UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAYER AG,
MONSANTO COMPANY, and
BASF SE,

Defendants.

Civil Action No. 1:18-cv-01241 (JEB)

RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

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I. Introduction

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), 15 U.S.C. §§ 16(b)-(h), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case. For the reasons set forth below, the remedy the United States obtained from Defendants addresses the competitive harm alleged in this action and is in the public interest. Accordingly, the United States recommends no modifications to the proposed Final Judgment.

This remedy is a victory for American farmers and consumers. It fully addresses the competitive threat posed by the merger by vesting the divestiture buyer, BASF, with the full complement of assets, personnel, and rights needed to preserve competition in each of the 17 affected markets. It requires divestitures that go beyond what would be needed to address the current horizontal overlaps or vertical concerns in order to ensure that BASF can step into Bayer's shoes, thereby preserving the competition that otherwise would be lost through the merger. It provides for the transfer of over 4,000 Bayer employees so that BASF will have the necessary expertise to run these divested businesses, and it provides for time-limited interim support agreements to avoid business disruptions during the transition period. It also incorporates further safeguards that allow BASF to obtain additional assets and personnel, if necessary, during the first year of operating these businesses. In short, the United States has gone to extraordinary lengths to ensure that BASF will seamlessly and successfully replace Bayer as an independent and vigorous competitor in each of the affected markets.

The competitive significance of the remedy is underscored by the $9 billion divestiture purchase price, which exceeds the value of most *mergers* reviewed by the United States and far exceeds the value of most merger remedies. Indeed, it is among the largest and most

comprehensive remedies obtained by the United States in a merger challenge. As one commenter observes, "the $9 billion divestiture, by which BASF would acquire Bayer's position in genetically modified seeds and seed traits, foundational herbicides, other crop seeds, and related research and development efforts appears to be as robust a divestiture as might be imagined."[1]

The United States received fourteen comments reflecting a wide array of views. After careful consideration of these comments, the United States has determined that nothing in them casts doubt on its conclusion that the public interest is well-served by the proposed remedy. The United States is publishing the comments and this response on the Antitrust Division website and is submitting to the *Federal Register* this response and the website address at which the comments may be viewed and downloaded, as set forth in the Court's order dated January 2, 2019 (Docket No. 21). Following *Federal Register* publication, the United States will move the Court to enter the proposed Final Judgment pursuant to 15 U.S.C. § 16(d).

II. Procedural History

On September 14, 2016, Bayer AG entered into an agreement to acquire Monsanto Company in a merger valued at approximately $66 billion. On May 29, 2018, the United States filed a civil antitrust Complaint seeking to enjoin Bayer from acquiring Monsanto. The Complaint alleges that the proposed acquisition would substantially lessen competition for the sale of a range of agricultural products to farmers in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment, a stipulation signed by the parties that consents to entry of the proposed Final

[1] Ducore Comment (attached as Exhibit 6) at 1.

Judgment after compliance with the requirements of the Tunney Act, and a Competitive Impact Statement describing the transaction and the proposed Final Judgment. The United States caused the Complaint, the proposed Final Judgment, and Competitive Impact Statement to be published in the *Federal Register* on June 13, 2018, *see* 83 Fed. Reg. 27652 (June 13, 2018), and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in *The Washington Post* on June 5-11, 2018 and in the *St. Louis Post-Dispatch* on June 3, 4, 6, and 8-11, 2018. The 60-day period for public comment ended on August 13, 2018. The United States received 14 comments (Exhibits 1 through 14).

III. Standard of Judicial Review

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

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

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is

necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the decree is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. 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 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 U.S. Airways*, 38 F. Supp. 3d at 74-75 (noting that a court should not reject the proposed remedies because it believes others are preferable and that room must be made for the government to grant concessions in the negotiation process for settlements); *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 government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case"). The ultimate question is 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.'" *Microsoft*, 56 F.3d at 1461 (*quoting United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990)). 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

[2] *See also 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").

relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60.

In its 2004 amendments to the APPA,[3] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to

[3] 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).

trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11. A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 76; *see also 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"); 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.").

IV. The Investigation and the Proposed Final Judgment

The proposed Final Judgment is the culmination of a thorough, comprehensive investigation conducted by the Antitrust Division of the United States Department of Justice. Based on the evidence gathered during its investigation, the United States concluded that Bayer's proposed acquisition of Monsanto would likely substantially lessen competition in 17 product markets in the agricultural industry, resulting in higher prices, less innovation, fewer choices, and lower-quality products for American farmers and consumers. Accordingly, the United States filed a civil antitrust lawsuit to block the acquisition as a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The proposed Final Judgment provides an effective and appropriate remedy for the transaction's likely competitive harm by requiring Bayer to divest its business in each relevant

market, along with various supporting assets, to BASF, a global chemical company with an existing crop protection business. The United States identified a divestiture package that remedies all dimensions of harm threatened by the proposed merger. First, the proposed Final Judgment requires Bayer to divest those businesses that vigorously compete head-to-head with Monsanto today. Second, the proposed Final Judgment requires Bayer to divest seed treatment businesses that, when combined with Monsanto's seed business, would have given the combined company the incentive and ability to harm competition by raising the prices it charges rival seed companies. Third, because Bayer and Monsanto compete to develop new products and services for farmers, the proposed Final Judgment requires the divestiture of associated intellectual property and research capabilities, including "pipeline" projects, to enable BASF to replace Bayer as a leading innovator in the relevant markets. Fourth, the proposed Final Judgment requires the divestiture of additional assets that will give BASF the scale and scope to compete effectively today and in the future.

Specifically, Bayer is required to divest its entire global row crop seeds and traits business (with insignificant exceptions not relevant to the United States), its entire global vegetable seeds business, and all related research and development ("R&D") assets. Bayer also must divest significant crop protection assets, including its global glufosinate ammonium business and IP and other assets to allow BASF to continue Bayer's efforts in developing new foundational herbicide systems. Finally, Bayer is required to divest certain seed treatments for corn, soy, and cotton.

Because many of the divested assets will be separated from Bayer's existing business units and incorporated into BASF, the proposed Final Judgment includes provisions aimed at ensuring that the assets are handed off in a seamless and efficient manner. To that end, Bayer is

required to transfer existing third-party agreements and customer information to BASF, as well as to enter transition services agreements that ensure that BASF can continue to serve customers immediately upon completion of the divestitures. The transition services and interim supply agreements are time-limited to ensure that BASF will become fully independent of Bayer as soon as practicable.

The proposed Final Judgment also contemplates heightened safeguards intended to ensure that BASF is receiving everything it needs to replace Bayer as a competitor. The proposed Final Judgment requires Bayer to warrant that the assets being divested are sufficient for BASF to maintain the viability and competitiveness of the divested businesses following BASF's acquisition of the assets. In addition, the proposed Final Judgment gives BASF a one-year window after closing to identify any additional assets that are reasonably necessary to ensure the continued competitiveness of the divested businesses. The United States will have sole discretion to determine if Bayer must divest these additional assets. Finally, the proposed Final Judgment gives BASF a one-year window to hire all of the personnel from Bayer needed to support these businesses. These novel provisions strengthen the remedy by allowing BASF to identify additional assets or employees it needs to compete effectively after it has operated the divested businesses for a certain period of time.

The divestitures will ensure that BASF can step into Bayer's shoes, thereby preserving the competition that the merger would otherwise destroy. The proposed Final Judgment provides for the appointment of a monitoring trustee to have close oversight over the divestitures and the transitional agreements between Bayer and BASF to ensure that they proceed appropriately. The proposed Final Judgment also includes robust mechanisms that will allow the United States and the Court to monitor the effectiveness of the relief and to enforce compliance. And because the

United States has determined that BASF, as the divestiture buyer, is a necessary party to effectuate complete relief, BASF has agreed to be joined to this action for the purposes of the divestitures.

V. Summary of Public Comments and the United States' Response

The United States received public comments from a group of state Attorneys General; certain Members of Congress; the National Federation of Independent Businesses ("NFIB"); Syngenta, a seed and agrochemical company; Daniel Ducore, former Assistant Director of the FTC Bureau of Competition's Compliance Division; Daniel Bellemare, an attorney; the Sierra Club; the Natural Resources Defense Council ("NRDC"); the Consumer Federation of America; ActionAid USA; the National Family Farm Coalition; Friends of the Earth; the Sustainable Food Center; and the Pollinator Stewardship Council.

