UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. B.S.A. S.A., LAG HOLDING, INC., and THE KRAFT HEINZ COMPANY, *Defendants*.	Civil Action No.: 1:21-cv-02976-RBW

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 September 15, 2020, B.S.A. S.A. (collectively with its subsidiaries LAG Holding, Inc., and Lactalis American Group, Inc., "Lactalis") agreed to acquire the natural cheese business of The Kraft Heinz Company ("Kraft Heinz") in the United States, along with its grated cheese business in Canada and its entire cheese business outside North America, for approximately $3.2 billion. The United States filed a civil antitrust Complaint on November 10, 2021, seeking to enjoin the transaction. *See* Dkt. No. 1. The Complaint alleges that the likely effect of this transaction would be to substantially lessen competition for the sale of feta cheese to retailers in

the United States and ricotta cheese to retailers in the metropolitan and surrounding area of New York, New York and in four metropolitan and surrounding areas in Florida 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 an Asset Preservation and Hold Separate Stipulation and Order ("Stipulation and Order") and a proposed Final Judgment, which are designed to remedy the loss of competition alleged in the Complaint. *See* Dkt. Nos. 2-1 and 2-2.

Under the proposed Final Judgment, explained more fully below, Defendants are required to divest Kraft Heinz's entire Athenos and Polly-O businesses, including the brand names, all products sold under those brand names, and other assets related to or used in these businesses to Emmi Roth USA, Inc. and BelGioioso Cheese, Inc., respectively, or to alternative acquirers acceptable to the United States, within 30 calendar days after entry of the Stipulation and Order. These divestitures will protect competition by enabling the acquirers of the Athenos and Polly-O businesses to step into the shoes of Kraft Heinz and compete with Lactalis in the feta and ricotta markets.

Under the terms of the Stipulation and Order, Defendants must also take certain steps to operate, preserve, and maintain the full economic viability, marketability, and competitiveness of the Athenos Divestiture Assets and the Polly-O Divestiture Assets. In addition, Lactalis must hold entirely separate, distinct, and apart from its other operations, the management, sales, and operations of the Athenos Divestiture Assets and the Polly-O Divestiture Assets. The purpose of these terms in the Stipulation and Order is to ensure that competition is maintained while the divestitures are being accomplished. The Court signed the Stipulation and Order on November 13, 2021, and entered the Stipulation and Order on November 15, 2021. *See* Dkt. No. 3.

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 by the Court 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 VIOLATIONS

A. The Defendants and the Transaction

B.S.A. S.A. is a French company operating under the name Lactalis Group, organized and existing under the laws of France, with its headquarters in Laval, France. It is one of the largest dairy companies in the world, selling cheese in the United States through its subsidiaries, LAG Holding, Inc. and Lactalis American Group, Inc. LAG Holding, Inc., a Delaware corporation with its headquarters in Buffalo, New York, and Lactalis American Group, Inc. generated natural cheese sales of approximately $429 million at retail outlets in the United States in 2020. In the United States, Lactalis sells natural cheeses primarily under the Galbani and Président brand names.

Kraft Heinz is a Delaware corporation co-headquartered in Pittsburgh, Pennsylvania and Chicago, Illinois. Kraft Heinz is one of the largest food products and beverage companies in the world. It is the largest supplier of natural cheeses to grocery stores and other retail outlets in the United States, with retail sales of its natural cheeses totaling over $2.2 billion in 2020. Kraft Heinz sells natural cheeses primarily under the Kraft, Cracker Barrel, Athenos, and Polly-O brand names.

Pursuant to a September 15, 2020 asset purchase agreement, Lactalis will acquire for approximately $3.2 billion Kraft Heinz's interests in its: (1) natural cheese business in the United States, which includes feta, ricotta, and many other types of cheeses; (2) grated cheese business

in Canada; and (3) entire cheese business outside North America (the "Transaction"). Kraft Heinz is retaining a significant portion of its cheese business in the United States, consisting of its processed cheese and cream cheese businesses, marketed under the Kraft Singles, Velveeta, Cheez Whiz, and Philadelphia Cream Cheese brand names.

