UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. STONE CANYON INDUSTRIES HOLDINGS LLC; SCIH SALT HOLDINGS INC; MORTON SALT, INC.; and K+S AKTIENGESELLSCHAFT, *Defendants*.	Civil Action No.: 1:21-cv-01067-TJK

COMPETITIVE IMPACT STATEMENT

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (the "APPA" or "Tunney Act"), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment filed in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On October 5, 2020, Stone Canyon Industry Holdings LLC ("Stone Canyon") and its portfolio company SCIH Salt Holdings Inc. ("SCIH") agreed to acquire the K+S Aktiengesellschaft ("K+S AG") Operating Unit Salt Americas business, a bundle of several subsidiaries including Morton Salt, Inc. ("Morton"). The United States filed a civil antitrust Complaint on April 19, 2021, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen competition in the

production and sale of evaporated salt products, including pharmaceutical-grade salt in the United States and Canada, "round-can" table salt in the United States, and bulk evaporated salt in the northeastern United States, 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 proposed Final Judgment and an Asset Preservation and Hold Separate Stipulation and Order ("Stipulation and Order"), which are designed to remedy the loss of competition alleged in the Complaint.

Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest SCIH's subsidiary, US Salt LLC ("US Salt").

Under the terms of the Stipulation and Order, Defendants must take certain steps to ensure that US Salt is operated as a competitively independent, economically viable, and ongoing business concern, which must remain independent and uninfluenced by Defendants, and that competition is maintained during the pendency of the required divestiture. On April 22, 2021, the Court entered the Stipulation and Order.

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 and the Proposed Transaction

Stone Canyon is an industrial holding company incorporated in Delaware and headquartered in Los Angeles, California. Stone Canyon acquired Kissner Group Holdings LP, which it later renamed SCIH, in April 2020.

SCIH is a subsidiary of Stone Canyon and is headquartered in Overland Park, Kansas. In 2020, SCIH had revenues of approximately $1 billion. SCIH is a leading supplier of salt products, including evaporated salt products.

K+S AG is a chemical company headquartered in Kassel, Germany. In 2020, K+S AG reported revenues of approximately $4.4 billion. K+S AG's Operating Unit Salt Americas business includes Morton as well as K+S Windsor Salt, which sells salt products in Canada, and Sociedad Punta de Lobos, which sells salt products in Chile.

Morton is a K+S AG subsidiary with approximately $1 billion in revenue in 2020. Morton is the largest supplier of pharmaceutical-grade salt in the United States and Canada, the largest supplier of "round-can" table salt in the United States, and one of only three suppliers of bulk evaporated salt in the northeastern United States.

Pursuant to a Transaction Agreement dated October 5, 2020, SCIH agreed to acquire K+S AG's Operating Unit Salt Americas business, including Morton, for approximately $3.2 billion.

B. Relevant Product Markets

Morton and SCIH's US Salt subsidiary both produce and sell evaporated salt. Evaporated salt is a type of sodium chloride produced through "vacuum evaporation." In the vacuum evaporation process, water is pumped into a salt deposit where the salt dissolves, and the resulting brine is forced into an evaporator on the surface where it is boiled in a series of pans until only the salt remains. Evaporated salt is nearly 100% sodium chloride and contains almost no other trace minerals. Because of the evaporation process, individual grains of evaporated salt are also more consistent and regularly shaped than other forms of salt.

Evaporated salt is distinct from salt created through other production methods, such as rock salt and solar salt. Rock salt is mined and then crushed into smaller sizes before being transported to the surface. Rock salt is less expensive to produce than evaporated salt, but it is also coarser, irregularly shaped, and contains other minerals and impurities. As a result, rock salt is used for applications that have less demanding quality requirements such as de-icing roads. Solar salt is created when salt water is captured in shallow ponds where the sun evaporates most of the water. It can only be produced in warm climates where the evaporation rate exceeds the precipitation rate. Solar salt is less pure and not as uniform in shape as evaporated salt, but it is purer than rock salt. Solar salt is used for applications such as water softening.

