UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
Department of Justice, Antitrust Division
450 5th Street, NW, Suite 8000
Washington, DC 20530

Plaintiff,

v.

Symrise AG
Mühlenfeldstraße 1
37603 Holzminden, Germany

and

IDF Holdco, Inc.
3801 East Sunshine Street
Springfield, MO 65809

and

ADF Holdco, Inc.
3801 East Sunshine Street
Springfield, MO 65809

Defendants.

CASE NO.: 1:19-cv-03263

JUDGE: Hon. Royce Lamberth

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

On January 31, 2019, Symrise AG ("Symrise") agreed to acquire International Dehydrated Foods, LLC ("IDF"), and American Dehydrated Foods, LLC ("ADF") (collectively "IDF/ADF"), from IDF Holdco, Inc. and ADF Holdco, Inc., for approximately $900 million. The United States filed a civil antitrust Complaint on October 30, 2019, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen competition for the manufacture and sale of chicken-based food ingredients (including chicken broth, chicken fat, and cooked chicken meat) for manufacturers of food for people and pets (collectively "food manufacturers") in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

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 are designed to address the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest, to Kerry, Inc. ("Kerry"), a global manufacturer of ingredients and recipe solutions for the food and beverage industry, or another acquirer approved by the United States, Symrise's newly constructed facility located in Banks County, Georgia (the "Banks County facility") which was built to manufacture and sell chicken-based food ingredients; along with certain tangible and intangible assets (collectively, the "Divestiture Assets"). Under the terms of the Hold Separate, Defendants will take certain steps to ensure that the Divestiture Assets are operated as a competitively independent, economically viable and ongoing business concern, which will remain independent and

uninfluenced by Symrise, and that competition is maintained during the pendency of the ordered divestiture.

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

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants

Symrise, an Aktiengesellschaft, or publicly listed company, organized under the laws of Germany, is headquartered in Holzminden, Germany. Symrise is active globally in three main business segments: (i) flavor; (ii) nutrition; and (iii) scent and care. In its 2018 fiscal year, Symrise had global sales of EUR 3.154 billion (or approximately $3.53 billion). Symrise's nutrition segment, represented by its Diana division, which also operates in the United States, specializes in producing natural functional ingredients for food manufacturers and aquaculture.

In October 2018, Diana Food, part of the Diana division within Symrise, opened the Banks County facility. The Banks County facility marked Symrise's entrance into the U.S. market for the manufacture and sale of chicken-based food ingredients for food manufacturers, to compete with incumbent suppliers, such as IDF/ADF. Production at the Banks County facility began in 2019. Diana Food's sales for chicken-based food ingredients manufactured at the Banks County facility continue to ramp up and Symrise expects, and has budgeted for, significant sales

by year-end 2019. Moreover, Symrise envisions continuing to gain shares of the U.S. market thereafter.

IDF Holdco, Inc. and ADF Holdco, Inc. are the ultimate parent entities of IDF and ADF. IDF and ADF are limited liability companies headquartered in Springfield, Missouri. IDF manufactures and sells chicken-based food ingredients. ADF owns 50% of Food Ingredient Technologies, LLC ("Fitco") which also manufactures and sells chicken-based food ingredients. Although legally separate entities, IDF and ADF operate as an integrated business unit and collectively are the largest developers and manufacturers in the United States of chicken-based food ingredients for food manufacturers. The companies develop and manufacture chicken-based food ingredients at facilities in Monett, Missouri, and Anniston, Alabama. IDF/ADF's 2018 annual total sales were approximately $266 million, of which approximately $177 million was attributable to the sale of chicken-based food ingredients.

B. The Competitive Effects of the Transaction

1. Relevant Markets

As explained in the Complaint, the manufacture and sale of chicken-based food ingredients (including chicken broth, chicken fat, and cooked chicken meat) for food manufacturers is a relevant product market under Section 7 of the Clayton Act, 15 U.S.C. § 18. The ingredients at issue are human-grade quality and are relied upon by food manufacturers for their taste and nutritional attributes. The chicken broth, chicken fat, and cooked chicken meat are each available in different forms and offer different taste profiles, nutrition, and ingredient characteristics that allow for limited substitution with other products.

Alternatives to chicken-based food ingredients may lack the taste, nutritional attributes, form, or labelling abilities desired by food manufacturers. For example, a purchaser of human-grade natural chicken broth for use in a finished chicken broth may not switch to turkey broth. Nor is a purchaser of human-grade natural cooked chicken meat likely to switch to turkey, tofu, or any other meat product for use in chicken noodle soup when the price of human-grade natural chicken broth or cooked chicken meat increases by a significant non-transitory amount. Additionally, some pet food manufacturers producing end-products with certain ingredient or health claims use only human-grade chicken-based food ingredients, and cannot make the necessary ingredient or health claims with non-human-grade products.