B. The Competitive Effects of the Transaction

The Complaint alleges that the Transaction will result in anticompetitive effects in the markets for the sale of feta cheese to retailers in the United States and the sale of ricotta cheese to retailers in the metropolitan and surrounding area of New York, New York (the "New York Metro Market") and in four metropolitan and surrounding areas in Florida: Miami/Ft. Lauderdale, Tampa/St. Petersburg, Orlando, and Jacksonville (collectively, the "Florida Metro Markets").

Cheeses are sold to retailers (such as grocery stores, supermarkets, mass merchandisers like Wal-Mart, and club stores like Sam's Club) as branded cheeses or private label cheeses. A branded cheese bears a brand name controlled by the cheese supplier (*e.g.*, Kraft Heinz's Athenos and Polly-O brands) and is usually carried by multiple retailers. A private label cheese is usually sold under a name owned by the retailer (*e.g.*, Wal-Mart's Great Value private label), and is typically offered only in that retailer's stores. Grocery stores and other food retailers act as proxies for individual customers and seek to offer a variety of products demanded by their customers. Accordingly, retailers strive to carry products and brands that their customers value, and may vary their offerings to meet local customer demand.

The Transaction would combine the two largest suppliers of feta cheese sold to retailers in the United States and the two largest suppliers of ricotta cheese sold to retailers in the New York Metro Market and in each of the Florida Metro Markets. As alleged in the Complaint,

eliminating the head-to-head competition between Lactalis and Kraft Heinz would likely lead to higher prices, lower quality, and less innovation for these products for retailers (and consumers) in the relevant markets.

1. Relevant Product Markets

A typical starting point for merger analysis is defining a relevant market, which has both a product and a geographic dimension. Courts define relevant markets to help determine the areas of competition most likely to be affected by a merger.

a. Feta Cheese Sold to Retailers

As alleged in the Complaint, feta cheese sold to retailers is a relevant antitrust product market in which to analyze the effects of the Transaction. Feta cheese originated in Greece, and is primarily used as an ingredient in food dishes. There are no reasonable substitutes for feta cheese for most consumers. A hypothetical monopolist supplier of feta cheese to retailers likely would find it profitable to increase its prices by at least a small but significant non-transitory amount (*e.g.*, five percent). Consumers are unlikely to sufficiently reduce their purchases of feta cheese or shift to a different cheese or other products to render such a price increase unprofitable. Retailers, buying on behalf of consumers, are also unlikely to sufficiently reduce purchases of feta cheese to render such a price increase unprofitable. Accordingly, feta cheese sold to retailers is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Defining a market for feta cheese that is sold to retailers is also consistent with industry recognition and practice. As the Complaint indicates, suppliers of feta cheese to retailers typically (1) monitor the retail prices of competing feta cheeses and set their prices and promotional spending accordingly, (2) do not set the price they charge for feta cheese based on

the prices of other cheeses or other consumer products, (3) track their sales to retailers separately from their sales to other distribution channels (*i.e.*, foodservice and the ingredients or industrial channels), (4) have sales employees dedicated to serving retailers, and (5) sell feta cheese to retailers in packaging and package sizes that are different than that used for feta cheese sold through other distribution channels. These factors further support that feta cheese sold to retailers is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

b. Ricotta Cheese Sold to Retailers

As alleged in the Complaint, ricotta cheese sold to retailers is a relevant antitrust product market in which to analyze the effects of the Transaction. Ricotta is a soft cheese that originated in Italy, and is primarily used as an ingredient in food dishes. There are no reasonable substitutes for ricotta cheese for most consumers. A hypothetical monopolist supplier of ricotta cheese to retailers likely would find it profitable to increase its prices by at least a small but significant non-transitory amount (*e.g.*, five percent). Similar to feta cheese, consumers and retailers are unlikely to sufficiently reduce their purchases of ricotta cheese or shift to a different cheese or other products to render such a price increase unprofitable. In addition, defining a market for ricotta cheese that is sold to retailers is consistent with industry recognition and practice for the same reasons described above for feta cheese. Accordingly, ricotta cheese sold to retailers is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. Relevant Geographic Markets