Evaporated salt typically is used in applications that require the highest quality of salt, such as human consumption. There are different types of evaporated salt that have different characteristics, end uses, and customers. As alleged in the Complaint, three types of evaporated salt produced by Defendants constitute relevant product markets—pharmaceutical-grade salt, round-can table salt, and bulk evaporated salt.

i. Pharmaceutical-Grade Salt

Pharmaceutical-grade salt is the grade of salt with the highest percentage of sodium chloride and thus is the purest grade of evaporated salt. Pharmaceutical-grade salt is used in the pharmaceutical industry as a building block for a number of life-saving treatments and products, including dialysis fluid, intravenous saline solution, and other medical products. Pharmaceutical-grade salt must be evaporated from salt deposits of extremely high purity and then undergo post-production processing to ensure that it contains virtually no trace minerals or other impurities.

Because of these stringent standards, the mining and production process for pharmaceutical-grade salt must be extensively monitored and documented to ensure purity and consistency across production batches. This documentation must then be provided to customers as a validation of the quality and purity of the pharmaceutical-grade salt.

Rock salt and solar salt do not meet the purity requirements for pharmaceutical-grade salt. Other grades of evaporated salt—for example, salt used in food processing—also cannot serve as a substitute for pharmaceutical-grade salt. Pharmaceutical-grade salt must contain a higher percentage of sodium chloride than other types of evaporated salt. This ensures that it does not contain trace minerals that would impact the efficacy of pharmaceutical products made using pharmaceutical-grade salt. Pharmaceutical-grade salt also cannot contain additives such as anti-caking agents that are added during the processing of other types of evaporated salt. Because of these requirements, pharmaceutical-grade salt is more difficult to produce than other forms of evaporated salt.

The Complaint alleges that, in the event of a small but significant increase in price by a hypothetical monopolist of pharmaceutical-grade salt, substitution away from pharmaceutical-grade salt would be insufficient to render the price increase unprofitable. Pharmaceutical-grade salt is therefore a line of commerce, or relevant product market, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

ii. Round-Can Table Salt

Table salt is evaporated salt that is processed for human consumption. It is regulated by the Food and Drug Administration ("FDA") and must meet high purity standards. Table salt also has a highly consistent size across granules and contains agents to prevent clumping and evaporation. Without additional processing—which raises price considerably—rock salt and

solar salt cannot meet the same purity requirements or achieve the same consistent granule size as table salt. Pharmaceutical-grade salt meets the purity requirements for table salt but does not contain the necessary agents to prevent clumping and evaporation. As such, rock salt, solar salt, and pharmaceutical-grade salt are not substitutes for table salt.

In the United States, the packaging format strongly preferred by consumers for table salt is the round can, which is a 26-ounce cardboard cylinder with a paper label and a metal spout. The round-can's size, shape, material, and metal spout make it an easy receptacle to use one-handed without spilling while cooking or refilling a salt shaker, which is a product characteristic that is highly valued by consumers. Reflecting consumer preference, retailers like grocery stores dedicate shelf space specifically to round-can packaging. As a result, approximately 95% of the table salt sold to consumers in the United States is sold in a round can.

Table salt packaged in other containers, such as boxes or bags, is not a reasonable substitute for round-can table salt. Boxes without a metal spout and bags are more difficult to use and store and may spill once opened. Larger packages of table salt also are not reasonable substitutes for round-can table salt, as they contain significantly more salt than an individual can practically use.

The Complaint alleges that, in the event of a small but significant increase in price by a hypothetical monopolist of round-can table salt, substitution away from round-can table salt would be insufficient to render the price increase unprofitable. Round-can table salt is therefore

a line of commerce, or relevant product market, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

iii. Bulk Evaporated Salt

Bulk evaporated salt is salt that is of sufficient purity to be used for human consumption that is sold in bulk form. Bulk evaporated salt is used to manufacture chemicals necessary to create essential everyday cleaning products such as disinfectants, soap, and bleach. Bulk evaporated salt is also an essential ingredient in nearly all processed pre-packaged foods, such as sauces, chips and other snacks, and frozen meals. Because bulk evaporated salt is incorporated into products end-consumers ingest or touch, it is regulated by the FDA and must meet stringent purity requirements.

Customers for bulk evaporated salt include chemical companies and large pre-packaged food manufacturers as well as smaller customers, such as bakeries, that use salt as an essential ingredient in their food products. To accommodate these customers, many of whom purchase thousands of tons of salt per year, evaporated salt is sold in bulk, by the truckload or in containers ranging from 50-pound bags to 2,000-pound "super-sacks."

