UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. DANFOSS A/S, and EATON CORPORATION PLC, Defendants.	Civil Action No.: 1:21-cv-1880-CJN

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

On January 21, 2020, Defendant Danfoss A/S ("Danfoss") entered into a binding agreement with Defendant Eaton Corporation ("Eaton") to acquire Eaton's hydraulics business for approximately $3.3 billion in cash. The United States filed a civil antitrust Complaint on July 14, 2021 seeking to enjoin the proposed transaction. The Complaint alleges that the likely effect of this transaction would be to substantially lessen competition in the design, manufacture, and sale of orbital motors and hydraulic steering units in 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 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, Defendant Danfoss is required to divest the following assets: the Danfoss Orbital Motor Business; the Danfoss Steering Unit Business; the Eaton Orbital Motor Assets; the Eaton Steering Unit Assets, and certain Intellectual Property (collectively "The Divestiture Assets"). Under the terms of the Stipulation and Order, Defendants must take certain steps to ensure that the Divestiture Assets that must be divested are operated as ongoing, economically viable, competitive Divestiture Assets for the design, manufacture, and sale of orbital motors and steering units and must take all other actions to preserve and maintain the full economic viability, marketability, and competitiveness of the Divestiture Assets to be divested.

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

Danfoss and Eaton are global corporations based in Nordborg, Denmark and Dublin, Ireland, respectively, that manufacture components of hydraulic power systems for industrial and agricultural use. Defendants' hydraulic components make it possible to steer, propel, and operate equipment used to pave roads, harvest produce, construct buildings, and perform other heavy industrial and agricultural tasks across the United States every day. Pursuant to a

Transaction Agreement dated January 21, 2020, Danfoss intends to acquire Eaton's hydraulics business for approximately $3.3 billion.

(B) The Competitive Effects of the Transaction

The Complaint alleges that the transaction as proposed will lead to anticompetitive effects in the markets for the design, manufacture, and sale of hydraulic orbital motors ("orbital motors") and hydraulic steering units ("steering units").

a. Relevant Product Markets

The Complaint alleges that orbital motors for mobile off-road equipment and steering units for mobile off-road equipment are lines of commerce, or relevant product markets, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18. Orbital motors, also called "low-speed, high-torque" motors, are a low-cost way to move heavy loads in a slow, and thus controlled, way. Steering units direct hydraulic fluid in response to commands from equipment operators and are necessary for any hydraulic steering system to function.

In the event of a small but significant increase in price by a hypothetical monopolist of orbital motors, the Complaint alleges that substitution away from orbital motors would be insufficient to render the price increase unprofitable. Other technologies, such as vane, gear, piston, or electric motors, do not offer the same level of performance, are less efficient, or cost more than an orbital motor. Therefore, these technologies are not reasonable substitutes for orbital motors. Orbital motors for mobile off-road equipment are 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.

Similarly, in the event of a small but significant increase in price by a hypothetical monopolist of steering units, the Complaint alleges that substitution away from steering units would be insufficient to render the price increase unprofitable. Electric steering technology—the only alternative steering system that does not require a hydraulic steering unit—is largely unproven and more expensive than hydraulic steering technology. The switching costs from hydraulic steering to electric steering are high and would require a costly redesign by Original Equipment Manufacturers ("OEMs"). Steering units for mobile off-road equipment are 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.

b. Relevant Geographic Markets

The Complaint alleges that OEMs located in the United States wish to avoid business disruption and cannot reasonably turn to suppliers without a U.S. presence for the supply of orbital motors or steering units for mobile off-road equipment. Long lead times due to international shipping and unexpected delays in the delivery of products can cause significant business disruption. Customers similarly require that suppliers warehouse new and replacement parts to avoid costly delays or interruptions to business operations and expect local service and support from suppliers. Thus, a hypothetical monopolist of orbital motors or steering units sold in the United States could profitably impose a small but significant non-transitory increase in price for orbital motors or steering units without losing sufficient sales to render the price increase unprofitable. Nor would the price increase be defeated by arbitrage, *e.g.*, by OEMs purchasing through subsidiaries located outside the United States. Accordingly, the relevant geographic market for purposes of analyzing the effects of the acquisition on orbital motors and

steering units for mobile off-road equipment under Section 7 of the Clayton Act, 15 U.S.C. § 18, is the United States.

c. Anticompetitive Effects of the Proposed Transaction

The Complaint alleges that the transaction as proposed would lessen competition and harm customers for orbital motors and steering units for mobile off-road equipment in the United States. The Herfindahl-Hirschman Index ("HHI"), as articulated in the Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission, measures the likely anticompetitive effects of an acquisition by assessing how concentrated a market is. The more concentrated a market, the higher the likelihood that a transaction will result in a meaningful reduction in competition and harm customers. HHI calculations in the markets for both orbital motors and steering units indicate that the proposed acquisition will result in highly concentrated markets and is thus presumed likely to enhance market power.

