UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. ZEN-NOH GRAIN CORP., and BUNGE NORTH AMERICA, INC., *Defendants.*	Civil Action No.:

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 April 21, 2020, Zen-Noh Grain Corp. ("ZGC") agreed to acquire 35 operating and 13 idled U.S. grain elevators from Bunge North America, Inc. ("Bunge") for approximately $300 million ("the Transaction"). The United States filed a civil antitrust Complaint on June 1, 2021, seeking to enjoin the proposed Transaction. The Complaint alleges that the likely effect of the Transaction would be to substantially lessen competition for purchases of corn and soybeans in nine geographic areas of the 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"), which are designed to address the anticompetitive effects of the Transaction. The proposed Final Judgment, explained more fully below, requires the Defendants to divest certain grain elevators and related assets of Bunge or ZGC affiliate CGB Enterprises, Inc. ("the Divestiture Assets") to Viserion Grain LLC and Viserion International Holdco LLC ("Viserion"), or to another acquirer or acquirers acceptable to the United States, within 30 calendar days after entry of the Stipulation.

Under the terms of the Stipulation, the Defendants will take certain steps to ensure that the Divestiture Assets remain independent; that all of the Divestiture Assets remain economically viable, competitive, and saleable; that Defendants will preserve and maintain the Divestiture Assets; and that the level of competition that existed between Defendants prior to the Transaction is maintained during the pendency of the required 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 Final Judgment and to punish violations thereof.

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

(A) The Defendants and the Proposed Transaction

Defendant ZGC, headquartered in Covington, Louisiana, is a subsidiary of the National Federation of Agricultural Cooperative Associations of Japan. ZGC owns and operates a state-of-the-art export elevator located on the Mississippi River near Convent, Louisiana, from which it trades and exports corn, soybeans, sorghum, wheat, and grain by-products. Export elevators

receive grain, largely via barge or rail, that has been purchased from farmers by inland elevators. Export elevators store the aggregated grain until it can be loaded onto ocean going ships. ZGC does not own any inland grain elevators and relies upon its affiliate, CGB Enterprises Inc. ("CGB"), to supply the majority of the corn, soybeans and other agricultural commodities ZGC exports annually from Convent. Post-acquisition, ZGC intends to lease the elevators that it proposes to acquire from Bunge to CGB to operate through CGB's wholly owned subsidiary, Consolidated Grain and Barge Co.

CGB is a 50-50 joint venture between ZGC and Itochu Corporation, a global trading company. CGB operates more than 100 elevators in the United States, many of which are located along the Mississippi, Ohio, Arkansas, and Illinois Rivers. CGB is the fifth-largest grain company in the United States by storage capacity. CGB's grain merchandisers are in daily contact with thousands of farmers, actively seeking to purchase grain from them. Currently, CGB sells approximately 60% of the grain it purchases to ZGC.

Defendant Bunge is the North American subsidiary of Bunge Limited. Bunge is a large agribusiness and food ingredient company that owns and operates grain elevators, oilseed processing plants, and edible oil refineries, as well as grain export terminals. Bunge is the eighth-largest grain company in the United States by storage capacity. Post-acquisition, Bunge will continue to purchase grain in the United States via its export elevator on the Mississippi River in Destrehan, Louisiana and its export terminal in Longview, Washington (a joint venture with Itochu Corporation). In addition to the export terminals, Bunge will retain ownership interests in eight grain elevators in Illinois and Indiana.

The 35 operating elevators ZGC proposes to acquire from Bunge are located in nine states – Arkansas, Iowa, Illinois, Indiana, Kentucky, Louisiana, Missouri, Mississippi and

Tennessee – primarily along the Mississippi River and its tributaries, and predominantly handle corn and soybeans.

(B) Relevant Markets and the Competitive Effects of the Transaction

American consumers benefit from the productivity and efficiency of American farmers, who annually produce far more volume than needed to meet domestic demand. Corn and soybeans (collectively referred to here as "grain") are the primary crops grown in the United States. American farmers produced 14.2 billion bushels of corn and 4.14 billion bushels of soybeans in 2020, and roughly one-quarter of these grains were exported. In the United States, grain may flow from the farm directly to end users like ethanol plants and feed mills, or farmers may sell their grain to nearby rail or river grain elevators, where it is stored, aggregated, and later transported by train or barge to more distant domestic end users or to port elevators for export.