Bulk evaporated salt is distinct from evaporated salt used for other applications. Compared to other types of evaporated salt, it has unique end-uses, customers, and packaging. While pharmaceutical-grade salt and round-can table salt are of sufficient purity, they are priced too high and packaged in quantities that are too small to serve as substitutes for bulk evaporated salt. Bulk evaporated salt also is distinct from rock salt and solar salt, which have lower purity

levels and non-uniform textures that make them unsuitable for chemical and food-production end uses. None of these types of salt can serve as a substitute to bulk evaporated salt.

The Complaint alleges that, in the event of a small but significant increase in price by a hypothetical monopolist of bulk evaporated salt, substitution away from bulk evaporated salt would be insufficient to render the price increase unprofitable. Bulk evaporated salt is therefore a line of commerce, or relevant product market, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

C. Relevant Geographic Markets

i. Pharmaceutical-Grade Salt

Pharmaceutical-grade salt is manufactured in only a few locations in the United States. From these locations, pharmaceutical-grade salt is shipped to customers throughout the United States and Canada.

While pharmaceutical-grade salt is shipped throughout the United States and Canada, shipping it from overseas is prohibitively expensive. This is because pharmaceutical-grade salt may not contain anti-caking agents. Without anti-caking agents, pharmaceutical-grade salt has a short shelf-life and may be damaged by the time and rigors of ocean-shipping. These limitations make ocean-shipping cost-prohibitive.

The Complaint alleges that a hypothetical monopolist of pharmaceutical-grade salt in the United States and Canada could profitably impose a small but significant non-transitory increase in price for pharmaceutical-grade salt without losing sufficient sales to render the price increase unprofitable. Accordingly, the Complaint alleges that the relevant geographic market for the purposes of analyzing the effects of the acquisition on pharmaceutical-grade salt under Section 7 of the Clayton Act, 15 U.S.C. § 18 is the United States and Canada.

ii. Round-Can Table Salt

Competition among round-can table salt suppliers occurs at a national level. Retailers, many of which are grocery store chains, mass merchandisers, or convenience stores with large national footprints, purchase round-can table salt for all of their locations at once, and suppliers ship round-can table salt from coast to coast.

Round-can table salt is not imported from outside the United States. In addition to being heavy—and therefore expensive to transport—table salt in other countries is typically sold in bags or cardboard boxes. As such, foreign suppliers of table salt typically lack the production facilities to produce round cans for the United States market.

The Complaint alleges that a hypothetical monopolist of round-can table salt in the United States could profitably impose a small but significant non-transitory increase in price for round-can table salt without losing sufficient sales to render the price increase unprofitable. Accordingly, the Complaint alleges that the relevant geographic market for the purposes of analyzing the effects of the acquisition on round-can table salt under Section 7 of the Clayton Act, 15 U.S.C. § 18 is the United States.

iii. Bulk Evaporated Salt

Bulk evaporated salt is a product that can be produced at a relatively low cost, but it is heavy and therefore expensive to transport. As a result, customers purchase from nearby suppliers to minimize shipping costs that can be high relative to the value of the bulk evaporated salt being purchased.

Both Morton and US Salt—along with only one other competitor—operate bulk evaporated salt production facilities in upstate New York. All three companies use these facilities to service customers in the northeastern United States, including Connecticut,

Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. Customers in the northeastern United States can economically procure bulk evaporated salt from only these three locations. Other more distant bulk evaporated salt facilities cannot compete successfully on a regular basis for customers in the northeastern United States because the suppliers are too far away, making transportation costs too great.

The Complaint alleges that a hypothetical monopolist of bulk evaporated salt in the northeastern United States could profitably impose a small but significant non-transitory increase in price for bulk evaporated salt without losing sufficient sales to render the price increase unprofitable. Accordingly, the Complaint alleges that the relevant geographic market for the purposes of analyzing the effects of the acquisition on bulk evaporated salt under Section 7 of the Clayton Act, 15 U.S.C. § 18 is the northeastern United States.

D. Anticompetitive Effects of the Proposed Transaction

The Complaint alleges that the proposed transaction would lessen competition and harm customers for pharmaceutical-grade salt in the United States and Canada, round-can table salt in the United States, and bulk evaporated salt in the northeastern United States by eliminating the substantial head-to-head competition that currently exists between Morton and US Salt. The Complaint further alleges that customers in each of these markets would pay higher prices and receive lower quality and service as a result of the acquisition.

i. Pharmaceutical-Grade Salt in the United States and Canada

As described in the Complaint, Morton and US Salt are the only two suppliers of pharmaceutical-grade salt in the United States and Canada, with Morton currently having a market share of around 77% and US Salt a share of around 23%. The acquisition would thus give the combined firm a monopoly in the sale of pharmaceutical-grade salt in the United States

and Canada, leaving pharmaceutical companies and other customers without a competitive alternative for this critical ingredient in dialysis fluid, intravenous saline solution, and other medical products.