Certain commenters acknowledge the meaningful protections for competition that the United States achieved, even as they advocate for modifications to the proposed Final Judgment. Syngenta, one of the Defendants' primary competitors, states that it "believes that the [proposed Final Judgment] remedies many of the most complex and difficult anticompetitive aspects of the transaction."[4] Similarly, Daniel Ducore, who served for more than 25 years as Assistant Director of the division that oversaw all of the FTC's merger and non-merger remedies, notes that the remedy "appears to be as robust a divestiture as might be imagined," and further observes that while "[e]very remedy raises risks about the scope of divested assets, the particular buyer, and the implementation of the remedy," here the United States "appears to have done everything possible to reduce those risks."[5]

[4] Syngenta Comment (Exhibit 12) at 1.
[5] Ducore Comment (Exhibit 6) at 1.

The comments can be grouped into six categories: (1) BASF's suitability as a divestiture buyer, including whether it will have sufficient assets, expertise, and incentives to preserve competition; (2) concerns that BASF could fail to execute the remedy in a way that effectively preserves competition; (3) concerns about whether the proposed Final Judgment properly addresses issues related to seed treatments; (4) concerns that the remedy will not prevent the combined Bayer/Monsanto from leveraging its strengths in certain areas—in particular, digital agriculture and traits—to foreclose competition in other markets; (5) procedural matters, including government oversight and enforcement of proposed Final Judgment compliance; and (6) other miscellaneous comments, including general concerns about consolidation in the agricultural industry; concerns relating to the environment, wildlife and human health; and concerns that the United States' review process may have been influenced by politics. The comments are summarized in more detail below:

- A number of commenters express concern about BASF's suitability as a divestiture buyer and its ability to compete effectively with the divested assets. NRDC and the Attorneys General of California, Iowa, Massachusetts, Mississippi, and Oregon ("State Attorneys General") express concerns that BASF may not be able to replace Bayer as a competitor, asserting that BASF has no seeds experience, that Monsanto is dominant in the market for genetically modified seeds, and that the divestiture may leave BASF reliant on the merged firm and discourage BASF from competing vigorously.[6] The Consumer Federation of America argues that the United States should have required the merged firm to divest the stronger set of assets to address each competitive overlap.[7] In contrast, Daniel Ducore states that the divestiture package includes everything that BASF could need to operate the divested businesses successfully.[8] Daniel Bellemare raises a different concern, suggesting that if BASF is already well-positioned to enter the relevant markets without the aid of the divested assets, it may not be an appropriate divestiture buyer.[9]

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[6] NRDC Comment (Exhibit 9) at 3-4; State Attorneys General Comment (Exhibit 2) at 5-7.
[7] Consumer Fed'n of Am. Comment (Exhibit 4) at 1.
[8] Ducore Comment (Exhibit 6) at 5.
[9] Bellemare Comment (Exhibit 5) at 10-12.

- Daniel Ducore and the State Attorneys General express concerns that BASF will fail to execute its business plans successfully and will therefore fail to replace the competition lost from the merger. Mr. Ducore opines that the divestiture package includes everything that BASF could need to operate the divested businesses successfully but nevertheless expresses concern that "BASF, even if it obtains everything that was considered necessary and relevant when the remedy was negotiated, will fail to step in for Bayer and compete with the new Bayer-Monsanto as strongly as Bayer had competed with Monsanto before the deal."[10] Mr. Ducore urges the United States to monitor BASF's performance over the next few years to evaluate the effectiveness of the settlement. The State Attorneys General recommend that the Court "order a retrospective study of the effects of the merger on competition two years after transfer of the divestiture assets has begun."[11]

- Syngenta and the Sustainable Food Center express concerns about various aspects of the seed treatment divestiture and seek modifications to the proposed Final Judgment's provisions concerning seed treatments. Syngenta asserts that certain provisions of the proposed Final Judgment should be modified to avoid the "risk [of] reducing competition and inhibiting innovation in the affected product markets" or otherwise undermining the purpose of the remedy.[12] The Sustainable Food Center seeks a broader divestiture of a class of seed treatments.[13]

- Several commenters, including the National Family Farm Coalition, Friends of the Earth, and NRDC, argue that allowing Bayer to retain Monsanto's leading digital agriculture platform will enhance the merged firm's ability to influence farmer choice in other areas, such as seed and crop protection markets.[14] Friends of the Earth, the Sustainable Food Center, and the Consumer Federation of America offer various suggestions regarding digital agriculture divestitures, including proposing that Monsanto divest its digital agriculture platform or revise its data access policies.[15] NRDC, the Consumer Federation of America, and the Pollinator Stewardship Council also raise broad cross-product leveraging concerns that the merged firm will be in a position to exploit its significant position in certain markets to achieve dominance in other markets.

- Three commenters take issue with various procedural aspects of the settlement. NFIB raises four concerns regarding aspects of the proposed Final Judgment pertaining to the United States' authority to oversee and enforce compliance with

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[10] Ducore Comment (Exhibit 6) at 1-2.
[11] State Attorneys General Comment (Exhibit 2) at 2-3.
[12] Syngenta Comment (Exhibit 12) at 1.
[13] Sustainable Food Ctr. Comment (Exhibit 11) at 1.
[14] NRDC Comment (Exhibit 9) at 4, 6, 9-10; Friends of the Earth Comment (Exhibit 7) at 2-3; Nat'l Family Farm Coal. Comment (Exhibit 8).
[15] Friends of the Earth Comment (Exhibit 7) at 3-4; Consumer Fed'n of Am. Comment (Exhibit 4) at 2; Sustainable Food Ctr. Comment (Exhibit 11).

the settlement—generally advocating for greater protections for the Defendants—and proposes modifications to address each issue.[16] The State Attorneys General suggest certain measures relating to the enforcement mechanisms in the proposed Final Judgment, such as removing the provision allowing for possible early termination and mandating the appointment of a monitoring trustee.[17] And Daniel Bellemare argues that a public interest determination in a transaction this complex merits more than the limited judicial inquiry that the Tunney Act contemplates.[18]

- Certain commenters express concerns with consolidation in the agricultural industry in general; some of these comments also suggest that the United States should have sued to block this transaction.[19]

- A number of commenters, including Sierra Club, NRDC, ActionAid USA, and the National Family Farm Coalition, argue that the merger will have a negative effect on the environment, wildlife and human health.[20]

- A group of 27 Members of Congress refer to media reports that raise the possibility that the White House may have unduly influenced the review of this and other transactions. They urge that antitrust enforcement "continue to be treated as a law enforcement matter properly left to the independent judgment of DOJ."[21]

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[16] NFIB Comment (Exhibit 13).
[17] State Attorneys General Comment (Exhibit 2) at 2-3.
[18] Bellemare Comment (Exhibit 5) at 12-15.
[19] In addition to their own comments, certain advocacy groups submitted lists of names of individuals supporting the group's comments and, in some cases, separate messages from individual members of the general public. These individual messages were not sent directly to the Division by their authors. ActionAid USA's submission included a list of more than 1,200 individual supporters of its comments. The Sierra Club enclosed more than 18,000 signatures and roughly 2,500 individual messages. NRDC and Friends of the Earth both submitted, along with their own comments, tens of thousands of what appear to be identical or substantially similar messages from individuals opposed to the merger. In addition, a number of other individuals sent emails about concerns relating to the transaction to the United States using various channels outside of the designated procedures for submitting Tunney Act comments. The United States has reviewed these messages and emails, and none appear to address the substance of the proposed Final Judgment or raise any issue not otherwise addressed in this Response to Comments. Accordingly, the United States has not addressed these lists of names, individual messages, or emails as separate comments and does not intend to file or publish them.
[20] *See, e.g.*, NRDC Comment (Exhibit 9) at 7-10.
[21] Members of Cong. Comment (Exhibit 3) at 2-3.

a. Comments Regarding BASF's Suitability as a Divestiture Buyer and Ability to Compete Effectively