The relevant geographic markets for analyzing the effects of the Transaction on competition for feta and ricotta cheeses sold to retailers are best defined by reference to the

locations of the retailers that purchase feta and ricotta cheeses in order to then sell those products to consumers. This approach to defining the relevant geographic markets is appropriate because suppliers of feta and ricotta cheeses to retailers assess the competitive conditions in particular localities, including local demand for feta and ricotta cheeses, as well as local demand for the suppliers' own brands as compared to competing brands and to private label offerings. As a result, suppliers of feta and ricotta cheeses can charge different prices, or offer different levels of promotional funding, to retailers in different locations based on local competitive conditions. If targeted for a price increase or reduction in promotional funding, retailers in a given locality would likely not be able to render such conduct unprofitable by purchasing feta or ricotta cheeses outside of the relevant geography and transporting it to their retail locations.

As the Complaint alleges, where feta and ricotta cheese suppliers can successfully vary prices and promotional funding based on retailer customer location, the goal of geographic market definition is to identify the area encompassing the location of potentially targeted customers. The relevant geographic markets described below encompass the locations of retailers that would likely be targeted by suppliers for price increases as a result of the Transaction.

a. The Relevant Geographic Markets for Feta Cheese Sold to Retailers

The relevant geographic market for the sale of feta cheese to retailers may be defined as narrowly as individual metropolitan and surrounding areas. A hypothetical monopolist supplier of feta cheese to retailers in any given metropolitan and surrounding area in the United States likely would find it profitable to increase its prices by at least a small but significant and non-transitory amount (*e.g.*, five percent). Therefore, each metropolitan and surrounding area in the United States is a relevant geographic market and section of the country within the meaning of

Section 7 of the Clayton Act, 15 U.S.C. § 18.

As the Complaint alleges, in circumstances where competitive conditions are similar, it is appropriate to aggregate local markets into a larger relevant market for analytical convenience. The competitive conditions across the country are similar for the sale of feta cheese to retailers. Kraft Heinz's Athenos feta and Lactalis's Président feta are the two top-selling feta cheese brands in the United States. While some regional brands of feta cheese exist, none place a significant competitive constraint on Defendants in any particular metropolitan and surrounding area. Therefore, it is appropriate to analyze competition for the sale of feta cheese to retailers on a national basis.

b. The Relevant Geographic Markets for Ricotta Cheese Sold to Retailers

The relevant geographic markets for the sale of ricotta cheese to retailers are the New York Metro Market and each of the Florida Metro Markets. In each of these markets, Defendants compete vigorously with each other for sales of ricotta cheese to retailers. A hypothetical monopolist supplier of ricotta cheese to retailers in the New York Metro Market and in each of the Florida Metro Markets likely would increase its price by at least a small but significant and non-transitory amount (*e.g.*, five percent). Therefore, the New York Metro Market and each of the Florida Metro Markets are relevant geographic markets and sections of the country within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

3. The Transaction Would Result in Large Combined Market Shares and Likely Substantially Lessen Head-to-Head Competition Between Two Particularly Close Competitors

The Transaction would combine Lactalis and Kraft Heinz, the two largest suppliers of feta cheese to retailers nationally, and the two largest suppliers of ricotta cheese to retailers in the New York Metro Market and in each of the Florida Metro Markets, resulting in a substantial

increase in concentration in these markets.

The Supreme Court has held that mergers that significantly increase concentration in already concentrated markets are presumptively anticompetitive and therefore presumptively unlawful. To measure market concentration, courts often use the Herfindahl-Hirschman Index ("HHI") as described in the *U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines*. HHIs range from 0 in markets with no concentration to 10,000 in markets where one firm has a 100% market share. According to the *Horizontal Merger Guidelines*, mergers that increase the HHI by more than 200 and result in an HHI above 2,500 in any market are presumed to be anticompetitive and, therefore, unlawful.

The Complaint alleges that the Transaction is presumptively unlawful for the sale of feta cheese to retailers nationally. Defendants are the two largest suppliers of feta cheese to retailers in the United States, and their Athenos and Président feta cheese brands combined would account for approximately 65% of all feta cheese sales by retailers nationally. In a national market for feta cheese sold by retailers, the Transaction would increase the HHI by more than 2,100 points, resulting in a highly concentrated market with a post-acquisition HHI of more than 4,300 points. Thus, the Transaction is presumptively unlawful for the sale of feta cheese to retailers nationally.

