UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff*, v. WIENERBERGER AG, GENERAL SHALE BRICK, INC., LSF9 STARDUST SUPER HOLDINGS, L.P. BORAL LIMITED and MERIDIAN BRICK LLC, *Defendants*.	Civil Action No.: 1:21-cv-02555

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 related to the proposed Final Judgment filed in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On December, 18, 2020, General Shale Brick, Inc. ("General Shale"), a subsidiary of Wienerberger AG, announced its intention to acquire Meridian Brick LLC ("Meridian") from Meridian's parent companies, Boral Limited and LSF9 Stardust Super Holdings, L.P. as part of a total transaction valued at approximately $250 million. The United States filed a civil antitrust Complaint on October 1, 2021, seeking to enjoin the proposed acquisition. The Complaint

alleges that the likely effect of this acquisition would be to substantially lessen competition for the design, manufacture, and sale of residential brick in eight geographic markets in the midwestern and southern 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, Defendants are required to divest specified residential brick manufacturing and sales assets located within seven states.

Under the terms of the Stipulation and Order, Defendants must take certain steps to ensure that the assets that must be divested are operated as ongoing, economically viable, competitive assets for the design, manufacture, and sale of residential brick and must take all other actions to preserve and maintain the full economic viability, marketability, and competitiveness of the assets to be divested. On October 5, 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

On December 18, 2020, General Shale announced its intention to acquire Meridian from Boral Limited and LSF9 Stardust Super Holdings, L.P. in a total transaction valued at approximately $250 million.

General Shale is a Delaware corporation headquartered in Johnson City, Tennessee. It is a leading U.S. producer of building material solutions and one of North America's largest brick, stone, and concrete block manufacturers. General Shale operates 11 production facilities in 10 states and provinces. It also has a network of 21 sales locations and more than 200 affiliated distributors in North America.

Wienerberger AG is General Shale's parent company. Based in Vienna, Austria, it is one of the world's largest building materials manufacturers. Wienerberger AG operates manufacturing and distribution facilities for brick and other construction materials in three continents, including in North America through its subsidiary General Shale. In 2020, Wienerberger AG's North American business generated revenues of approximately $370 million, 78% of which was derived from brick sales, including residential brick sales.

Meridian is a Delaware limited liability company headquartered in Alpharetta, Georgia. Meridian manufactures and sells construction materials, including commercial and residential brick and masonry materials. Meridian is the largest brick supplier in the United States. During the fiscal year 2020, Meridian generated over $400 million in revenues, primarily from brick sales, including residential brick sales. Meridian and its sister company Meridian Brick Canada Ltd. make up the Meridian Group. The Meridian Group is directly and indirectly owned by Boral

Limited and LSF9 Stardust Super Holdings, L.P. Boral Limited and LSF9 Stardust Super Holdings, L.P. formed Meridian as a joint venture in 2016.

B. Relevant Product Market: Residential Brick

Residential brick is a type of exterior cladding that is used to protect homes and other buildings from weather and the elements. It comes in various sizes and colors and is primarily comprised of shale or red clay that has been fired in a kiln. Residential brick of each color and size is manufactured in a substantially similar process, with minor adjustments in the amount of clay or type of color additives used to make a particular brick model. Indeed, although residential brick comes in varying sizes (e.g., modular, queen, and king) and colors (e.g., red, white, or grey), all residential brick volumes are measured in Standard Brick Equivalents ("SBE").[1]

Residential brick is distinct from commercial brick. Residential brick is less expensive than commercial brick due to different manufacturing processes. In particular, commercial brick is made by a process called through-body extrusion. Through-body extrusion entails a rigorous coloring process that ensures uniform coloring throughout the body of the brick. This achieves the higher color quality required of commercial brick. By contrast, residential brick is often colored only on the outer portion of the brick, and the residential brick manufacturing process requires fewer additives and other costly inputs.

Residential brick must meet standard specifications for residential use that are set by the American Society for Testing and Materials ("ASTM"). These standards require certain durability and load capabilities that differentiate residential brick from decorative paving brick as

[1] The American Society for Testing and Materials has established a standard brick size for construction uses, which is referred to as the standard brick equivalent or "SBE." Residential brick of different sizes is converted to SBE units when sold for purposes of measuring the volume sold.

well as "thin" brick, which is a fraction of the thickness of residential brick and has lower structural requirements because it is ornamental.