Comments questioning BASF's ability to preserve competition fall into two general categories: (1) BASF's ability to succeed with the divested assets and (2) BASF's incentives to compete aggressively against the merged company. The United States carefully considered these issues in crafting the proposed remedy. The proposed Final Judgment requires Bayer to divest a broad range of assets—essentially its entire global seeds and traits business as well as its digital agriculture business and important crop protection products—and to provide an array of transitional services. While it is impossible to predict with certainty how well BASF will perform with the divested assets (just as Bayer's own performance with those assets absent the merger is not certain), the proposed remedy ensures that BASF will be as well-positioned as possible and have the necessary incentives to step into Bayer's shoes to replace the competition that otherwise would be lost through the merger.

i. The Proposed Divestitures Give BASF Everything Necessary to Preserve Competition

The State Attorneys General assert that the proposed Final Judgment "trusts that BASF can immediately step into the shoes of Bayer in the market" with the divestiture assets and express concern about the consequences if BASF is not able to do so.[22] They also observe that BASF "does not currently make seeds and has never run a seeds business."[23] Other commenters likewise express doubt about BASF's ability to replace Bayer as a competitor.[24]

The United States crafted the remedy specifically taking into account BASF's existing assets and capabilities.[25] The fact that United States has not identified viable alternative buyers

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[22] State Attorneys General Comment (Exhibit 2) at 5.
[23] *Id.*
[24] *See, e.g.*, Consumer Fed'n of Am. Comment (Exhibit 4) at 1; NRDC Comment (Exhibit 9).
[25] *See* Competitive Impact Statement at 31-32.

is not a weakness in the remedy as some commenters might suggest,[26] but rather a reflection of the importance of the buyer to the remedy here and the high standard that the United States applied in evaluating potential buyers for the divested assets. BASF is a large multinational firm with extensive experience operating in jurisdictions around the world. And while it is correct that BASF has not owned a seed business, BASF has extensive agricultural experience in crop protection and trait research—closely related businesses that it will integrate with the seed businesses it is acquiring from Bayer.

This remedy is the result of a careful and thorough investigation, during which the United States scrutinized the merging parties' and BASF's businesses and operations to identify a comprehensive package of assets to be divested. The United States has structured the proposed remedy to position BASF to be as strong of a competitor as Bayer in the affected markets. To that end, the required divestitures go beyond what would be needed to address the current horizontal overlaps or vertical concerns in order to ensure that BASF can step into Bayer's shoes, thereby preserving the competition that otherwise would be lost through the merger. They also provide BASF with comparable scale and scope to Bayer and give BASF the assets it needs going forward to be a strong innovator.

Bayer is required to divest its entire global row crop seeds and traits business (with insignificant exceptions not relevant to the United States), its entire global vegetable seeds business, and all related R&D assets. Even though neither Bayer nor Monsanto sells hybrid wheat in the United States, Bayer must divest its entire wheat R&D platform as well as its research facility in Ghent, Belgium that is used to support R&D for wheat and other crops. These broad divestitures assure that BASF will be able to take advantage of cross-crop R&D

[26] *See* State Attorneys General Comment (Exhibit 2) at 5.

synergies to the same extent as Bayer today. Similarly, Bayer is divesting its entire vegetable seed business, which encompasses 24 different crops, even though the transaction raises competition concerns in only five vegetable seed markets in the United States.

On the crop protection side, Bayer is divesting not only its global glufosinate ammonium business, which competes with Monsanto's Roundup, but also intellectual property and other assets to allow BASF to continue Bayer's efforts in developing new foundational herbicide systems.[27] Bayer is also required to divest certain seed treatments for corn, soy, and cotton to address horizontal and vertical concerns.[28] BASF is now able to offer these market-leading seed treatment products alongside its cotton and soy seeds, just as Bayer was able to do prior to the merger.

Without the merger, it is anticipated that competition would intensify between Bayer and Monsanto to pursue what the industry calls "integrated solutions"—combinations of seeds, traits, and crop protection products supported by digital farming technologies and other services.[29] Commenters such as NRDC note the potential importance of digital agriculture tools (which help farmers maximize yields and get the most out of their other agriculture products) to future competition in the industry. Even though integrated solutions are still evolving, the proposed remedy requires Bayer to divest all assets related to Bayer's digital agriculture business, including pipeline products, and to transfer employees supporting these assets and products to BASF. With these assets and employees, BASF will be able to step into Bayer's shoes in pursuing integrated solutions.

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[27] *See* Proposed Final Judgment § II(U); Complaint ¶ 36.
[28] *See* Complaint ¶¶ 38-50.
[29] *See id.* ¶ 61.

As an additional precaution, the proposed Final Judgment requires Bayer to warrant that the divestiture assets are "sufficient in all material respects for BASF, taking into account BASF's assets and business, to maintain the viability and competitiveness" of the businesses BASF has acquired.[30] And if BASF determines that Bayer has not divested all of the assets "reasonably necessary for the continued competitiveness" of the divested businesses, BASF may notify Bayer and the Monitoring Trustee that it requires those assets, and, in that situation, the United States will determine whether the assets should be divested.[31] One commenter notes that this aspect of the remedy "perhaps reflect[ed] the Division's efforts to reduce any 'asset package risk' to near zero."[32]

BASF will have the benefit of not only all of Bayer's seeds and traits assets, but also of the approximately 4,000 former Bayer employees slated to move to BASF with the divestitures. These employees, who operated the divested businesses day-in and day-out for Bayer, have extensive seeds experience. If BASF determines during the following year that it lacks employees with expertise it needs, it may seek to hire, without any interference from Bayer, any additional Bayer employees who supported the divested businesses in any way since 2015.[33]

Complementing the divested assets and transferring personnel, the proposed remedy requires Bayer to provide transitional support to BASF to ensure that BASF will be able to step into Bayer's competitive shoes. For example, because prior to the merger Bayer was able to sell a suite of its own seed treatments for use on its proprietary canola, cotton, and soy seeds, Bayer is required to provide BASF a supply of these seed treatments at Bayer's cost until BASF is able

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[30] Proposed Final Judgment § IV(F)(1).
[31] *Id.* § IV(F)(2).
[32] Ducore Comment (Exhibit 6) at 4.
[33] *See* Proposed Final Judgment § IV(E).

to develop alternative sources of supply.[34] In addition to the various transition services specifically discussed in the proposed Final Judgment, Bayer is required to provide "any other transition services reasonably necessary" to facilitate a seamless transition of the divested businesses from Bayer to BASF.[35] One of the responsibilities of the Monitoring Trustee is to ensure that Bayer lives up to its obligation to provide such transition services to BASF. As Daniel Ducore observes, "it's hard to identify anything that BASF *might* need that it isn't getting."[36]

Voicing a different concern about the sufficiency of the divestiture assets, the Consumer Federation of America writes that "[t]he chances that BASF will be able to acquire the weaker agricultural assets of the two firms and use them to compete effectively are doubtful."[37] Yet Bayer has been a strong competitor even with what the Consumer Federation calls Bayer's "weaker agricultural assets." And the proposed Final Judgment ensures that BASF will receive all of the assets it needs (along with transitional support) to step into Bayer's shoes, thereby replacing any competition that would otherwise be lost as a result of the merger. To the extent commenters believe that Monsanto, by itself, held too much market power prior to the merger, that concern is not specific to the merger and not within the four corners of the United States' Complaint. *See U.S. Airways*, 38 F. Supp. 3d at 76 ("'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. . . .'") (quoting *United States v. Graftech Int'l*, No. 10-cv-2039, 2011 WL 1566781, at *13 (D.D.C. Mar. 24, 2011)).

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[34] *See id.* § IV(G)(1).
[35] *See id.* § IV(H)(4).
[36] Ducore Comment (Exhibit 6) at 5.
[37] Consumer Fed'n of Am. Comment (Exhibit 4) at 1.

While the proposed Final Judgment requires the merging parties to divest Bayer's assets, and not Monsanto's, it also does not permit them to pick and choose among Bayer's and Monsanto's assets to divest only the weakest links in each company's portfolio. Bayer is not divesting Monsanto's canola business, even though Monsanto has a much smaller market share than Bayer in canola.[38] Bayer is divesting its entire global vegetable seeds business (Nunhems) even though Bayer's share for certain vegetable seeds is larger than Monsanto's.[39] Similarly, Bayer is required to divest its market-leading nematicidal seed treatment products, which enjoy over a 95% share for corn and 85% share for soy, rather than Monsanto's NemaStrike product, which has only recently become available for commercial sale.[40]

The required divestitures are also not wholly limited to Bayer assets. Bayer is a relatively new entrant to the soybean business in the United States. It has emerged as a serious threat to Monsanto in the southern United States, but it lacks germplasm and varieties suitable to the Midwest, an important soybean growing region. To help strengthen BASF as a competitor to the merged company (and other firms), the merged company is obligated to divest not only Bayer's global soybean business, but also certain groups of Monsanto soybeans used for research and breeding.[41] These Monsanto assets will help make BASF a stronger competitor in the Midwest than Bayer was before the merger.