Although some food manufacturers may be able to reformulate their end-products to decrease the amount of chicken-based food ingredients called for in a certain formula or recipe, at least some manufacturers may not be able to reformulate to an extent that would allow for complete substitution. Additionally, even a small reformulation to limit the amount of chicken-based food ingredients used in a given recipe requires time-consuming reformulation work by food manufacturers. This is especially true because a food manufacturer may need its end-product to maintain the same nutritional and taste attributes that consumers expect, making switching, even in small amounts, impractical and potentially costly. For these reasons, a hypothetical profit-maximizing monopolist manufacturer and seller of chicken-based food ingredients for food manufacturers in the United States could profitably impose at least a small but significant and non-transitory price increase.

The relevant geographic market for the manufacture and sale of chicken-based food ingredients for food manufacturers is the United States. Domestic customers of chicken-based food ingredients for use in food for human consumption or pet consumption cannot buy the products from outside of the United States to use domestically because of restrictions imposed by the United States Department of Agriculture ("USDA") that prohibit importation into the United States of natural chicken ingredients. Accordingly, the United States is the relevant geographic market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. Competitive Effects

As explained in the Complaint, the proposed acquisition would eliminate the burgeoning competition between IDF/ADF and Symrise, the likely effect of which would be a substantial lessening of competition for the manufacture and sale of chicken-based food ingredients for food manufacturers, resulting in higher prices and lower quality products. The relevant market is highly concentrated, with IDF/ADF having a 54% market share by capacity of the chicken-based food ingredients market and 2018 sales of $177 million. Symrise recently entered this market through the construction of the Banks County facility which began to sell chicken-based food ingredients to food manufacturers earlier this year, including to some of IDF/ADF's largest customers. The brand-new plant has the capacity to take approximately 23% of the market, making it IDF/ADF's largest competitor. This would give the merged company more than three-quarters of the market by capacity for the manufacture and sale of chicken-based food ingredients, with no other individual competitor having more than a 6% share.

3. Entry

As alleged in the Complaint, entry of additional competitors into the market for the manufacture and sale of chicken-based food ingredients for food manufacturers is unlikely to be timely, likely, or sufficient to prevent the harm to competition that would result if the proposed transaction were consummated.

Any new entrant would need to develop infrastructure and research and development capabilities in order to start manufacturing and selling chicken-based ingredients. This would require significant time and financial resources as Symrise's recent entry experience demonstrates. Symrise, a company with significant chicken-based food ingredient operations in Europe, still needed almost three years and over $54 million dollars to construct the Banks County facility. Any new entrant also would need to work with food manufacturers to develop chicken-based food ingredients that meet the specific flavor, nutritional and other characteristics sought by the customer. This often requires extensive and time-consuming testing between a facility and the food manufacturer customer. Finally, food manufacturers often are reluctant to switch from an established chicken-based food ingredients manufacturer given the close relationships that develop, presenting a further hurdle to any new entrant.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint. The proposed Final Judgment requires Symrise, within forty-five (45) calendar days after the entry of the Hold Separate by the Court, to divest the Divestiture Assets to Kerry or another acquirer approved by the United States. The assets must be divested in such a way as to satisfy the United States, in its sole discretion, that they can and

will be operated by the acquirer as a viable, ongoing business that can compete effectively in the market for the manufacture and sale of chicken-based food ingredient for food manufacturers. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with prospective acquirers.

The proposed Final Judgment also contains provisions designed to promote compliance and make the enforcement of the Final Judgment as effective as possible. Paragraph XIII(A) provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XIII(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore competition that would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIII(C) of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the proposed Final Judgment, Paragraph XIII(C) provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, Defendants will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

Paragraph XIII(D) states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired. This provision, therefore, makes clear that, for four years after the Final Judgment has expired, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XIV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and

Defendants that the divestiture has been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

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 neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will

be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Robert Lepore
Chief, Transportation, Energy, and Agriculture Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 8000
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

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Symrise's acquisition of IDF/ADF. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the manufacture and sale of chicken-based food ingredients for food manufacturers in the United States. Thus, the proposed Final Judgment achieves all or

substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 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); *United States v. U.S. Airways Grp., 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 a court's review of a consent judgment is limited and only inquires

"into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the U.S. 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 proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court is "not to make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *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." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at

1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case"). The ultimate question is whether "the remedies [obtained by the Final Judgment 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 W. Elec. Co.*, 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 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, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added 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 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). "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 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. DETERMINATIVE DOCUMENTS

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

Dated: November 18, 2019

Respectfully submitted,

/s/ William M. Martin

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2019, I caused a copy of the foregoing Competitive Impact Statement to be served on counsel for defendants in this matter in the manner set forth below:

Via the Court's ecf system.

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