The HHI indicators of highly concentrated markets and enhanced market power are consistent with historical head-to-head competition between Danfoss and Eaton to supply orbital motors and steering units for mobile off-road equipment. Danfoss and Eaton compete directly on price, quality, product innovation, delivery, and technical service, and the competition between them has benefited U.S. customers of orbital motors and steering units for mobile off-road equipment. Danfoss and Eaton have a reputation for high-quality orbital motors and steering units, product developments that benefit OEMs, an extensive network of distributors throughout the United States, and localized customer support and service. As a result, Danfoss and Eaton are considered to be the two primary—and sometimes the only two—suppliers of orbital motors and steering units to customers in the United States.

d. Difficulty of Entry

The Complaint alleges that entry of additional competition into the design, manufacture, and sale of orbital motors and steering units sold in North America is unlikely to be timely, likely, or sufficient to prevent the harm to competition caused by Danfoss's acquisition of Eaton's hydraulics business. A new entrant must have the technical capabilities necessary to design, manufacture, and sell orbital motors and steering units that meet customer requirements for quality, performance, and reliability. Additionally, a new entrant must have the requisite scale, an established reputation, and an extensive network of distributors to supply to all customers throughout the United States.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the market for the design, manufacture, and sale of orbital motors and steering units. Paragraph IV.A of the proposed Final Judgment requires Defendant Danfoss, within 60 days after the entry of the Stipulation and Order by the Court, to divest the Divestiture Assets to Interpump Group S.p.A. ("Interpump") or an alternative acquirer acceptable to the United States, in its sole discretion. If the 60 days expire while Defendants are waiting for regulatory approval from U.S. or international regulators, Paragraph IV.B extends the time allowed for the divestiture to take place to ten calendar days after the Regulatory Approval has been received. The extension may be no longer than 30 calendar days, unless the United States, in its sole discretion, consents to an additional extension.

(A) Divestiture Assets

The Divestiture Assets consist of the Danfoss Divestiture Assets and the Eaton Divestiture Assets. Taken together, the Divestiture Assets will form a viable, ongoing business that can compete effectively in the hands of an acquirer approved by the United States, in its sole discretion. The combination of product model lines from both Defendants ensures that an acquirer will have the breadth and scale necessary to succeed while preserving Danfoss's headquarters in Nordborg, Denmark, which houses businesses that are not being divested.

(B) Danfoss Divestiture Assets

The Danfoss Divestiture Assets are defined in Paragraph II.O as all tangible and intangible assets relating to or used in connection with the Danfoss Orbital Motor Business or the Danfoss Hydraulic Steering Unit Business—including three facilities that are located in Hopkinsville, Kentucky; Wroclaw, Poland; and Parchim, Germany. The Danfoss Orbital Motor Business and Danfoss Hydraulic Steering Unit Business, in turn, are defined by model of orbital motor or steering unit in Paragraphs II.E and II.F and comprise Danfoss's business of designing, manufacturing, and selling these orbital motors and steering units in the United States. The Danfoss Divestiture Assets also include assets necessary for the acquirer to manufacture Danfoss' S70 model of steering unit, which currently is in development. Certain assets located in Zhenjiang, China and Nordborg, Denmark are excluded from the Danfoss Divestiture Assets because they are not used for the orbital motors and hydraulic units at issue for sale to U.S. customers.

(C) Eaton Divestiture Assets

The Eaton Divestiture Assets are defined in Paragraph II.P as all tangible and intangible assets relating to or used in connection with the Eaton Orbital Motor Assets or the Eaton

Hydraulic Steering Unit Assets. The Eaton Orbital Motor Assets and Eaton Hydraulic Steering Unit Asset, in turn, are defined by model of orbital motor or steering unit in Paragraphs II.H and II.I and comprise all the assets used to manufacture these models of orbital motors and steering units. Unlike the Danfoss Divestiture Assets, the Eaton Divestiture Assets do not include real property. Instead, the Eaton Orbital Motor Assets and Eaton Hydraulic Steering Unit Assets will move to the divested facility located in Hopkinsville, KY. The Eaton Divestiture Assets will include all fixed assets, machinery, and manufacturing equipment for the Eaton Orbital Motor Assets and Eaton Hydraulic Steering Unit Assets except Eaton's Series 20 model of hydraulic steering unit products. The Eaton Divestiture Assets also do not include the transfer of paint line assets (*see* Paragraph II.Q), which are instead included in the Danfoss Divestiture Assets.