As alleged in the Complaint, the Transaction is also presumptively unlawful for the sale of ricotta cheese to retailers in the New York Metro Market and in each of the Florida Metro Markets. In each of these markets, the Defendants are the two largest suppliers of ricotta cheese to retailers. In the New York Metro Market, their Polly-O and Galbani ricotta cheese brands combined would account for approximately 70% of all ricotta cheese sales by retailers, and the Transaction would increase the HHI by more than 2,400 points, resulting in a highly

concentrated market with a post-acquisition HHI of more than 5,000 points. In each of the Florida Metro Markets, the Defendants' Polly-O and Galbani ricotta cheese brands combined would account for over 65% of all ricotta cheese sales by retailers, and the Transaction would increase the HHI by more than 1,500 points, resulting in highly concentrated markets, each with a post-acquisition HHI of more than 4,400 points. Thus, the Transaction is presumptively unlawful in the New York Metro Market and in each of the Florida Metro Markets.

The Complaint further alleges that Lactalis and Kraft Heinz are particularly close competitors for feta cheese sold to retailers nationally, and for ricotta cheese sold to retailers in the New York Metro Market and in each of the Florida Metro Markets. The Defendants are the only two major brands for feta and ricotta cheese in the relevant geographic markets and compete aggressively with each other on pricing and promotions. The Defendants also compete to offer new and innovative products and features, such as Kraft Heinz's flip top container for Athenos crumbled feta cheese and Lactalis's double cream ricotta cheese. Accordingly, the proposed combination of Lactalis and Kraft Heinz would likely lead to higher prices, lower quality, and less innovation for feta cheese sold to retailers nationally and for ricotta cheese sold to retailers in the New York Metro Market and in each of the Florida Metro Markets.

4. Difficulty of Entry or Expansion

As alleged in the Complaint, new entry and expansion by competitors will likely neither be timely nor sufficient in scope to prevent the likely anticompetitive effects of the Transaction. Barriers to entry and expansion are high and include the substantial time and expense required to build a brand's reputation and overcome existing consumer preferences through promotional and advertising activity as well as the substantial sunk costs needed to secure the distribution and

placement of a new entrant's products in retail outlets (*e.g.*, paying slotting fees to obtain shelf space at supermarkets and other food retailers).

The Complaint also alleges that the likely anticompetitive effects of the Transaction are not likely to be reversed or outweighed by any efficiencies that the Transaction may achieve.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

To remedy the likely anticompetitive effects of the Transaction, the United States required the Defendants to divest Kraft Heinz's competing feta cheese business (the Athenos Divestiture Business), and its competing ricotta cheese business (the Polly-O Divestiture Business) to acquirers who will step into the shoes of Kraft Heinz and preserve the competition with Lactalis in the relevant geographic markets. Thus, the relief required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing independent and economically viable competitors in the markets for the sale of feta cheese nationally and for the sale of ricotta cheese in the New York Metro Market and in each of the Florida Metro Markets.

A. Athenos Divestiture Provisions

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 Athenos Divestiture Assets to Emmi Roth USA, Inc. ("Emmi Roth") or an alternative acquirer acceptable to the United States, in its sole discretion. Emmi Roth is an established cheese producer based in Fitchburg, Wisconsin. With the divestiture of Kraft Heinz's Athenos business, Emmi Roth, or an alternative qualified acquirer, will be able to enter or expand feta cheese sales to grocery stores and other retailers across the United States. The United States, in its sole discretion, may agree to one or more extensions of the time period to complete the divestiture of the Athenos

Divestiture Assets, not to exceed 60 calendar days in total, and will notify the Court of any extensions. Paragraph IV.C of the proposed Final Judgment requires that the divestiture must include the entire Athenos Divestiture Assets and that the assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be operated by the acquirer as a viable, ongoing business that can compete effectively in the sale of feta cheese to retailers. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and must cooperate with any acquirer.