Residential brick is distinct from other types of exterior cladding. It has both performance characteristics (such as durability and structural integrity) and aesthetic traits that distinguish it from products such as siding and other exterior claddings. Customers who prefer the look of residential brick, or whose projects require the unique properties of residential brick, cannot reasonably turn to alternative exterior cladding solutions.

As alleged in the Complaint, because of these unique characteristics, substitution away from residential brick in the event of a small but significant increase in price by a hypothetical monopolist of residential brick would be insufficient to make such a price increase unprofitable. Accordingly, residential brick is a line of commerce, or relevant product market, for purposes of analyzing the effects of the proposed acquisition under Section 7 of the Clayton Act.

C. The Relevant Geographic Markets are Local

Residential brick is generally transported by truck. Transportation costs can be substantial and typically range from 15% to 30% of the total price of residential brick. As a result, the Complaint alleges the geographic markets for residential brick tend to be local, with the specific geographic boundaries of any local market also determined by road infrastructure, traffic conditions, and natural conditions, such as mountain ranges that impose significantly higher fuel costs on the transportation of residential brick to customers in local markets.

As alleged in the Complaint, the transaction would likely harm competition for residential brick in the following Metropolitan Statistical Areas ("MSAs")[2]: (1) Nashville,

[2] An MSA is a geographical region defined by the Office of Management and Budget for use by federal statistical agencies, such as the Census Bureau. It is based on the concept of a core area with a large concentrated population, plus adjacent communities having close economic and

Tennessee; (2) Memphis, Tennessee; (3) Huntsville, Alabama; (4) Lexington, Kentucky; (5) Louisville, Kentucky; (6) Indianapolis, Indiana; (7) Detroit, Michigan; and (8) Cincinnati, Ohio.

In each of these relevant markets, the Complaint alleges a small but significant increase in price by a hypothetical monopolist of residential brick would not be defeated by substitution to commercial brick or other claddings, other construction materials, or by arbitrage – i.e., a buyer cannot purchase outside the MSA and transport the residential bricks itself without incurring prohibitive transportation costs. Accordingly, the sale of residential brick in each of these MSAs constitutes a relevant market for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

D. Anticompetitive Effects of the Proposed Transaction

The Complaint alleges the proposed transaction would significantly increase concentration in the relevant markets and harm consumers by eliminating the substantial head-to-head competition that currently exists between General Shale and Meridian.

For each relevant market, General Shale and Meridian are among the top suppliers of residential brick by volume sold and have a competitive advantage because of the proximity of their manufacturing facilities to customers in each relevant market. Further, only two or three significant competitors, including General Shale and Meridian, supply each relevant market. Other residential brick suppliers face significantly higher transportation costs to serve these markets and thus have limited competitive significance. Competition between General Shale and Meridian has also spurred product innovation that has yielded higher quality and a variety of innovative residential brick products, including new colors, textures, and facing styles.

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social ties to the core. For the purposes of the Complaint, it includes the dense central business districts in the named cities as well as the adjacent, connected communities.

As alleged in the Complaint, homebuilders and other customers in the relevant markets thus rely on competition between General Shale and Meridian to supply a variety of quality residential brick at competitive prices. By eliminating this competition, the proposed transaction would likely lead to higher prices and reduced investment in innovation and quality.

1. The Nashville, Tennessee MSA

In 2020, Tennessee was the second-largest brick consuming state in the United States. General Shale and Meridian supplied approximately 54% of the total brick volume sold in Tennessee in 2020. General Shale and Meridian are particularly important suppliers for the Nashville MSA, where they are the top two suppliers of residential brick by volume and face only each other as significant competitors. General Shale and Meridian are the only significant suppliers of residential brick that operate brick manufacturing facilities located within 150 miles of Nashville, and no other significant supplier has a manufacturing facility located within 200 miles.

2. The Memphis, Tennessee MSA

General Shale and Meridian are also important suppliers of residential brick for the Memphis MSA, where they face only one other significant competitor. These three firms are the only significant suppliers that operate brick manufacturing facilities within 200 miles of Memphis, and no other significant supplier of residential brick has a facility located within 350 miles.

3. The Huntsville, Alabama MSA

Alabama consumed the fifth most bricks of any state in the nation in 2020. General Shale and Meridian are two of the top three residential brick suppliers in Alabama and combined supplied over 43% of the total brick volume sold in Alabama in 2020. General Shale and

Meridian are particularly important suppliers for the Huntsville MSA, where they are two of the top three residential brick suppliers by volume and face only one other significant competitor. These three firms are the only significant suppliers that operate a residential brick manufacturing facility located within 125 miles of Huntsville.