The Complaint alleges that Morton and US Salt compete to sell pharmaceutical-grade salt on the basis of quality and surety of supply. This competition has resulted in higher quality, lower prices, and better customer service. The combination of Morton and US Salt would eliminate this competition and its future benefits to customers, including pharmaceutical companies. Post-acquisition, the combined Morton and US Salt likely would have the incentive and ability to increase prices and offer less favorable contractual terms.

As alleged in the Complaint, the proposed acquisition, therefore, likely would substantially lessen competition in the production of pharmaceutical-grade salt in the United States and Canada in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

ii. Round-Can Table Salt in the United States

As described in the Complaint, Morton and US Salt are two of the largest table salt suppliers in the United States and are two of only three suppliers of round-can table salt in the United States. Morton is the largest supplier of branded round-can table salt in the United States. US Salt is the largest supplier of private-label round-can table salt—which is made by US Salt but sold under the brands of retailers and other third-parties—in the United States. US Salt is also the second-largest supplier of branded round-can table salt, with around six percent of sales.

The Complaint alleges that, today, US Salt's private-label and branded round-can table salt products compete directly with Morton's branded round-can table salt. Together, the combined firm would control at least 90% of the round-can table salt market in the United States.

The Complaint further alleges that the combination of Morton and US Salt would eliminate the head-to-head competition between Morton and US Salt and leave customers in the United States with only two alternatives for round-can table salt in the United States. Post-acquisition, the combined firm likely would have the incentive and ability to increase prices and offer less favorable contractual terms.

The Complaint also alleges that Morton and US Salt compete for sales of round-can table salt on the basis of quality, price, and contractual terms such as delivery times. This competition has resulted in higher quality, lower prices, and more reliable delivery. The combination of Morton and US Salt would eliminate this competition and its future benefits to customers, including grocery chains, big box stores, and discount stores.

As alleged in the Complaint, the proposed acquisition, therefore, likely would substantially lessen competition in the production of round-can table salt in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

iii. Bulk Evaporated Salt in the Northeastern United States

As described in the Complaint, three bulk evaporated salt suppliers—Morton, US Salt, and one additional competitor, each with production facilities in upstate New York—compete for bulk evaporated salt customers in the northeastern United States. The combination of Morton and US Salt would eliminate the head-to-head competition between the parties and result in only two remaining competitors in the region.

The Complaint alleges that bulk evaporated salt customers in the northeastern United States, including food processors and chemical manufacturers, have been able to secure lower prices and improved quality and service—such as more reliable delivery—by threatening to switch between Morton and US Salt. The elimination of this head-to-head competition would

allow a combined Morton and US Salt to exercise market power to unilaterally increase prices and reduce the quality and service for bulk evaporated salt customers in the northeastern United States.

As alleged in the Complaint, the proposed acquisition, therefore, likely would substantially lessen competition in the production of bulk evaporated salt in the northeastern United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

E. Difficulty of Entry

i. Difficulty of Entry into Pharmaceutical-Grade Salt in the United States and Canada

As alleged in the Complaint, entry of new competitors into pharmaceutical-grade salt in the United States would be difficult and time-consuming and is unlikely to prevent the harm to competition that is likely to result if the proposed transaction is consummated.

The Complaint alleges that potential pharmaceutical-grade salt entrant would need to acquire suitable land that includes a salt deposit of sufficient purity, obtain the permits necessary to construct an evaporation and processing facility, possess or obtain appropriate financing for a significant capital expenditure, and then design, construct, and qualify the facility. This process would likely take several years, at a minimum. No new evaporated salt facility has been constructed in the United States in over 20 years.