More than 45% of the grain exported from the United States is shipped out from port elevator export terminals located at the mouth of the Mississippi River near the Gulf of Mexico. The vast majority of this grain is sourced from river elevators located along the Mississippi and its tributaries. These river elevators, found as far north as Minnesota, purchase grain from surrounding farms and load it onto barges for transport to port elevators. Nearly all of the elevators ZGC seeks to acquire from Bunge are river elevators located on the Mississippi or its tributaries.

The livelihood of farmers depends on their ability to sell the corn and soybeans they grow to purchasers who offer them the best price, net of transportation and other selling costs that farmers incur. Ethanol plants and feed and crush mills purchase grain and process it into usable products such as soymeal or fuel. Rail and river elevators also purchase grain and store it until it is sold and transported to end users, in either domestic or export markets.

For convenience, some farmers may sell their grain to smaller, "country" elevators, located in closer proximity to the farmer than end users or rail and river elevators. Such elevators serve as grain collection and buying points in rural communities, and may provide other services like grain storage, drying, and conditioning services. Upon aggregating sufficient quantities of grain, or when market prices are most attractive, country elevators ultimately resell the grain to end users or to the larger rail or river elevators that can transport the grain to end users or export elevators.

Today, ZGC and its affiliate CGB compete against Bunge to purchase corn and soybeans from farmers. In particular, in nine geographic areas a Bunge river elevator and a nearby ZGC or CGB elevator represent two of only a handful of grain purchasing alternatives for area farmers. In those nine geographic areas, ZGC and Bunge currently compete aggressively to win farmers' business by offering better prices and more attractive amenities such as faster grain drop-off services and better grain grading. Faster drop-off services mean farmers can get back to their fields more quickly and make better use of their trucks and employees, ultimately saving time and money. If one elevator is grading grain more harshly or inconsistently, which may lead to a lower price paid, the farmer has the option of selling to a competing elevator which may grade differently. The Transaction will eliminate competition between ZGC and Bunge in those locations. As result, many U.S. farmers are likely to receive lower prices and poorer quality service when seeking to sell their grain.

1. Relevant Product Markets

ZGC (mainly through CGB) and Bunge own grain elevators, primarily located at rail terminals and along navigable rivers. They compete with other grain purchasers, including ethanol processors, feed mills, and crush processors, to purchase corn and soybeans from U.S.

farmers, brokers, and country elevators. Corn and soybeans are each distinct products without reasonable substitutes, differing from other agricultural commodities and one another in their physical characteristics, means of production, uses, and pricing. Because of the length of growing seasons, and the suitability of corn and soybeans to certain climates and regions, farmers of these crops would not switch to production of other agricultural commodities in sufficient numbers to render unprofitable a small but significant decrease in price by a hypothetical monopsonist of that crop. The purchase of corn and the purchase of soybeans for end use or for sale to the export market each constitute a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. Relevant Geographic Markets

Farmers typically haul grain by truck to nearby elevators or end users. Transportation costs increase significantly with every mile the farmers must transport the grain to reach a purchaser, reducing the farmers' profits. Transporting grain also consumes farmers' time. For these reasons, a small change in price would not likely cause farmers to significantly expand the distance they are willing to drive to sell their grain. The distance a farmer is willing to drive is determined in large part by the second-closest potential purchaser, which is the best competitive threat to the purchaser closest to the farmer.

Rail or river elevators and other grain purchasing facilities, such as grain crush plants and ethanol plants, typically purchase grain from within the facility's draw area. "Draw area" is an industry term that describes the locations of farms from which the facility expects to acquire most of its grain. Each elevator or end user has a unique draw area due to characteristics such as surrounding road conditions, crop output, local topography, and proximity of competing

purchasers. The draw area of a grain purchasing facility is determined by transportation time and costs and so is usually very localized.

The draw area of one grain facility frequently will overlap with that of another, resulting in competition between the facilities to purchase grain from farmers. Some farming areas of the country may be located such that they fall within the overlapping draw areas of only a few competing grain purchasing facilities. In particular, in the following areas where the Defendants' river elevators have overlapping draw areas, there are only a small number of grain purchasers competing to purchase farmers' corn and soybeans:

(a) The overlapping draw areas of elevators in the vicinity of McGregor, Iowa;

(b) The overlapping draw areas of elevators in the vicinity of Albany/Fulton, Illinois;

(c) The overlapping draw areas of elevators in the vicinity of Shawneetown, Illinois;

(d) The overlapping draw areas of elevators in the vicinity of Caruthersville, Missouri;

(e) The overlapping draw areas of elevators in the vicinity of Huffman, Arkansas;

(f) The overlapping draw areas of elevators in the vicinity of Osceola, Arkansas;

(g) The overlapping draws areas of elevators in the vicinity of Helena, Arkansas;

(h) The overlapping draw areas of elevators in the vicinity of Lake Providence, Louisiana; and

(i) The overlapping draw areas of elevators in the vicinity of Lettsworth, Louisiana.