4. The Lexington, Kentucky MSA

General Shale and Meridian supplied over 50% of the total brick volume sold in Kentucky in 2020. General Shale and Meridian are particularly important suppliers for the Lexington MSA, where they are the two largest suppliers of residential brick by volume and face only each other as significant competitors. General Shale and Meridian are the only significant residential brick suppliers located within 50 miles of Lexington; the next closest residential brick manufacturer is over 230 miles away.

5. The Louisville, Kentucky MSA

General Shale and Meridian are also important residential brick suppliers for the Louisville MSA. In the Louisville MSA, the proposed acquisition would reduce the number of significant competitors for residential brick from three to two, as the merging parties own two of the three brick manufacturing facilities located within 200 miles of Louisville. Following the transaction, the third-closest significant residential brick manufacturer would be located over 300 miles away.

6. The Indianapolis, Indiana MSA

General Shale and Meridian are the top two suppliers of residential brick to customers in Indiana. In 2020, they combined to supply over 45% of the total brick volume sold in the state. General Shale and Meridian are particularly important suppliers of residential brick for the Indianapolis MSA, where they face only one other significant competitor. These three firms are

the only significant suppliers that operate a residential brick manufacturing facility located within 100 miles of Indianapolis, with the next closest competitor located almost 350 miles away.

7. The Detroit, Michigan MSA

General Shale and Meridian are the first and third largest suppliers of brick to customers in Michigan. In 2020, General Shale and Meridian supplied 45% of the total brick volume sold in the state. General Shale and Meridian are particularly important suppliers for the Detroit MSA, where they are the top two competitors for residential brick by volume. In this market, the proposed acquisition would reduce the number of significant suppliers for residential brick from three to two with these three firms being the only significant suppliers that operate residential brick manufacturing facilities within 375 miles of Detroit.

8. The Cincinnati, Ohio MSA

General Shale and Meridian are the top two residential brick suppliers to customers in Ohio. In 2020, General Shale and Meridian supplied 28% of the total brick volume sold in the state. General Shale and Meridian are particularly important suppliers for the Cincinnati MSA, where they are the top two competitors for residential brick by volume and face only one other significant supplier. These three firms are the only significant suppliers with residential brick manufacturing facilities located within 200 miles of Cincinnati, and no other significant manufacturer has a facility within 350 miles.

E. Difficulty of Entry

As alleged in the Complaint, entry of new competitors into the relevant residential brick markets would be costly, time consuming, and is unlikely to prevent the harm to competition that is likely to result if the proposed transaction were to proceed unremedied. The time and expense

required to construct manufacturing facilities, acquire necessary equipment, develop product formulas, and overcome various regulatory hurdles would take years of planning and significant financial investment.

Additionally, repositioning by a commercial brick manufacturer is also unlikely to lessen the harm that would likely result from the proposed transaction. This is because commercial brick yields higher profit margin than residential brick, and, accordingly, such a switch would come at a significant opportunity cost that commercial brick manufacturers are unlikely to be incentivized to make.

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 design, manufacture, and sale of residential brick in the eight geographic markets alleged in the Complaint.

A. The Divestiture Assets

Paragraph IV(A) of the proposed Final Judgment requires Defendants, within 30 days after the entry of the Stipulation and Order by the Court, to divest the Divestiture Assets (capitalized terms are defined in the proposed Final Judgment) to RemSom, LLC or an alternative 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 that can compete effectively in the design, manufacture, and sale of residential brick in the eight geographic markets alleged in the Complaint (proposed Final Judgment Paragraphs IV(C) and (D)). Defendants Wienerberger AG, General Shale, and Meridian must use best efforts to divest

the Divestiture Assets expeditiously and may not take actions that would jeopardize the completion of the divestiture (proposed Final Judgment Paragraph IV(B)).

The Divestiture Assets are defined at Paragraph II(H) of the proposed Final Judgment. The Divestiture Assets are defined to include three manufacturing facilities, 14 Distribution Yards, and six mines, identified in Appendices A and B. The Divestiture Assets also include all tangible and intangible property and assets related or used in connection with the manufacturing facilities, mines, and Distribution Yards, except for the assets identified in Appendix C of the proposed Final Judgment and any trademarks, trade names, service marks, or service names containing the names "General Shale," "Meridian," "Watsontown," "Columbus," "Arriscraft," or "Wienerberger." The Divestiture Assets include all of the assets necessary for the Acquirer to operate an economically viable business that will remedy the harm that the United States allege would otherwise result from the transaction.