The Athenos Divestiture Assets are defined in Paragraph II.E of the proposed Final Judgment as all rights, titles, and interests in and to all tangible and intangible property and assets relating to or used in connection with the Athenos Divestiture Business.[1] These assets include: (1) the Athenos Brand Name,[2] including the exclusive right to the name in all sales channels (including the retail, foodservice, and ingredients or industrial channels), and all other intellectual property owned, licensed, or sublicensed, including patents, patent applications, and inventions or discoveries that may be patentable, registered and unregistered copyrights and copyright applications, and registered and unregistered trademarks, trade dress, service marks, trade names, and trademark applications; (2) all contracts, contractual rights, and customer relationships, and all other agreements, commitments, and understandings, including agreements with suppliers, manufacturers, co-packers, and retailers, teaming agreements, leases, and all outstanding offers or solicitations to enter into a similar arrangement; (3) all licenses, permits,

[1] The Athenos Divestiture Business is defined in Paragraph II.F of the proposed Final Judgment as "the worldwide business of the sale of Athenos Products by Kraft Heinz." Athenos Products is defined in Paragraph II.H of the proposed Final Judgment as "any product that Kraft Heinz sold, sells, or has plans to sell under the Athenos Brand Name anywhere in the world."
[2] The Athenos Brand Name is defined in Paragraph II.D of the proposed Final Judgment as "Athenos and any other name that uses, incorporates, or references the Athenos name."

certifications, approvals, consents, registrations, waivers, and authorizations, and all pending applications or renewals; (4) all records and data, including customer lists, accounts, sales, and credit records; production, repair, maintenance, and performance records; manuals and technical information Defendants provide to their own employees, customers, suppliers, agents, or licensees; records and research data concerning historic and current research and development activities; and drawings, blueprints, and designs; and (5) all other intangible property, including commercial names and d/b/a names, technical information such as recipes and formulas, computer software and related documentation, know-how, trade secrets, design protocols, specifications for materials, parts, and devices, procedures for safety, quality assurance, and control, design tools and simulation capabilities, and rights in internet websites and domain names.

Importantly, the Athenos Divestiture Assets include all rights to the Athenos Brand Name, which is currently used to sell feta, gorgonzola, blue cheese, hummus, and pita chips. By requiring the full divestiture of the Athenos Brand Name, which will allow the acquirer to use the Athenos Brand Name for more than just feta, the proposed Final Judgment will enable the acquirer to more effectively compete in the sale of feta cheese by (1) avoiding the potential consumer confusion and potential harm to the Athenos Brand Name that could result from having both the acquirer and Lactalis marketing and selling Athenos-branded products, and (2) by giving the acquirer control over the sale of all Athenos Products in all three channels of distribution – retail, foodservice, and ingredients or industrial.[3] In this case, it is appropriate to

[3] The retail channel is comprised of grocery stores, supermarkets, mass merchandisers like Wal-Mart, and club stores like Sam's Club; the foodservice channel is for distributors that sell to restaurants, cafeterias, hospitals, and other businesses that prepare and serve food; and the ingredients/industrial channel is for companies that primarily prepare and package the frozen entrées that are sold in grocery stores and supermarkets.

require a divestiture that is broader than the harm alleged in the Complaint in order to preserve competition. *See, e.g.*, *Merger Remedies Manual*, Antitrust Division, September 2020, at 9 (explaining that the Division "may seek to include a full line of products in the divestiture package, even when the antitrust concern relates to only a subset of those products"). The divestiture of the entire Athenos Brand Name (and the entire Athenos Divestiture Business) will allow the divestiture buyer the opportunity to use the divested brand in the same way that Kraft Heinz uses it to compete today.