(D) Intellectual Property

With the exceptions of the intellectual property listed in Exhibits 1, 2, or 3, and the Char Lynn license, all Intellectual Property including, but not limited to (a) patents, patent applications, and inventions and discoveries that may be patentable, (b) registered and unregistered copyrights and copyright applications, and (c) registered and unregistered trademarks, trade dress, service marks, trade names, and trademark applications will be divested to the acquirer.

The intellectual property listed in Exhibits 1, 2, and 3 is necessary for the Divestiture Assets as well as for assets that will be retained by Defendant Danfoss. Consequently, the acquirer will receive worldwide, non-exclusive, royalty-free, perpetual, paid-up, irrevocable licenses to the intellectual property listed in Exhibits 1, 2, and 3. Likewise, the acquirer will receive a worldwide, non-exclusive, royalty-free, perpetual, paid-up, irrevocable license to use the Char Lynn name, which is used for certain Eaton orbital motor models. This license will

allow the acquirer to transition these products to its own product names.

(E) Divestiture Provisions

Section IV of the proposed Final Judgment contains additional detail about how the divestitures should be carried out. Defendants are required to act expeditiously (Paragraph IV.C), to divest the Divestiture Assets in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets will be used as a part of a viable ongoing business and will remedy the competitive harm alleged in the Complaint (Paragraph IV.D). The divestiture must be made to an acquirer that, in the United States' sole judgment, has the intent and capability to compete effectively in the design, manufacture and sale of orbital motors and hydraulic steering units for mobile off-road equipment (Paragraph IV.E) and must be done in such a manner that Defendants cannot interfere in the acquirer's efforts to compete effectively in the design, manufacture, and sale of orbital motors and hydraulic steering units for mobile off-road equipment. If the Divestiture Assets are divested to an acquirer other than Interpump, Paragraphs IV.G and IV.H require Defendants to make certain information available to the prospective acquirer, including a copy of the proposed Final Judgment.

Paragraph IV.I of the proposed Final Judgment contains provisions intended to facilitate the acquirer's efforts to hire certain employees. Specifically, Paragraph IV.I of the proposed Final Judgment requires Defendant Danfoss 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, Defendant Danfoss must waive all non-compete and non-disclosure agreements, vest and pay to these employees (or to the acquirer for payment to the employee) on a prorated basis any

bonuses, incentives, other salary, benefits or other compensation fully or partially accrued at the time of the transfer of the employee to the acquirer; vest any unvested pension or other equity rights; and provide all other benefits that the employees would generally be provided had those employees continued employment with Defendants, including but not limited to any retention bonuses or payments.

Paragraph IV.J of the proposed Final Judgment ensures that the Divestiture Assets are unencumbered and operable from the first day that the acquirer takes ownership. Paragraph IV.L ensures that the acquirer will receive all necessary licenses, registrations, and permits to operate the Divestiture Assets once they are transferred.

Paragraph IV.K of the proposed Final Judgment will facilitate the transfer to the acquirer of customers and other contractual relationships that are included within the Divestiture Assets. 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.

Paragraph IV.M of the proposed Final Judgment requires Defendants to accomplish the move of Eaton Divested Equipment, as defined in Paragraph II.Q, to the acquirer's preferred location within 12 months after the Court's entry of the Stipulation and Order. In the interim, the supply contracts mandated by Paragraph IV.O will ensure that the acquirer can serve its new customer base without disruption. Paragraphs IV.M and IV.O allow the United States to extend the time to move the Eaton Divested Equipment and the terms of the supply contracts up to an additional six months if necessary.

Paragraphs IV.N and IV.O of the proposed Final Judgment address supply contracts between Defendant Danfoss and the acquirer. Paragraph IV.N requires Defendant Danfoss, at

the acquirer's option, to enter into a supply contract for certain services and components, such as heat treatment services and gerotors, sufficient to meet the acquirer's needs, as determined by the acquirer, for a period of up to 12 months. The acquirer may terminate the supply contract, or any portion of it, without cost or penalty at any time upon commercially reasonable notice, and any amendments to or modifications of any provisions of a supply contract are subject to approval by the United States in its sole discretion. Paragraph IV.O requires Defendants to enter into a supply contract for certain models of orbital motor and steering unit products, for a period of up to 18 months. Upon the acquirer's request, the United States, in its sole discretion, may approve one or more extensions of the supply contracts contemplated in Paragraphs IV.N and IV.O for up to an additional six months. This provision will help to ensure that the acquirer will not face disruption to its supply of these input products during an important transitional period.