In contrast to some commenters' concern that BASF may not be able to compete effectively with the seed assets it is acquiring from Bayer, Daniel Bellemare questions whether BASF would have entered the seeds markets and become a significant competitor on its own

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[38] *See* Complaint ¶ 28 (Bayer's share is 60%; Monsanto's share is 14%).
[39] *See, e.g.*, *id.* ¶ 58 (Bayer's share of watermelon seeds is much larger than Monsanto's).
[40] *See* Complaint ¶¶ 41-42.
[41] Proposed Final Judgment §§ IV(N), II(S).

without the divestitures.[42] Even for a large company with substantial resources such as BASF, however, barriers to entry in these markets are high.[43] BASF needs Bayer's extensive libraries of seeds and other assets to compete as an integrated firm on a global scale in seeds and traits.

ii. BASF Has a Strong Incentive to Compete Aggressively Against Bayer

Certain commenters also express concern that BASF will lack sufficient incentive to compete against the merged company due to the number of post-divestiture agreements between BASF and Bayer as well as BASF's interest in dicamba production.[44] These concerns do not cast doubt on the strength of the proposed remedy. The proposed Final Judgment incentivizes BASF to compete aggressively against Bayer and other competitors, and encourages BASF to become independent from Bayer as soon as is reasonably possible.

Bayer is obligated under the proposed Final Judgment to provide various forms of transitional support to BASF. These arrangements lead the State Attorneys General to suggest that, "[b]ecause BASF will have to rely on Bayer to make these assets work, the company will have a disincentive to anger Bayer."[45] The tolling, supply, and transition service agreements are designed to eliminate any potential gaps in BASF's ability to fully compete with the divested assets from the outset. The intention is not to establish an "ongoing, close relationship" between BASF and Bayer as the State Attorneys General suggest.[46] To the contrary, the proposed Final Judgment sets relatively short initial time periods for these arrangements (generally two years or less), which may be extended only with the approval of the United States. The proposed Final Judgment encourages BASF to end these arrangements as soon as practicable, requiring BASF to

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[42] Bellemare Comment (Exhibit 5) at 10-12.
[43] *See* Complaint ¶ 62.
[44] State Attorneys General Comment (Exhibit 2) at 6-7; NRDC Comment (Exhibit 9) at 2.
[45] State Attorneys General Comment (Exhibit 2) at 6.
[46] *Id.* at 7.

use "best efforts to develop or procure alternative sources of supply by the end of the initial periods" for tolling and supply agreements, and "to develop alternative solutions by the end of the initial periods" for transition service agreements.[47] The Monitoring Trustee will closely track BASF's progress towards operating without reliance on Bayer.[48] In the meantime, BASF will not have to pull its competitive punches out of concern that Bayer will stop providing the tolling, supply, or other transitional services that it needs. Bayer's obligations are clearly stated in the proposed Final Judgment (and detailed in separate agreements between BASF and Bayer), and the Monitoring Trustee will assess whether Bayer is fulfilling its responsibilities.

NRDC suggests that BASF may not be an effective competitor to the merged company because of BASF's existing interest in the herbicide dicamba.[49] The United States carefully considered BASF's premerger role as a supplier of dicamba to Monsanto in evaluating BASF's suitability as a buyer of the divestiture assets. As the owner of Bayer's glufosinate ammonium business and the LibertyLink traits, BASF will earn returns from selling seed containing the LibertyLink traits, licensing those traits to third party seed companies, and selling the Liberty herbicides. These interests will greatly outweigh any benefit BASF would gain, as a supplier of dicamba, from Monsanto's sale of seed containing Monsanto's dicamba-tolerance traits.[50] Further, the proposed remedy is structured so that BASF will not only have an appropriate incentive to promote its already-commercialized LibertyLink traits, but also traits that potentially

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[47] Proposed Final Judgment §§ IV(G)(10); (H)(6).

[48] Nor will Bayer want the transitional agreements to continue longer than necessary, as Bayer is required during the initial terms to provide the tolling and other services at variable cost (or better). Proposed Final Judgment §§ IV(G), (H).

[49] NRDC Comment (Exhibit 9) at 2.

[50] It is also unclear for how long (or to what extent) BASF will continue to supply dicamba to Monsanto. In 2017, Monsanto broke ground on a $975 million expansion of a facility in Louisiana to produce dicamba. *See, e.g.*, https://monsanto.com/news-releases/monsanto-board-of-directors-approves-expansion-in-luling-louisiana/.

would compete with Monsanto's dicamba-tolerance traits in the future, such as isoxaflutole tolerance.[51]

b. Comments Regarding BASF's Ability to Execute the Remedy Successfully and Requests for Ongoing Study

Three commenters—the State Attorneys General, Daniel Ducore, and Consumer Federation of America—raise concerns that the size and complexity of the proposed remedy create uncertainty as to whether BASF will be able to execute its current plans successfully and preserve competition at premerger levels. As Mr. Ducore describes his concern, there remains a risk that BASF "will fail to step in for Bayer and compete with the new Bayer-Monsanto as strongly as Bayer had competed with Monsanto before the deal," notwithstanding that the remedy package "appears to be as robust a divestiture as might be imagined."[52] The commenters do not propose any specific measures that could be incorporated to reduce these risks. Nor do they urge the court to block the merger. Instead, Mr. Ducore and the State Attorneys General propose that the United States commit to conduct a retrospective study on the success of the settlement in preserving competition, with the State Attorneys General requesting that this Court order that the study be conducted two years after the divestitures have been completed.[53] The commenters argue that the uncertainty inherent in the large and complex transfer of businesses and assets justifies greater oversight of BASF's future operations than the government would typically undertake in conjunction with a merger settlement. Mr. Ducore proposes a particularly extensive "ongoing assessment," including, for example, tracking BASF's ongoing performance,

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[51] To ensure that BASF has a similar incentive to Bayer to commercialize and promote these traits, Bayer is required to provide BASF with a supply of isoxaflutole at Bayer's cost and to use best efforts to obtain regulatory approvals for the use of isoxaflutole over soybeans and cotton containing an isoxaflutole-tolerance trait. Proposed Final Judgment §§ IV(G)(2); (L)(3).
[52] Ducore Comment (Exhibit 6) at 1-2.
[53] State Attorneys General Comment (Exhibit 2) at 2-3.

assessing BASF's evaluation of its R&D projects, and reviewing BASF's sales and pricing levels.[54]

An obligatory retrospective study of the effects of this merger and settlement on competition is not necessary to protect the public interest. As described more fully in Section V(a), the United States has incorporated a number of safeguards in the proposed Final Judgment to ensure that BASF will be fully capable of stepping into Bayer's shoes as an effective competitor. The United States intends to monitor the divestitures to ensure that all of the assets and businesses are transferred to BASF in accordance with the terms of the proposed Final Judgment, and it has even taken the unusual step of requesting the appointment of a monitoring trustee to supplement the government's oversight of this process. The Monitoring Trustee has authority to access the relevant company personnel, books, records, and other pertinent information to ensure that Defendants comply with their obligations, and the trustee will provide regular updates to the United States on Defendants' compliance.[55] The Trustee will continue to monitor compliance with the proposed Final Judgment for as long as the transitional agreements required by the proposed Final Judgment remain in place (unless this period shortened or extended by the United States).[56] Thus, the proposed Final Judgment contemplates several years of oversight by the Monitoring Trustee with regular reporting to the United States to address issues that may arise with respect to the remedy.

