exclusive license to use the particular brands of sliced bread, the proposed Final Judgment requires with respect to each relevant geographic market the divestiture of related tangible assets, including records, customer information, and other assets related to the divested brands. It also requires the divestiture of related intangible assets, including the rights to trade dress, trademarks, trade secrets, and other intellectual property used in the research, development, production, marketing, servicing, distribution, or sale of the brands being divested.

In addition, effective divestitures probably will require the sale of manufacturing plants and equipment used primarily to manufacture the divested brands, as well as distribution facilities, routes, route assets, and other tangible assets used in connection with those manufacturing plants. Accordingly, the proposed Final Judgment requires the divestiture of brand-related plants and plant-related assets, but it also provides that the Defendants need not divest those assets in the event that (1) the acquirer does not want those assets, and (2) the United States determines in its sole discretion that a divestiture of some or all of such assets is not reasonably necessary to enable the acquirer to replace the competition that otherwise would have

been lost pursuant to the Acquisition.

The proposed Final Judgment provides that there will be a single acquirer of all brands and brand-related assets required to be divested in California, and that there may be different acquirers in different relevant markets outside of California. As stated above, to prevent the splitting of a divested brand between BBU and the acquirer within a relevant market, in most instances the proposed Final Judgment provides that for each brand of sliced bread required to be divested, the divestiture will include additional fresh-bread products sold under that brand, i.e., buns, rolls, sandwich thins, thin buns, etc.

The proposed Final Judgment provides that the assets must be divested in such a way as to satisfy the United States, in its sole discretion, that an acquirer or acquirers can and will use the assets as part of a viable, ongoing business engaged in the sale of sliced bread in the metropolitan and surrounding areas of Los Angeles, San Diego, San Francisco, Sacramento, Harrisburg, Scranton, Kansas City, Kansas, Omaha, and Oklahoma City.

Section V of the proposed Final Judgment provides that if Defendants do not accomplish the ordered divestitures within the prescribed time period, the Court will appoint a trustee, selected by the United States, to complete the divestitures. If a trustee is appointed, the proposed Final Judgment provides that Defendants must cooperate fully with the trustee and pay all of the trustee's costs and expenses. The trustee's compensation will be structured to provide an incentive for the trustee to maximize the price and terms of the divestitures and the speed with which they are accomplished. After the trustee's appointment becomes effective, the trustee will file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the required divestitures.

The proposed Final Judgment provides that if a trustee is appointed, the trustee may make the ordered divestitures in California to different acquirers, so long as the United States is satisfied that the California divestiture assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint.

At the end of six months, if the divestitures have not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the Final Judgment, including extending the trust or the term of the trustee's appointment.

The proposed Final Judgment also provides that the United States may appoint a monitoring trustee to ensure that Defendants expeditiously comply with all of their obligations and perform all of their responsibilities under the Final Judgment and the Hold Separate and to ensure that the divestiture assets remain economically viable, competitive, and ongoing assets, and that competition in the sale of sliced bread in the relevant markets is maintained until the required divestitures have been accomplished. The monitoring trustee shall serve at the cost and expense of Defendants, on customary and reasonable terms and conditions agreed to by the monitoring trustee and the United States.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

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

brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

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

Written comments should be submitted to:

Joshua H. Soven
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 4100
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought a judicial order enjoining BBU's acquisition of Sara Lee's North American Fresh Bakery business. The United States is satisfied, however, that divestiture of the assets described in the proposed Final Judgment will preserve competition for the sale of sliced bread in the relevant geographic markets. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

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

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

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

15 U.S.C. § 16(e)(1)(A) & (B).

In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.").[3]

A court considers under the APPA, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS Inc.*, 858 F.2d 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; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Instead:

> [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

[3] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts 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).

> 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).[4] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' "prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long 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).

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[4] *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'").

To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60. As the United States District Court for the District of Columbia confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of using 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.[5]

VIII. DETERMINATIVE DOCUMENTS

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

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[5] *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 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.").