In addition to the Athenos Divestiture Assets, at a later date, the acquirer will acquire additional physical assets and contracts relating to Athenos feta cheese. These additional assets are referred to as Athenos Transitional Manufacturing Assets in Paragraph II.I of the proposed Final Judgment and defined as: (1) production lines numbers 25 and 26 that are used by the Athenos Divestiture Business for crumbling and packaging feta cheese and are located at Kraft Heinz's facility in Wausau, Wisconsin; (2) the feta cheese packaging mold used to produce plastic feta lids and containers that was purchased by Kraft Heinz in 2021 and is located at the facilities of packaging supplier RPC Bramlage-WIKO USA, Inc. in Morgantown, Pennsylvania; and (3) contracts and agreements between Kraft Heinz and Agropur, J. Rettenmaier USA LP, International Paper Company, Berry Global, Inc., Weber Packaging Solutions, Inc., and Bramlage, Inc.

Because the Athenos Transitional Manufacturing Assets will be used by Defendants to fulfill their obligations under the supply contract permitted by Paragraph IV.M of the proposed Final Judgment, Lactalis is permitted, pursuant to Paragraph IV.N of the proposed Final Judgment, to retain these Athenos Transitional Manufacturing Assets until the supply agreement expires or is terminated. At that point, Defendants are required to sell and transfer to the

acquirer of the Athenos Divestiture Assets the Athenos Transitional Manufacturing Assets within 60 days. This is preferable because Lactalis will be responsible for the maintenance and upkeep of the Athenos Transitional Manufacturing Assets for the duration of any supply contract, and pursuant to Paragraph IV.O of the proposed Final Judgment, Lactalis is required to warrant that the Athenos Transitional Manufacturing Assets are operational and without material defect at the time of such transfer to the acquirer.

Similarly, Paragraph IV.K of the proposed Final Judgment provides the acquirer of the Athenos Divestiture Assets with the option to have a series of third-party contracts relating to the production of Athenos Products assigned to it at any time prior to the conclusion of any transition services agreement entered into between the acquirer and Defendants pursuant to Paragraph IV.P of the proposed Final Judgment. These third-party contracts are referred to as the Athenos Transitional Service Contracts in the proposed Final Judgment and are defined in Paragraph II.J as contracts between Kraft Heinz and Prairie Farms, Great Lake Cheese Company, Inc., Marathon Cheese Corporation, Cedar's Mediterranean Foods, Inc., and Saputo Cheese USA, Inc. An acquirer, such as Emmi Roth, that is already a cheese producer with an existing series of suppliers and contracts may prefer not to have some or even any of the Athenos Transitional Services Contracts assigned to it pursuant to Paragraph IV.K of the proposed Final Judgment, but, for a different acquirer, this option will ensure continuity in supply while also allowing that acquirer to evaluate its needs.

The proposed Final Judgment also contains provisions intended to facilitate the acquirer's efforts to hire employees whose job responsibilities relate to the Athenos Divestiture Assets, enabling the acquirer to successfully operate the Athenos business. Paragraph IV.H of the proposed Final Judgment requires Defendants to provide the acquirer and the United States with

organization charts and information relating to these employees and to make them available for interviews with the acquirer. It also prohibits Defendants from interfering 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, incentives, other salary, benefits, or other compensation fully or partially accrued at the time of transfer; vest any unvested pension and other equity rights; and provide all other benefits that the employees would generally be provided had those employees continued employment with Defendants, including any retention bonuses or payments. Finally, the timeline for when these employees may be hired by the acquirer has been set to ensure that employees providing any transition services pursuant to a transition services agreement entered into pursuant to Paragraph IV.P of the proposed Final Judgment are not interrupted.

Paragraph IV.H of the proposed Final Judgment further provides that Defendants may not directly solicit to rehire any Athenos-related employees who were hired by the acquirer, unless an employee is terminated or laid off by the acquirer or the acquirer agrees in writing that Defendants may solicit to rehire that individual. This non-solicitation period runs for 12 months from the date of the divestiture. This provision serves two purposes. First, it promotes a period of stability that will aid the acquirer in assuming control of the Athenos business. Second, many food retailers conduct periodic category reviews in which they evaluate their brand offerings and shelf space allocations, and a one-year non-solicitation period will permit the acquirer to complete at least one such category review at most food retailers. It is important to note, however, that this non-solicitation provision does not prohibit Defendants from advertising employment openings using general solicitations or advertisements and rehiring anyone who applies

for an opening through a general solicitation or advertisement.