That said, the United States deliberately crafted the proposed Final Judgment as a complete and permanent structural resolution that remedies the antitrust violations alleged in the Complaint without the need for future government involvement in BASF's (or Bayer's) business

[54] Ducore Comment (Exhibit 6) at 5-7.
[55] Proposed Final Judgment §§ VIII(G), (H).
[56] *Id.* § VIII(J).

operations. A retroactive assessment would not help shape the remedy in this matter. The commenters do not explain how they expect the United States to use the results of the assessment they would require, but they may be suggesting that the United States should require additional remedies in the future in the event the post-hoc review reveals deficiencies in the settlement. As a law enforcement agency, the United States is ill-equipped to continually oversee broader market operations as suggested by the commenters. The United States should not be second-guessing, for example, BASF's business plans or R&D investments several years from now, when many of the relevant circumstances may have changed from today. Indeed, as it would be impossible to predict with certainty how well Bayer would have performed with the divested assets absent the merger, it also would be impossible to assess with certainty BASF's performance in comparison. To the contrary, once the United States has remedied the antitrust violations—as the proposed Final Judgment does here—competition, not the government, should determine how individual competitors and the market as a whole perform going forward.

c. Comments Regarding Seed Treatments

Two commenters raise questions relating to seed treatments. Syngenta generally supports the proposed Final Judgment, noting that it "resolves many of the most complex and difficult anticompetitive aspects of the Transaction;"[57] however, Syngenta seeks modifications to provisions that require Bayer to supply BASF with seed treatments and proposes restrictions on BASF's ability to sell divested seed treatments to Bayer. In addition, the Sustainable Food Center proposes that all of Bayer's neonicotinoid seed treatments be divested to BASF. We respond to each of these comments below.

[57] Syngenta Comment (Exhibit 12) at 1.

i. The Proposed Final Judgment Appropriately Requires Bayer to Supply Seed Treatments to BASF at Variable Cost

The proposed Final Judgment requires Bayer to supply certain seed treatments products to BASF at "variable cost" for a limited period of time to ensure continuity of seed treatment supply for the divested businesses.[58] Syngenta expresses concern that the term "variable cost" is susceptible to different interpretations and could "permit BASF the opportunity to buy the products at a fraction of their full production costs," which would give BASF "a cost advantage above any competitor" and "distort normal competitive dynamics" for these products.[59] In particular, Syngenta asserts that the agribusiness usage of the term "variable cost" would include only "direct input costs" (such as the cost of raw materials), and exclude other costs that would vary with production levels, resulting in BASF paying too little for these products.[60] Essentially, Syngenta appears to be concerned that BASF may get too good a deal from Bayer on seed treatment products, which could make it more challenging for Syngenta, the second largest seed treatment supplier, to compete with BASF. Syngenta asks that the proposed Final Judgment be "clarified to note that 'variable cost' is defined more broadly than its typical industry definition to include an appropriate allocation of fixed costs."[61] To accomplish this, Syngenta proposes amending the proposed Final Judgment to require Bayer to supply BASF these seed treatment products at "fully absorbed cost," an accounting measure that includes an allocation of certain fixed costs.[62]

Syngenta's concerns are misplaced, and the proposed Final Judgment changes that Syngenta requests are not necessary. The seed treatment supply provisions aim to place BASF in

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[58] Proposed Final Judgment at § IV(G).
[59] Syngenta Comment (Exhibit 12) at 1, 3-4.
[60] *Id.* at 3.
[61] *Id.* at 4.
[62] *Id.*

the same cost position as Bayer before the merger. By doing so, the remedy preserves competition during the transition period since BASF's pricing decisions will be based on the same underlying cost structure as Bayer prior to the merger. To accomplish this, the proposed Final Judgment uses the economic concept of "variable cost," *i.e.,* "that part of cost which varies with the level of output."[63] This measure of costs will capture costs that directly relate to Bayer's production of seed treatments for BASF—including, for example, a per-unit allocation for machine use, where appropriate—regardless of the accounting label that industry participants might place on any specific cost item. Thus, there is no basis for concern that Bayer will be selling seed treatments to BASF at a fraction of the production costs. To the contrary, BASF will fully reimburse Bayer for the costs directly related to producing these seed treatment products.

Syngenta's proposal to change the cost standard for seed treatments would also introduce needless complication. Bayer is required to provide several additional products and services at "variable cost" for the purpose of placing BASF in the same cost position as Bayer before the merger. Amending the proposed Final Judgment to introduce another cost standard specific to seed treatments would create confusion in addition to being unnecessary. It would also create a risk that Bayer would face conflicting obligations across jurisdictions, as the European Commission and other jurisdictions have imposed the same variable cost requirements as the United States in their respective settlement documents.[64]

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[63] *See, e.g.*, *Variable cost*, Oxford Dictionary of Economics (5th ed. 2017).
[64] *See, e.g.*, European Commission, Case M.8084 – Bayer/Monsanto, Modification of Commitments, Schedule, at ¶ 21, p. 39 (divested seed treatments to be tolled at variable cost), at ¶ 68(c) (glufosinate formulations supplied at variable cost), and 9, 13, 28, 65 and 67 (transitional supplies or services will be supplied by Bayer at variable cost), dated April 11, 2018, available at http://ec.europa.eu/competition/mergers/cases/decisions/m8084_12985_3.pdf; Competition Commission of India, Order under Section 31(7) of the Competition Act, Combination

ii. BASF Cannot Resell Bayer Seed Treatments Supplied under Section IV(G)(1) for Use on Non-BASF Seeds

Section IV(G)(1) of the proposed Final Judgment requires Bayer to supply BASF with the seed treatments that Bayer is not divesting to BASF but that Bayer has been using in the divested seed businesses. These provisions allow BASF to seamlessly continue marketing the same combinations of seeds and seed treatments that Bayer offered before the merger while BASF transitions to alternative sources of supply. Syngenta suggests, however, that this section could be read to permit BASF to resell these Bayer seed treatments for use on other companies' seeds in competition with Syngenta, Bayer, and other producers of seed treatments. Syngenta proposes amending the proposed Final Judgment to expressly prohibit this.[65]

Syngenta's proposed amendment is unnecessary, as it would merely repeat what is already clear from the text of the proposed Final Judgment. The title of Section IV(G)(1) makes plain that the provision relates to "Seed Treatment Supply Agreements *for* Broad Acre Seeds and Traits Business,"[66] that is, the agreements are intended to supply the Broad Acre Seeds and Traits business BASF is acquiring from Bayer. Moreover, the body of the provision limits its scope to Bayer seed treatments that have been "used by Bayer in the Broad Acre Seeds and Traits Business."[67] The European Commission Commitments likewise prohibit resale because they require Bayer to supply these seed treatments to BASF for use on BASF seeds.[68] Given that

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Registration No. C-2017/08/523, at ¶ 180(c), p. 54 (glufosinate formulation to be supplied at variable cost) and ¶ 181, p. 54 (transitions supplies or services provided at variable cost), dated June 14, 2018, available at https://www.cci.gov.in/sites/default/files/Notice_order_document/Order_14.06.2018.pdf.

[65] Syngenta Comment (Exhibit 12) at 2.

[66] Proposed Final Judgment § IV(G)(1) (emphasis added).

[67] *Id.* § IV(G)(1).

[68] *See* European Commission, Case M.8084 – Bayer/Monsanto, Modification of Commitments, Schedule, at ¶ 66(d) and 66(e), p. 52 (in connection with the divestiture of Broad Acre Seeds and Traits, requiring Bayer to supply seed treatment "used on" divested canola seeds and seed

Section IV(G)(1) is limited to the supply of seed treatments to BASF for use on its own seeds, Syngenta's proposed amendment should be rejected.

iii. The Proposed Final Judgment Allows BASF to Sell Seed Treatments to Bayer

Syngenta is also concerned that nothing prevents BASF from entering into arm's-length commercial agreements to supply Bayer with the seed treatments products it is obtaining through the divestitures. Syngenta contends that allowing BASF to enter into such an agreement with Bayer would undermine the remedy because it would "permit Bayer to recreate the sort of product bundles that were the source of significant concern in the Transaction."[69] Syngenta proposes to close the purported "loophole" by amending the proposed Final Judgment to prohibit BASF from selling divested seed treatments to Bayer except for use in Bayer's branded seed business.[70]

Syngenta's concerns are based on a fundamental misunderstanding of the United States' theory of harm relating to seed treatments and the basis for requiring divestiture of certain seed treatment products. The United States has alleged that the merger would substantially lessen competition through the vertical integration of Bayer and Monsanto in one respect: by combining Monsanto's strong position in corn and soybean seeds with Bayer's dominant position in certain seed treatments, the merger would give the combined company the incentive and ability to harm its seed rivals by raising the price of those seed treatments—a key input for genetically modified seeds. For example, before the merger, Bayer sold the only seed treatment that effectively controls a destructive pest called corn rootworm. Because Bayer did not sell corn

treatment "for divested cotton and soy varieties"), dated April 11, 2018, available at http://ec.europa.eu/competition/mergers/cases/decisions/m8084_12985_3.pdf.