These geographic areas satisfy the hypothetical monopsonist test (a "monopsonist" is a buyer that controls the purchases in a given market), the buyer-side counterpart to the hypothetical monopolist test. A hypothetical monopsonist of the purchase of corn or soybeans in each of these areas would impose at least a small but significant and non-transitory decrease in

the price paid to farmers. Such a price decrease for these products would not be defeated by farmers selling to purchasers outside their local area due to the added costs of transportation. As farmers in these areas have already determined the best use of their farmland, a price decrease would also not be defeated by farmers' switching to growing alternative crops. Farmers currently growing corn or soybeans are unlikely convert to production of other agricultural commodities in sufficient numbers to prevent a small but significant decrease in price. Nor could area farmers thwart a post-transaction price decrease by selling instead to local country elevators. Country elevators simply resell grain to river and rail elevators or to other end users; if Defendants lower prices post-transaction, country elevators would be forced to lower their own price to farmers to maintain profitability. Consequently, country elevators cannot mitigate a price decrease resulting from the Transaction. Therefore, each of the overlapping draw areas above constitute a relevant geographic market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18, for the purposes of analyzing this transaction.

3. Competitive Effects

In the each of the nine relevant geographic markets, ZGC (and its affiliate CGB) and Bunge are two of a very small number of grain purchasers competing to buy corn and soybeans; in two of these markets, CGB and Bunge are the only elevators available to area farmers. Famers located within these geographic areas depend on this competition to obtain a competitive price for their grain. ZGC's acquisition of Bunge's elevators will substantially lessen competition for the purchase of corn and soybeans in these markets, enabling it to unilaterally depress prices paid to farmers for their crops.

Because there are few alternative grain purchasers within these geographic areas, purchases of grain are highly concentrated, with the Defendants accounting for a majority of

corn and/or soybean purchases in a given year. For example, in 2019, the Defendants purchased upwards of 95% of the total corn and soybean output of farmers in Pemiscot County, Missouri; Pemiscot County falls within the draw area of Bunge's Caruthersville, Missouri river elevator, and the draw areas of CGB's Caruthersville and Cottonwood, Missouri river elevators.

By eliminating head-to-head competition between ZGC (and its affiliate CGB) and Bunge for grain purchases in these geographic markets, the Transaction would result in lower prices paid to farmers, lower quality of services offered to farmers at the grain origination elevators, and reduced choice of outlets for farmers to sell their grain. The Transaction would substantially lessen competition and harm the many farmers selling their crops to river elevators along the Mississippi River and its tributaries.

4. Entry

New entry and expansion by competitors likely will not be timely and sufficient in scope to prevent the likely anticompetitive effects of Defendant ZGC's acquisition of Bunge's elevators. Competitors are unlikely to construct new elevators in these geographic markets because of the high cost of construction and the difficulty of finding appropriate locations to build along the Mississippi or its tributaries. Even assuming such a location could be found and regulatory and permitting requirements could be fulfilled, constructing a river elevator would take approximately two years to complete.

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 by establishing an independent and economically viable competitor for the purchase of corn and soybeans in certain geographic markets along the Mississippi and Ohio Rivers. The proposed Final Judgment requires the Defendants to divest

nine elevators[1] in nine geographic markets within 30 days after the entry of the Stipulation by the Court to Viserion or another acquirer or acquirers approved by the United States. In each of those nine geographic markets, a Bunge elevator competes head to head with one or more ZGC or CGB elevators.

The Divestiture Assets include the real property and real property rights, fee simple interests; buildings, facilities, and other structures, including bins, silos, other grain storage facilities, and dock facilities associated with the nine grain elevators. The Divestiture Assets also encompass all existing grain inventories at the elevators, and all contracts (including grain contracts), contractual rights, and relationships, including customer and supplier relationships, and all other agreements, commitments, and understandings, including, supply agreements, teaming agreements, and leases, and all outstanding offers or solicitations to enter into a similar arrangement that relate exclusively to the elevators that will be divested.

The Divestiture 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 operated by the purchaser as a viable, ongoing business that can compete effectively in the market for the purchase of corn and the market for the purchase of soybeans. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with any acquirer.