B. Divestiture Provisions

The proposed Final Judgment contains several provisions to facilitate the transition of the Divestiture Assets to the Acquirer. First, Paragraph IV(J) of the proposed Final Judgment facilitates the transfer of customers and other contractual relationships to the Acquirer. Defendants Wienerberger AG, General Shale, and Meridian must transfer all contracts, agreements, and relationships included in the Divestiture Assets to the Acquirer and must make best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting, or other transfer.

Second, Paragraph IV(K) requires Defendants Wienerberger AG, General Shale, and Meridian to use their best efforts to assist the Acquirer in obtaining all of the licenses, registrations, and permits necessary to operate the Divestiture Assets. Paragraph IV(K) further

requires Defendants Wienerberger AG, General Shale, and Meridian to provide the Acquirer with the benefit of Defendants Wienerberger AG's, General Shale's, and Meridian's licenses, registrations, and permits to the full extent permissible by law until the Acquirer obtains the necessary licenses, registrations, and permits.

Third, Paragraph IV(L) of the proposed Final Judgment requires Defendants Wienerberger AG, General Shale, and Meridian, at the option of the Acquirer, and subject to the approval by the United States in its sole discretion, on or before the date of the divestiture, to enter into an agreement to provide transition services for back office, human resources, accounting, employee health and safety, and information technology services and support for the Divestiture Assets 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 written notice. The paragraph further provides that if the Acquirer seeks an extension of the term of any contract for transition services, Defendants Wienerberger AG, General Shale, and Meridian must notify the United States in writing at least three months prior to the date the contract expires. Paragraph IV(L) also provides that employees of Defendants Wienerberger AG, General Shale, and Meridian tasked with supporting this agreement must not share any competitively sensitive information of the Acquirer with any other employee of Defendants Wienerberger AG, General Shale, and Meridian.

The proposed Final Judgment also contains provisions intended to facilitate efforts by the Acquirer to hire certain employees. Specifically, Paragraph IV(H) of the proposed Final Judgment requires Defendants Wienerberger AG, General Shale, and Meridian 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 all Defendants must

not interfere with any negotiations 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 and pay on a prorated basis any bonuses, incentive, other salary, benefits or other compensation fully or partially accrued at the time the employee transfers to the Acquirer, vest any unvested pension and other equity rights, and provide all other benefits that those employees otherwise would have been provided had those employees continued employment with Defendants, including but not limited to any retention bonuses or payments. This paragraph further provides that the Defendants Wienerberger AG, General Shale, and Meridian may not solicit to hire any employees who elect employment with the Acquirer, unless that individual is terminated or laid off by the Acquirer or the Acquirer agrees in writing that the Defendants Wienerberger AG, General Shale, and Meridian may solicit or hire that individual. The non-solicitation period runs for 12 months from the date of the divestiture. This paragraph does not prohibit Defendants Wienerberger AG, General Shale, and Meridian from advertising employment openings using general solicitations or advertisements and rehiring employees who apply for a position through a general solicitation or advertisement.

B. Divestiture Trustee

If Defendants Wienerberger AG, General Shale, and Meridian 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 Wienerberger AG, General Shale, and Meridian 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.

D. Other Provisions

Section XI of the proposed Final Judgment requires Defendants Wienerberger AG, General Shale, and Meridian, unless a transaction is otherwise 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"), to not directly or indirectly acquire any assets of or any interest, including a financial, security, loan, equity, or management interest, in an entity involved in the design, manufacture, and sale of residential brick in Alabama, Indiana, Kentucky, Michigan, Ohio, or Tennessee without first providing at least 30 calendar days advance notification to the United States. Pursuant to the proposed Final Judgment, during the term of the proposed Final Judgment, Defendants Wienerberger AG, General Shale, and Meridian must notify the United States of such acquisitions as it would for a required HSR Act filing, as specified in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations. The proposed Final Judgment further provides for waiting periods and opportunities for the United States to obtain additional information analogous to the provisions of the HSR Act before such acquisitions can be consummated. Requiring notification of any such acquisition will permit the

United States, as relevant, to assess the competitive effects of that acquisition before it is consummated and, if necessary, seek to enjoin the transaction.

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 caused 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 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 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 that effort to enforce this 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 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 D. Owen
Acting Chief, Defense, Industrials, and Aerospace Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 8700
Washington, D.C. 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 General Shale's acquisition of Meridian. 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 residential brick in the eight geographic markets alleged in the Complaint. 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
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> (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,

FOR PLAINTIFF
UNITED STATES OF AMERICA:

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