[69] Syngenta Comment (Exhibit 12) at 2.

[70] *Id.* at 2-3.

seeds itself, it had a strong incentive to sell that seed treatment to all corn seed companies, including Monsanto's rivals. But the merger changes this calculus because Bayer now owns Monsanto, the largest supplier of corn seeds in the United States. If Bayer were permitted to retain its corn seed treatment, it would have a strong incentive to raise the price of that treatment to its seed rivals (or stop selling it altogether), knowing that its rivals rely on the product and would be less able to compete effectively without it.

In other words, the possibility that Bayer may continue to use the divested seed treatments on its seeds does not, in and of itself, give rise to competitive harm. Rather, the problem is one of incentives. By vesting control of both products in one firm, the merger would create an incentive for the combined firm to raise its rivals' costs to make it harder for them to compete to sell seeds. To ensure that the merger does not give rise to this incentive to foreclose other competitors, the United States has required Bayer to divest certain seed treatments to BASF. In doing so, the United States has preserved the competitive status quo: the seeds and seed treatments remain under the control of different firms, Bayer and BASF, respectively. Accordingly, the divestiture of these seed treatments to BASF fully resolves the vertical foreclosure allegations in the Complaint.

iv. Concerns Regarding All Neonicotinoid Seed Treatments Are Outside the Scope of the Complaint

Sustainable Food Center comments that the merger should not be permitted unless Bayer divests, among other things, all its "neonicotinoid seed treatments."[71] "Neonicotinoids" refer to a particular chemical class of insecticides. Under the proposed Final Judgment, Bayer will divest seed treatments based on the chemical clothianidin, which is one type of neonicotinoid. Bayer also sells seed treatments based on the chemicals imidacloprid and thiacloprid, two other types of

[71] Sustainable Food Ctr. Comment (Exhibit 11).

neonicotinoid. The Complaint does not include a claim relating to these types of seed treatments. Accordingly, there is no basis for requiring Bayer to divest these products as a condition of approving the merger.

d. Comments Related to Digital Agriculture and Cross-Product Leveraging

Several commenters argue that allowing Bayer to retain Monsanto's leading digital agriculture platform will enhance the merged firm's ability to influence farmer choice in other areas, such as seed and crop protection markets.[72] Digital agriculture, although still emerging, refers to tools and services that allow farmers to collect, store, process, or interpret data about their crops. Digital agriculture is expected to drive an industry trend toward "integrated solutions"— combinations of seeds, traits, and crop protection products supported by digital farming technologies and other services. Certain commenters argue that the merged firm will be able to use its platform to recommend its own products, "locking in" farmers to the merged firm's portfolio of products.[73] Several commenters urge the United States to seek to block the merger altogether based on these concerns.[74] Other commenters propose modifications to the settlement on this basis. For example, Friends of the Earth and the Consumer Federation of America argue that Monsanto's digital agriculture platform should be divested instead of

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[72] NRDC Comment (Exhibit 9) at 4, 6, 9-10; Friends of the Earth Comment (Exhibit 7) at 2-3; Nat'l Family Farm Coal. Comment (Exhibit 8).

[73] NRDC Comment (Exhibit 9) at 4 (asserting that the bundled products would "effectively turn farmers into captured users"); Friends of the Earth Comment (Exhibit 7) at 3 (alleging that the merged firm will be "well-positioned to continue leveraging" Monsanto's platform "to sell more of its products"); Nat'l Family Farm Coal. Comment (Exhibit 8) at 1 (arguing that the merged firm will be able to "leverage the sale of one product into another"); Pollinator Stewardship Council Comment (Exhibit 10) at 2 (observing that "fewer technology 'platforms' will dominate the marketplace," making it hard for smaller companies to compete, and "farmers will be locked into using these platforms as fewer choices will be available in the marketplace")

[74] *See, e.g.*, NRDC Comment (Exhibit 9); Nat'l Family Farm Coal. Comment (Exhibit 8); Friends of the Earth Comment (Exhibit 7).

Bayer's.[75] Friends of the Earth also suggests that the merged firm should be required to update its privacy policy to allow farmers to more easily remove data from its digital agriculture platform.[76] Consumer Federation similarly urges the Court to impose "rigorous open access conditions" for its digital agriculture interfaces.[77]

The United States has not alleged anticompetitive effects arising from Bayer's acquisition of Monsanto's digital agriculture platform. Nonetheless, the United States recognizes that BASF's ability to compete in the future in the individual seed and crop protection markets that are subject of the Complaint may depend on the strength of BASF's digital agriculture platform. The leading global agricultural businesses (including Bayer and Monsanto) project that digital agriculture will be a key driver of seed and crop protection sales in the future. To ensure BASF has the digital agriculture capabilities it needs to replace Bayer as a competitor going forward, the proposed Final Judgment requires Bayer to divest all assets related to its digital agriculture portfolio and pipeline of products to BASF. Although Bayer's digital agriculture products are not as developed as Monsanto's, the divestiture provides BASF with similar scale, scope, and innovation incentives as Bayer before the merger.

Comments advocating for open access to digital agriculture data or for particular privacy policy provisions should be rejected as requests for regulatory relief. The merger does not directly implicate these issues. Moreover, behavioral remedies that require firms to commit to particular business actions, such as requiring open access or particular privacy provisions, are disfavored mechanisms for addressing the effects of a merger, as they are inherently more

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[75] Friends of the Earth Comment (Exhibit 7) at 3-4; Consumer Fed'n of Am. Comment (Exhibit 4) at 1.
[76] Friends of the Earth Comment (Exhibit 7) at 3-4.
[77] Consumer Fed'n of Am. Comment (Exhibit 4) at 2.

difficult to craft and administer and they risk unintended consequences. For example, imposing a remedy that restricts the behavior of one competitor (the merged firm) but not others may interfere with the competitive marketplace. The structural divestiture of Bayer's digital agriculture assets raises none of these concerns.

Several commenters also express broad concerns that the merged firm, by virtue of its broader portfolio of products including Monsanto's digital agriculture platform, will be able to leverage its significant position in certain markets to foreclose competition in other markets.[78] Many of these cross-product leveraging concerns appear to be animated by Monsanto's significant presence in traits: commenters fear that the merger will give the combined Bayer/Monsanto new opportunities to leverage its strength in trait markets to foreclose competition in other, unspecified, markets. For example, NRDC argues that Monsanto has leveraged its "virtual monopoly power" in seeds in anticompetitive ways in the past, and that a "larger, more-powerful Bayer/Monsanto corporation would be in an equal if not better position to do so in the future by denying access to key traits, charging monopoly prices, or coercing its competitors into anti-competitive collaboration."[79]

To the extent the commenters have concerns about anticompetitive effects in markets beyond those alleged in the Complaint and remedied by the proposed Final Judgment, the commenters have not identified them. Nor do the commenters explain why the merger, as remedied, would result in such harm. It would be inappropriate to require a remedy for such

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[78] NRDC Comment (Exhibit 9) at 3; Pollinator Stewardship Council Comment (Exhibit 10) at 3-4; Consumer Fed'n of Am. Comment (Exhibit 4) at 1-2.