If Defendants do not accomplish the divestiture within the period prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a

[1] In Osceola, Arkansas, Bunge has two elevator locations, "Riverside," which as the name implies, abuts the Mississippi, and "Landside," a former soy crush plant located a bit inland from the river. Bunge currently operates the two locations as one combined entity, with Landside being used primarily for overflow storage in support of Riverside; similarly, the proposed Final Judgment and Stipulation view the two Bunge Osceola locations as one asset for purposes of remedying the likely harm from the proposed Transaction.

divestiture trustee selected by the United States to execute the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that Defendant ZGC will pay all costs and expenses of the trustee. The divestiture trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee will provide periodic reports to the United States setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished at the end of six months, the divestiture trustee and the United States will make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the trust, including by extending the trust or the term of the divestiture trustee's appointment.

Under Paragraph IV.I. of the proposed Final Judgment, Defendants must cooperate with and assist the acquirer in identifying and, at the option of acquirer, hiring (1) all full time, part time, or contract employees employed at the divested elevators at any time between August 21, 2020, and the divestiture date; (2) all elevator managers, grain merchandisers, and elevator superintendents employed by Bunge or CGB whose job responsibilities are shared between or among divested elevators and any non-divested elevators, at any time between August 21, 2020, and the divestiture date; and (3) all regional managers employed by Bunge one organizational level above the elevator manager level, wherever located, whose job duties support the grain purchasing business of any of the Bunge elevators, at any time between August 21, 2020, and the divestiture date. Defendants must provide Viserion, or any other acquirer or acquirers, with information on these employees and are prohibited from interfering with the efforts of Viserion, or any other acquirer or acquirers, to hire them.

The proposed Final Judgment includes a non-solicit provision (Paragraph IV.I.6.) prohibiting the Defendants from attempting to rehire relevant personnel that have agreed to work for the acquirer, subject to certain narrow exceptions, such as if an individual is laid off by the acquirer. The non-solicit provision is limited in duration to 12 months, which is a length of time intended to encompass the first harvest season for which the acquirer will be operating the divested elevators. It is also limited in scope to apply only to certain relevant personnel—regional/general managers, elevator managers, merchandisers, bookkeepers, and site superintendents—the employees most intimately involved with farmer outreach and elevator operation. The categories of employees protected by the non-solicit provision are integral to maintaining customer relations while ownership of the assets is transitioning; elevator managers and the grain merchandisers, in particular, are needed to develop and keep strong customer relationships to get grain into the elevators. Defendants are not restricted, however, from advertising employment openings using general solicitations or advertisements and rehiring relevant personnel who apply for an employment opening through a general solicitation or advertisement.

Under Paragraph IV.M. of the proposed Final Judgment, at the option of the acquirer or acquirers, and subject to approval by the United States in its sole discretion, Defendants must enter into one or more contracts to provide the acquirer or acquirers with transition services for back office, human resources, or information technology, for a period of up to six months after the divestiture occurs, on terms and conditions reasonably related to market conditions for the provision of the transition services. The transition services covered by the proposed Final Judgment are those that might reasonably be necessary to ensure that an acquirer or acquirers can readily and promptly use the assets to compete in the relevant markets.

For the term of the proposed Final Judgment, Paragraph XI.A. requires Defendant ZGC to provide at least 30 calendar days advance notification to the United States of its intent to directly or indirectly acquire any assets of, or any interest in, grain purchasing facilities located within a 100-mile radius any divested elevator. The notification requirement of Paragraph XI.A. applies to transactions that are not subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act").[2] Notification of such non-reportable transactions is necessary because acquisition of a single elevator from another grain purchasing company is not uncommon in the grain industry, and such an acquisition, or even an acquisition of a small suite of elevators, likely would not meet the notification thresholds of the HSR Act, but nevertheless could have a substantial anticompetitive effect.

The proposed Final Judgment also contains provisions designed to promote compliance and make the 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 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

[2] Paragraph XI.M. exempts from this reporting requirement Defendant ZGC's acquisition of grain purchasing facilities that were leased by Defendant ZGC as of January 1, 2021. The United States has already accounted for ZGC's control over those assets in its competitive analysis of the Transaction and structuring of the divestiture.

standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XIV.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 XIV.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 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, that 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 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 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
U.S. 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 ZGC's acquisition of grain elevators from Bunge. 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 purchase of corn and soybeans in the nine relevant geographic

markets along the Mississippi and Ohio Rivers. 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 may "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.

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Respectfully submitted,

/s/

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