The proposed Final Judgment requires Defendant Danfoss to provide certain transition services to maintain the viability and competitiveness of the Divestiture Assets during the transition to the acquirer. Paragraph IV.P of the proposed Final Judgment requires Defendant Danfoss, at the acquirer's option, to enter into a transition services agreement for back office, accounting, human resources, information technology services and support, employee health and safety, and technical training services and support 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 commercially reasonable notice. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions of this transition services agreement for a total of up to an additional 6 months and that any amendments to or modifications of any provisions of a transition services agreement are subject to approval by the United States in its sole discretion. Paragraph IV.P also provides that employees of Defendants

tasked with supporting this agreement must not share any competitively sensitive information of the acquirer with any other employee of Defendants, unless such sharing is for the sole purpose of providing transition services to the acquirer.

Paragraph IV.Q of the proposed Final Judgment requires Defendants to refrain for one year from soliciting customers for the portion of the customer's business that is transferring to the acquirer. Defendants may respond to inquiries initiated by such customers and enter into negotiations at the request of the customers but must maintain a log of any such inquiries and requests. This provision gives the acquirer time to establish a performance record with new customers without interference from Defendants. Paragraph IV.Q allows the United States to extend the time period of this provision up to an additional six months if necessary.

Paragraph IV.R ensures that the terms of the proposed Final Judgment supersede any terms of agreement between Defendants and the acquirer that are inconsistent with the proposed Final Judgment.

(F) Divestiture Trustee Provisions

If Defendants do not accomplish the divestiture within the period prescribed in Paragraph IV.A or IV.B 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 Defendant Danfoss 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 Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment by a period requested by the United States.

(G) Monitoring Trustee Provisions

Section X of the proposed Final Judgment provides that the United States may appoint a monitoring trustee who will have the power and authority to investigate and report on Defendants' compliance with the terms of the Final Judgment and the Stipulation and Order, including compliance with all supply and transition service agreements and progress of production line transfers, and will have other powers as the Court deems appropriate. The monitoring trustee will not have any responsibility or obligation for the operation of Defendants' businesses. The monitoring trustee will serve at Defendant Danfoss' expense, on such terms and conditions as the United States approves, and Defendants must assist the monitoring trustee in fulfilling his or her obligations. The monitoring trustee will provide periodic reports to the United States and will serve until the divestiture of all the Divestiture Assets is finalized pursuant to either Section IV or Section V of this Final Judgment and Defendant Danfoss has complied with the terms of the transition services agreements and supply contracts provided for in this Final Judgment, unless the United States, in its sole discretion, determines a different period is appropriate.

(H) Firewall Provision

The relocation of the Eaton Divested Equipment to a location specified by acquirer will require Defendants' employees to train employees of the acquirer on how to properly operate the equipment. Section XII of the proposed Final Judgment requires Defendants to implement and

maintain a firewall to prevent the exchange of competitively sensitive information between Defendants and the acquirer. Specifically, Defendants must implement and maintain procedures to prevent any employees of Defendants from sharing competitively sensitive information relating to the Divestiture Assets with personnel of Defendants with responsibilities relating to Danfoss's or Eaton's design, manufacture, and sale of hydraulic orbital motors or hydraulic steering units. Such a firewall will prevent competitively sensitive information about the Divestiture Assets from being used to influence business decisions relating to Danfoss's or Eaton's design, manufacturing, or sale of orbital motors or steering units. 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 XII.B, Defendants must, within 30 days of entry of the Stipulation and Order, submit to the United States a document setting forth in detail the procedures each has implemented to effect compliance with Section XII. The United States will determine, in its sole discretion, whether to approve or reject Defendants' proposed compliance plans.

(I) Compliance and Enforcement Provisions

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the Final Judgment as effective as possible. Paragraph XV.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 XV.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 XV.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 an 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 XV.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 XV.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.

(J) Term of the Final Judgment

Finally, Section XVI 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:

Jay Owen
Acting 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 Danfoss's acquisition of certain assets and equity interests of Eaton's hydraulics business. 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 design, manufacture, and sale of orbital motors and hydraulic steering units. 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.

Dated: July 14, 2021

Respectfully submitted,

FOR PLAINTIFF
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CERTIFICATE OF SERVICE

I, Rebecca Valentine, hereby certify that on July 20, 2021, I caused a copy of the foregoing to be served upon Defendants by filing the document with the court's electronic-filing system, which will send electronic notice to the following registered users:

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