The proposed Final Judgment contains several provisions to facilitate the transition of the Athenos Divestiture Business to the acquirer. First, Paragraph IV.J of the proposed Final Judgment will facilitate the transfer to the acquirer of customer and other contractual relationships that are included within the Athenos Divestiture Assets. Defendants must transfer all contracts, agreements, and customer relationships (or portions of such contracts, agreements, and customer relationships), including all supply and sales contracts and co-packing and packaging supplier agreements, 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 otherwise transferring. Defendants must not interfere with any negotiations between the acquirer of the Athenos Divestiture Assets and a contracting party. These protections also apply to any of the Athenos Transitional Services Contracts that the acquirer can elect to have assigned under Paragraph IV.K of the proposed Final Judgment.

Second, Paragraph IV.M of the proposed Final Judgment requires Defendants, at the acquirer's option, to enter into a supply contract or contracts for the processing and packaging of Athenos Products sufficient to meet the acquirer's needs for a period of up to two years on terms and conditions reasonably related to market conditions for the processing and packaging of Athenos Products. A two-year term is appropriate here to permit the acquirer to move the physical equipment included in the Athenos Transitional Manufacturing Assets to a facility that will allow for the most efficient operation of the Athenos Divestiture Business. Supply contracts of this nature are common in this industry; indeed, Kraft Heinz today outsources much of its cheese production to other cheese manufacturers, including its feta cheese production. Companies operating in this industry have experience negotiating and managing these types of supply contracts, and such arrangements are used by other natural cheese brands. In addition,

Paragraph IV.M of the proposed Final Judgment prohibits employees of the Defendants tasked with providing services pursuant to any supply contract from sharing any competitively sensitive information of the acquirer with any other employee of Defendants.

The acquirer may terminate any supply contract described in Paragraph IV.M of the proposed Final Judgment, or any portion of any such supply contract, without cost or penalty at any time upon commercially reasonable written notice. The United States, in its sole discretion, may approve one or more extensions of any supply contract for up to an additional 12 months, and if the acquirer requests such an extension, Defendants must notify the United States in writing at least three months prior to the date the supply contract expires. Any amendments to or modifications of any provisions of a supply contract are subject to approval by the United States, in its sole discretion.

Finally, Paragraph IV.P of the proposed Final Judgment requires Defendants, at the acquirer's option and subject to approval by the United States in its sole discretion, to enter into a transition services agreement for a period of up to six months. Among other things, this transition services agreement will ensure that the acquirer has sufficient access to Athenos-related enterprise data and personnel that are knowledgeable about this data, so as to avoid disruption to the Athenos Divestiture Business while Defendants work to transfer this data to the acquirer and the acquirer interviews and makes offers of employment to Athenos personnel. 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 United States, in its sole discretion, may approve one or more extensions of any transition services agreement for a total of up to an additional six months, and if the acquirer requests such an extension, Defendants must notify the United States in writing at least 30 days prior to the date the transition services

agreement expires. Any amendments to or modifications of any provisions of a transition services agreement are also subject to approval by the United States, in its sole discretion. The employees of Defendants tasked with providing transition services must not share any competitively sensitive information of the acquirer of the Athenos Divestiture Assets with any other employee of Defendants.

B. Polly-O Divestiture Provisions

Paragraph V.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 Polly-O Divestiture Assets to BelGioioso Cheese, Inc. ("BelGioioso") or an alternative acquirer acceptable to the United States, in its sole discretion. BelGioioso is an established cheese producer based in Green Bay, Wisconsin. With the divestiture of Kraft Heinz's Polly-O business, BelGioioso, or an alternative qualified acquirer, will be able to enter or expand ricotta cheese sales to grocery stores and other retailers in New York and Florida. The United States, in its sole discretion, may agree to one or more extensions of the time period to complete the divestiture of the Polly-O Divestiture Assets, not to exceed 60 calendar days in total, and will notify the Court of any extensions. Paragraph V.C of the proposed Final Judgment requires that the Polly-O Divestiture Assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be operated by the acquirer as a viable, ongoing business that can compete effectively in the sale of ricotta cheese to retailers. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and must cooperate with any acquirer.