The Complaint alleges that, even if an entrant were able to construct an evaporated salt production facility, before selling a single grain of pharmaceutical-grade salt, it would need to install and test additional equipment needed to meet the exacting purity requirements for pharmaceutical-grade salt. Reputational barriers make entry even more difficult, as customers would be reluctant to switch to an unproven supplier that could not guarantee access to high-quality pharmaceutical-grade salt. Thus, as alleged in the Complaint, entry would not be timely,

likely, or sufficient to mitigate the anticompetitive effects from SCIH's proposed acquisition of Morton.

ii. Difficulty of Entry into Round-Can Table Salt in the United States

As alleged in the Complaint, entry of new competitors into round-can table salt in the United States would be difficult and time-consuming and is unlikely to prevent the anticompetitive effects that are likely to result if the proposed transaction is consummated.

The Complaint alleged that, even though table salt has lower purity requirements than pharmaceutical-grade salt, a round-can table salt entrant would still need to take all of the steps to construct a facility that a pharmaceutical-grade salt entrant would, including locating an appropriate salt deposit, and investing significant time and money to build the facility.

The Complaint alleges that, in addition, an entrant in round-can table salt would have to secure a round-can packaging line. The packaging process for round-can table salt, created decades ago, is based on technology from that era and has proven to be difficult to replicate in a price-competitive manner. As a result, potential entrants with access to suitable salt deposits have tried, and failed, to develop round-can packaging technology in the last five years.

Thus, as alleged in the Complaint, entry through the construction of a new round-can table salt facility therefore will not be timely, likely, or sufficient to mitigate the anticompetitive effects of SCIH's proposed acquisition of Morton.

iii. Difficulty of Entry into Bulk Evaporated Salt in the Northeastern United States

As alleged in the Complaint, entry of new competitors into bulk evaporated salt in the northeastern United States would be difficult and time-consuming and is unlikely to prevent the harm to competition that is likely to result if the proposed transaction is consummated.

The Complaint alleges that, just as with pharmaceutical-grade salt or round-can table salt,

a new entrant in bulk evaporated salt would need to invest significant time and money to acquire land and construct an evaporated salt processing facility. The Complaint further alleges that entry into bulk evaporated salt in the northeastern United States is particularly difficult because this area has limited salt deposits, which are necessary serve the market.

As alleged in the Complaint, entry through the construction of a new bulk evaporated salt production facility will therefore not be timely, likely, or sufficient to mitigate the anticompetitive effects from SCIH's proposed acquisition of Morton.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment requires Stone Canyon and its subsidiary, SCIH, to divest their entire evaporated salt business, US Salt, to proceed with their proposed acquisition of Morton. This divestiture allows a third-party buyer to step in as the owner of US Salt and use all of those assets to compete for the production and sale of pharmaceutical-grade salt in the United States and Canada, round-can table salt in the United States, and bulk evaporated salt in the northeastern United States. The proposed divestiture will thus establish an independent and economically viable competitor that will ensure competition in these markets going forward.

Paragraph IV(A) of the proposed Final Judgment requires Defendants, within 120 calendar days after the entry of the Stipulation and Order by the Court, to divest the Divestiture Assets to an Acquirer acceptable to the United States, in its sole discretion. The assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business in the production and sale of evaporated salt products so that the Acquirer can compete effectively in the market for pharmaceutical-grade salt in the United States and Canada, round-can table salt in the United States, and bulk evaporated salt in the northeastern United States. Defendants must

use best efforts to accomplish the divestiture of the Divestiture Assets quickly and must take no action to jeopardize the divestiture.

The Divestiture Assets include all of Defendants' rights, titles, and interests in US Salt, including two US Salt facilities (a refinery located in Watkins Glen, NY and a warehouse located in Horseheads, NY).

The proposed Final Judgment contains provisions intended to facilitate efforts by the Acquirer to hire certain employees. Specifically, Paragraph IV(H) of the proposed Final Judgment requires Defendants to provide the Acquirer and the United States with organization charts and information relating to these employees and to make them available for interviews. It also provides that Defendants must not interfere with any efforts by the Acquirer to hire these employees. In addition, for employees who elect employment with the Acquirer, Defendants must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro-rata, provide all other compensation and benefits that those employees have fully or partially accrued, and provide all other benefits that those employees otherwise would have been provided had those employees continued employment with Defendants, including any retention bonuses or payments.

Paragraph IV(H) further provides that Defendants may not solicit to hire any employees who elect employment with the Acquirer within a certain time after the divestiture is completed, unless an individual is terminated or laid off by the Acquirer or the Acquirer agrees in writing that Defendants may solicit or hire that individual. The non-solicitation period runs for 12 months from the date of the divestiture. Paragraph IV(H) does not prohibit Defendants from advertising employment openings using general solicitations or advertisements and rehiring employees who apply for a position through a general solicitation or advertisement.