[79] NRDC Comment (Exhibit 9) at 3. *See also* Consumer Fed'n of Am. Comment (Exhibit 4) at 1-2 (asserting that the proposed remedy fails to prevent the merged firm from "expanding its market power and vertical leverage"); Pollinator Stewardship Council Comment (Exhibit 10) at 3-4 (asserting that "Monsanto can already exert considerable market power through its cross-licensing agreements" and "[the merger] would likely lessen competition even further").

broad, amorphous concerns, unsupported by the rigorous antitrust analysis the law requires. Furthermore, any such concerns go beyond the allegations in the complaint and are thus beyond the scope of Tunney Act review. *See U.S. Airways*, 38 F. Supp. 3d at 76 ("'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. . . .'") (quoting *Graftech*, 2011 WL 1566781, at *13). Going forward, the antitrust laws will continue to apply to the merged firm, and the United States will challenge practices that run afoul of applicable statutes.

e. Comments Regarding Procedural Matters, Including Government Oversight and Enforcement of Proposed Final Judgment Compliance

Several commenters express concerns about procedural aspects of the proposed Final Judgment. One commenter argues that the judicial review procedures set forth in the APPA may be inapt in large transactions requiring complicated divestitures. Another commenter argues that the proposed Final Judgment should require, rather than permit, the appointment of a monitoring trustee. Two commenters are concerned that the proposed Final Judgment's jurisdictional provisions are inadequate. One commenter fears that the proposed Final Judgment's enforcement provisions improperly favor the United States. As explained below, these concerns lack merit and do not require any amendment of the proposed Final Judgment.

i. The Standard of Review Established by Congress Is Appropriate

One commenter, Daniel Bellemare, argues that a proposed decree remedying the anticompetitive effects of a complex transaction such as Bayer's acquisition of Monsanto may not be suited for a public interest review under the APPA.[80] Mr. Bellemare suggests instead that

[80] Bellemare Comment (Exhibit 5) at 14-15.

a trial or preliminary injunction hearing may be a better forum for the resolution of complicated antitrust issues.[81]

Irrespective of the size or nature of a transaction, the APPA requires a court to conduct a limited public interest determination when reviewing a proposed decree. Congress vested authority in the Department of Justice, rather than the courts, to investigate and prosecute violations of the Federal antitrust laws. *See* 28 C.F.R. §§ 0.40, 0.41; 15 U.S.C. §§ 4, 9, 15a. This prosecutorial authority includes the ability to craft remedies, such as the proposed Final Judgment. In light of the fact that a proposed decree is the product of the United States' exercise of prosecutorial discretion, courts have interpreted the APPA to permit only a limited inquiry into whether a settlement is "within the reaches of the public interest." *Microsoft,* 56 F.3d at 1458-61 (citation omitted). The court's public interest determination focuses on whether the settlement appropriately addresses the allegations identified in the complaint. *Id.* at 1458-59; *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (the court's "scope of review remains sharply proscribed by precedent and the nature of the Tunney Act proceedings"). The APPA does not require a court to expend judicial time and resources considering alternative remedies or probing the adequacy of the complaint itself. The limited judicial review required by the APPA is appropriate for this matter and is not unduly burdensome for this Court.

ii. Modifications Concerning the Monitoring Trustee Are Unnecessary

The State Attorneys General propose that the appointment of a monitoring trustee should be required, rather than left to the "discretion" of the United States.[82] This proposal is moot. This Court granted the United States' motion to appoint the Honorable Michael B. Mukasey as Monitoring Trustee on August 14, 2018.

[81] *Id.* at 15.
[82] State Attorneys General Comment (Exhibit 2) at 2.

iii. The Proposed Final Judgment's Jurisdictional Provisions Are Sufficient

The State Attorneys General contend that the Court should affirmatively retain jurisdiction throughout the ten-year term of the Final Judgment.[83] The commenters appear to misunderstand the terms of the proposed Final Judgment, which provides that the Court retains jurisdiction, without limitation, to enable any party to seek orders or directions necessary or appropriate to carry out the terms of the proposed Final Judgment.[84]

By its terms, the Final Judgment is to expire ten years from the date of its entry; however, the United States may terminate the Final Judgment after six years if it finds that the divestitures have been completed and the continuation of the Final Judgment is no longer necessary or in the public interest.[85] The State Attorneys General ask that the Court require that the proposed Final Judgment, or at least certain of its provisions, remain in place for the full ten-year term, with no option to terminate after six years.[86] This request is unnecessary. The proposed Final Judgment is designed to address the very potential for uncertainty that troubles the State Attorneys General: it allows the decree to remain in place for ten years if competition so requires, but it also reasonably allows for the decree to be terminated earlier if it becomes unnecessary to protect competition.

This flexibility is important because, while equitable relief under the Clayton Act "should unfetter a market from anticompetitive conduct," *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972), at the same time relief "must not be punitive," *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). District courts have regularly approved consent

[83] *Id.*
[84] Proposed Final Judgment § XIII.
[85] *Id.* § XV.
[86] State Attorneys General Comment (Exhibit 2) at 3, 8.

decrees providing for the sort of flexibility contemplated here. *See, e.g.*, *United States v. Northrup Grumman Corp.*, No. 1:02 CIV 02432, 2003 U.S. Dist. LEXIS 10636, at *26 (D.D.C. June 10, 2003) (approving decree with seven-year term and option for government to seek three-year extension); *United States v. Alex Brown & Sons, Inc.*, No. 96 CIV 5313 (RWS), 1997 WL 314390, at *8 (S.D.N.Y. Apr. 24, 1997) (approving decree with a ten-year term except that certain portions of the decree would expire in five years and the Antitrust Division had the option to terminate those portions after only two years); *United States v. Lykes Bros. Steamship Co.*, No. CIV.A. 95 1839, 1995 WL 803552, at *4 (D.D.C. Oct. 5, 1995) (approving decree with five-year term and option for government to extend an additional five years).

If, after six years (but before the end of the full ten-year term) the divestitures have been completed and the United States determines that effective competition thereby has been preserved, then the public interest is not served by a continuation of the decree and the associated burdens placed upon the United States, the Defendants, and the Court. It should also be noted that the proposed Final Judgment also includes a provision allowing the United States to seek a one-time extension of the decree in any enforcement proceeding in which the Court finds that the Defendants have violated the decree. In any event, in applying its review function under the Tunney Act, the district court's role is not to make a *de novo* determination of what the public interest requires but rather to determine whether the settlement reflected in the proposed final judgment falls "within the reaches of the public interest." *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1237 (D.C. Cir. 2004) (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995)). This provision falls within those reaches.

In its comment, NFIB complains that the proposed Final Judgment's jurisdictional provision does not explicitly say "[t]he Court has determined that this matter constitutes a case or

controversy."[87] This argument has no merit. Although "a court must assure itself of the existence of subject-matter jurisdiction," *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 511 (D.C. Cir. 2018), a court's written decision need not "explicitly discuss it," *Trans World Airlines v. Morales*, 949 F.2d 141, 144 (5th Cir. 1991), *aff'd in part*, *rev'd in part*, 504 U.S. 374 (1992). More importantly, the Supreme Court has already determined that a proposed antitrust consent decree filed simultaneously with the United States' complaint satisfied Article III's case or controversy requirement because, among other things, "a suit for an injunction deals primarily, not with past violations, but with threatened future ones." *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928). It is sufficient, therefore, for the proposed Final Judgment to state that the "Court has jurisdiction over the subject matter of and each of the parties hereto with respect to this action."[88]

iv. The Proposed Final Judgment Appropriately Grants the United States Discretion over Certain Decisions

The NFIB claims the phrase "sole discretion," as it applies to the United States throughout the proposed Final Judgment, "encourages, if not authorizes, arbitrary action," and requests that a new paragraph be inserted in the proposed Final Judgment imposing an explicit duty on the United States "to act reasonably in the circumstances."[89]

Certain aspects of the proposed Final Judgment contemplate flexibility to ensure that the assets are handed off smoothly and effectively. For example, Paragraph IV(F)(2) of the proposed Final Judgment provides that, within one year, if BASF determines that additional Bayer assets are reasonably necessary for the continued competitiveness of the divested businesses, BASF may request that the United States require Bayer to divest additional assets.

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[87] NFIB Comment (Exhibit 13) at 2.
[88] Proposed Final Judgment § I.
[89] NFIB Comment (Exhibit 13) at 2-3.

This provision allows BASF to fill any gaps that could not reasonably be foreseen before it started operating those businesses. At the same time, an efficient and impartial arbiter is needed to ensure that any such requests are valid. With respect to this and all other provisions allowing the United States to exercise its discretion, the United States intends to strike a balance between ensuring that BASF has the resources to replace Bayer as an independent and vigorous competitor and guarding against BASF seeking more from Bayer than is necessary or BASF relying on Bayer for transition services for longer than necessary.