Paragraph IV(J) of the proposed Final Judgment will facilitate the transfer of customers and other contractual relationships from Defendants to the Acquirer. Defendants must transfer all contracts, agreements, and relationships to the Acquirer and must use best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting, or other transfer.

The proposed Final Judgment contains provisions to ensure that the Acquirer will be able to operate US Salt and serve customers immediately upon completion of the divestiture. For example, Paragraph IV(L) of the proposed Final Judgment requires Defendants, at the Acquirer's option, to enter into a transition services agreement for back office, human resource, and information technology services and support for US Salt for a period of up to 12 months. The Acquirer may terminate the transition services agreement, or any portion of it, without cost or penalty at any time upon 30 days' written notice. Paragraph IV(L) further provides that the United States, in its sole discretion, may approve one or more extensions of the transition services agreement for a total of up to an additional six months and that any amendments to or modifications of any provisions of a transition services agreement between Defendants and Acquirer are subject to approval by the United States, in its sole discretion. Paragraph IV(L) also provides that employees of Defendants tasked with providing any transition services must not share any competitively sensitive information of the Acquirer with any other employee of Defendants.

Paragraph IV(K) requires Defendants to use best efforts to assist the Acquirer to obtain all necessary licenses, registrations, and permits to operate US Salt. Defendants must provide Acquirer with the benefit of Defendants' licenses, registrations, and permits until Acquirer obtains the necessary licenses, registrations, and permits,

Certain executives and employees of Stone Canyon and/or SCIH, who will remain with Stone Canyon and/or SCIH after the divestiture, have had access to competitively sensitive information about US Salt's business operations. In order to prevent Stone Canyon and SCIH from using that information, Paragraph XI(A) requires Stone Canyon and SCIH to implement a firewall. Specifically, Stone Canyon and SCIH must implement and maintain reasonable procedures to prevent the sharing of competitively sensitive information relating to US Salt with Defendants' personnel with responsibilities relating to Morton's production or sale of evaporated salt products. Such a firewall will prevent competitively sensitive information about US Salt—to which Stone Canyon will have had access prior to the divestiture—from being used to influence business decisions relating to Morton's production or sale of evaporated salt products or otherwise used to subvert competition. The implementation of these procedures for a two-year period will ensure that the information cannot be used while it is still competitively sensitive. After two years, any information will be sufficiently out of date to no longer pose a risk and the firewall can be eliminated. Under Paragraph XI(B), Stone Canyon and SCIH must, within 30 days of the entry of the Stipulation and Order, submit a document setting forth in detail the procedures Defendants have implemented to effect compliance with Section XI. The United States will determine, in its sole discretion, whether to approve or reject Stone Canyon and SCIH's proposed compliance plan.

If Defendants do not accomplish the divestiture within the period prescribed in Paragraph IV(A) of the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that Defendants must pay all costs and expenses of the trustee. The divestiture trustee's compensation must be

structured so as to provide an incentive for the trustee based on the price and terms obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee must provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within six months of the divestiture trustee's appointment, the United States may make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the proposed Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment by a period requested by the United States.

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the Final Judgment as effective as possible. Paragraph XIV(A) provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right 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 with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph XIV(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the loss of competition the United States alleges 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 the 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 XIV(C) provides that if the Court finds in an enforcement proceeding that a Defendant has 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 Final Judgment, Paragraph XIV(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, the Defendant must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph XIV(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 or been terminated. 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 been terminated 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 or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment will expire 10 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 continuation of the Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

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, the comments and the United States' responses will be published in the *Federal Register* unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to:

Katrina Rouse
Chief, Defense, Industrials, and Aerospace Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 8700
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 Stone Canyon and SCIH's acquisition of Morton. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the production and sale of evaporated salt products in the markets alleged in the Complaint: pharmaceutical-grade salt in the United States and Canada, round-can table salt in the United States, and bulk evaporated salt in the northeastern 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.

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

Under the Clayton Act and APPA, proposed Final Judgments or "consent decrees" in antitrust cases brought by the United States are 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 proposed Final 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 may not "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); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Microsoft*, 56 F.3d 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 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or

even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

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

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Respectfully submitted,

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/s/
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