The term "sole discretion" appears regularly in consent decrees approved by this and other courts as in the public interest. *See, e.g., United States v. Heraeus Electro-Nite Co., LLC*, No. 1:14-CV-00005-JEB, 2014 U.S. Dist. LEXIS 62755, at *6 (D.D.C. Apr. 7, 2014) (approving antitrust consent decree ordering divestiture "to an Acquirer acceptable to the United States, in its sole discretion"); *United States v. Anheuser-Busch InBev SA/NV*, No. CV 13-127(RWR), 2013 U.S. Dist. LEXIS 167309, at *14 (D.D.C. Oct. 21, 2013) (approving decree providing that "United States, in its sole discretion, may agree to one or more extensions of [] time period [to complete divestiture]"). NFIB's suggestion ignores that "a presumption of regularity attaches to the actions of Government agencies" such as the Department of Justice. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)). NFIB has offered no reason to believe the United States would exercise its discretion other than in ways that it reasonably determines would best advance its longstanding mission of protecting competition and consumers. The proposed modification should be rejected.[90]

[90] *See Mission*, U.S. Dep't of Justice Antitrust Div., https://www.justice.gov/atr/mission (last updated July 20, 2015) ("The mission of the Antitrust Division is to promote economic competition," which "benefits American consumers through lower prices, better quality and greater choice").

v. The Proposed Final Judgment Is Not the Product of "Economic Leverage"

NFIB misconstrues the proposed Final Judgment when it insists that "[t]he Court should not permit the Justice Department to use the economic leverage it gained over the Defendants by filing an antitrust lawsuit to pressure the Defendants to give up the assistance of corporate counsel."[91] The proposed Final Judgment merely gives the United States the right "to interview, either informally or on the record, Defendants' officers, employees, or agents," for compliance purposes, with "their individual counsel present."[92] That provision does not, however, exclude corporate counsel. NFIB's comment also ignores that "in the absence of clear evidence to the contrary, courts presume that [government officials] have properly discharged their official duties." *Chem. Found.*, 272 U.S. at 14-15.

NFIB similarly complains that the Defendants' agreement to a "preponderance of the evidence" standard in decree enforcement proceedings was a product of the United States' purported "economic leverage."[93] The terms of the proposed Final Judgment were determined through negotiation, and both sides benefit in certain ways from the agreement to a preponderance standard. The United States and the public gain by making the investigation and enforcement of antitrust consent decrees more efficient; the clear and convincing evidence standard, which would otherwise apply, would subject the parties to more onerous and resource-intensive investigations. The preponderance standard lessens those burdens, while still ensuring that the United States carries the burden of proving a decree violation. The D.C. Circuit has already recognized that the standard of proof in decree enforcement proceedings can be waived. *See United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 338-39 (D.C. Cir. 2014) (concluding

[91] NFIB Comment (Exhibit 13) at 3.
[92] Proposed Final Judgment § X.
[93] NFIB Comment (Exhibit 13) at 4.

that the defendant waived the "clear and convincing" standard by oral representation in the district court). NFIB has identified no valid reason why the Defendants' waiver of the clear and convincing standard here should not similarly be honored.

f. Additional Issues Raised By Commenters

i. Commenters Concerned about Industry Consolidation Fail to Acknowledge the Effect of the Remedy

Several commenters oppose the merger based on general concerns about consolidation in the agricultural industry. They view the merger as part of a pattern of consolidation and raise concerns regarding the impact of such consolidation on prices and innovation. For example, the comment by certain Members of Congress notes that this transaction "comes in the midst of other agro-chemical company mergers . . . and is only the latest example in decades of consolidation in the industry."[94] NRDC states that "today's agricultural inputs markets already resemble the tight, seemingly impenetrable oligopoly that the Clayton Act abhors as a result of considerable and unchecked consolidation over the past twenty years."[95] The Sustainable Food Center asserts that "[f]armers in our network have expressed growing concern with consolidation in the market for agricultural inputs."[96] While these commenters cite consolidation as a reason to block the merger, they fail to acknowledge that the remedy ensures that the merger will not increase concentration in the affected markets.[97]

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[94] Members of Cong. Comment (Exhibit 3) at 1.
[95] NRDC Comment (Exhibit 9) at 4.
[96] Sustainable Food Ctr. Comment (Exhibit 11) at 1.
[97] To the extent that commenters raised substantive issues regarding the efficacy of the relief contained in the proposed Final Judgment to remedy the competitive harm at issue in this transaction we discuss and respond to them above. A number of comments, however, expressed opposition to the merger without addressing any specific aspects of the transaction or the settlement. *See, e.g.*, Pollinator Stewardship Council Comment (Exhibit 10) at 1 (asking the United States to "block this biotechnology mega-merger"); ActionAid USA Comment (Exhibit 1) at 2 ("The only answer to this merger is NO.").

The United States agrees that the proposed merger, unremedied, poses a substantial threat to competition. At the same time, the United States is confident that the proposed divestitures to BASF will fully address those concerns. As detailed above in Section V(a), the proposed Final Judgment will ensure that BASF replaces Bayer as an independent and vigorous competitor in each of the markets in which the merger would otherwise lessen competition. The United States has gone to extraordinary lengths to ensure that this settlement will prevent increased concentration in the affected markets by vesting BASF with the full complement of assets, personnel, and rights needed to preserve competition in the affected markets.

It is well established that courts "must accord deference to the government's predictions about the efficacy of its remedies." *SBC Commc'ns*, 489 F. Supp. 2d at 17. According appropriate deference to the United States here, the proposed settlement is well within "the reaches of the public interest." *Microsoft*, 56 F.3d at 1461.

ii. Comments Regarding the Environmental Impact of Agricultural Chemicals Are Beyond the Scope of this Action

A number of commenters express concerns relating to the environment. Some commenters express broad concerns that the merger would result in environmental harm.[98] Others commenters express general concerns, not specific to the merger, about the effect of agricultural chemicals on wildlife, human health, and the environment.[99] NRDC expresses concern about the effect of the merger on pollinators, specifically that Bayer may seek to leverage Monsanto's seed position to expand the use of neonicotinoid seed treatments and other pesticides, resulting in harm to pollinators.[100]

[98] ActionAid USA Comment (Exhibit 1) at 1; Members of Cong. Comment (Exhibit 3) at 2.
[99] Sierra Club Comment (Exhibit 14) at 1; Nat'l Family Farm Coal. Comment (Exhibit 8) at 1.
[100] NRDC Comment (Exhibit 9) at 7-10.

These comments are beyond the purview of the Tunney Act. The United States did not allege that the merger would result in harm to the environment and, thus, environmental concerns are beyond the scope of this proceeding and do not provide a basis for rejecting the proposed Final Judgment. *See U.S. Airways*, 38 F. Supp. 3d at 76 ("'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. . . .'") (quoting *Graftech*, 2011 WL 1566781, at *13).

Moreover, commenters generally concerned about the environmental impact of agricultural chemicals offer no reason why the merger would have an effect on such issues. Similarly, commenters who broadly allege that the merger will result in environmental harm offer no specific basis for their concerns. Regarding NRDC's concern that the merger will increase the use of neonicotinoid seed treatments, as described in Section V(d), the United States carefully considered whether the merger would allow the merged firm to leverage Monsanto's seed position to advance its position in certain seed treatments. Ultimately, the United States did not find a basis to compel the divestiture of all of the neonicotinoid seed treatments that are the subject of NRDC's complaint.

iii. The United States Conducted an Impartial and Independent Merger Analysis

Members of Congress refer to news reports that raise the possibility that the White House may have "exercised outsized influence" in the review of this transaction and other deals.[101] The commenters do not make any specific claims regarding the investigation of this merger, but rather urge that antitrust enforcement "continue to be treated as a law enforcement matter properly left to the independent judgment of DOJ."[102]

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[101] Members of Cong. Comment (Exhibit 3) at 2-3.
[102] *Id.* at 2.

Any suggestion that the settlement at issue here is or could be the result of improper lobbying or political pressure is both unsubstantiated and meritless. The settlement followed a thorough and comprehensive investigation, and it is the result of extensive, good faith negotiations between the United States and Defendants. The proposed Final Judgment requires substantial relief that addresses the competitive harm alleged in the Complaint. In short, there is no basis to allege that the settlement results from anything other than the United States' independent investigation and analysis.

VI. Conclusion

After careful consideration of the public comments, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comments and this response are published pursuant to 15 U.S.C. § 16(d).

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Respectfully submitted,

/s/

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