The Polly-O Divestiture Assets are defined in Paragraph II.S of the proposed Final Judgment as all rights, titles, and interests in and to all intangible and tangible property and

assets, relating to or used in connection with the Polly-O Divestiture Business.[4] These assets include: (1) the Polly-O Brand Name,[5] including the exclusive right to the name in all sales channels (including the retail, foodservice, and ingredients or industrial channels), and all other intellectual property owned, licensed, or sublicensed, including patents, patent applications, and inventions or discoveries that may be patentable, registered and unregistered copyrights and copyright applications, and registered and unregistered trademarks, trade dress, service marks, trade names, and trademark applications; (2) the Shared Recipes License, which is defined in Paragraph II.X of the proposed Final Judgment as a perpetual, royalty-free, paid-up, irrevocable, worldwide, non-exclusive license to the formulas, recipes and related trade secrets, know-how, confidential business information and related data that were used by Kraft Heinz for the production of cheese sold under both the Polly-O Brand Name and any other Kraft Heinz brand name; (3) all contracts, contractual rights, and customer relationships, and all other agreements, commitments, and understandings, including agreements with suppliers, manufacturers, co-packers, and retailers, teaming agreements, leases, and all outstanding offers or solicitations to enter into a similar arrangement; (4) all licenses, permits, certifications, approvals, consents, registrations, waivers, and authorizations, and all pending applications or renewals; (5) all records and data, including customer lists, accounts, sales, and credit records; production, repair, maintenance, and performance records; manuals and technical information Defendants provide to their own employees, customers, suppliers, agents, or licensees; records and research data

[4] The Polly-O Divestiture Business is defined in Paragraph II.T of the proposed Final Judgment as "the worldwide business of the sale of Polly-O Products by Kraft Heinz." Polly-O Products is defined in Paragraph II.W of the proposed Final Judgment as "any product that Kraft Heinz sold, sells, or has plans to sell under the Polly-O Brand Name anywhere in the world."

[5] The Polly-O Brand Name is defined in Paragraph II.R of the proposed Final Judgment as "Polly-O and any other name that uses, incorporates, or references the Polly-O name."

concerning historic and current research and development activities; and drawings, blueprints, and designs; and (6) all other intangible property, including commercial names and d/b/a names, technical information, computer software and related documentation, know-how, trade secrets, design protocols, specifications for materials, parts, and devices, procedures for safety, quality assurance, and control, design tools and simulation capabilities, and rights in internet websites and domain names.

Similar to the Athenos Divestiture Assets, the proposed Final Judgment requires Defendants to divest all rights to the Polly-O Brand Name, which is currently used to sell ricotta, chunk mozzarella, shredded mozzarella, string mozzarella,[6] twist mozzarella-cheddar, fresh mozzarella, asiago, parmesan, romano, and Italian cheese blends. By requiring the full divestiture of the Polly-O Brand Name, the proposed Final Judgment will enable the acquirer to more effectively compete in the sale of ricotta cheese by (1) avoiding the potential consumer confusion and potential harm to the brand that could result from having both the acquirer and Lactalis marketing and selling Polly-O branded cheeses, and (2) by giving the acquirer control over the sale of all Polly-O Products in all three channels of distribution – retail, foodservice and ingredients or industrial. For the same reasons described with respect to the Athenos divestiture provisions, requiring Defendants to divest the full Polly-O Brand Name will preserve competition. Most notably, with respect to the Polly-O Brand Name, it will permit the acquirer to offer both ricotta and chunk mozzarella cheese under the same brand name, which is important

[6] Both Defendants also sell mozzarella string cheese in many local areas, particularly in the eastern United States. However, since the proposed Final Judgment requires divesting the entire Polly-O business—including mozzarella string cheese—it fully remedies any potential competitive harm to purchasers of mozzarella string cheese.

for competing in the market for the sale of ricotta cheese to retailers because both cheeses are often promoted in tandem.

Under the Shared Recipes License defined in Paragraph II.X of the proposed Final Judgment, the acquirer will also receive a perpetual, royalty free, paid-up, irrevocable, worldwide, non-exclusive license to the formulas, recipes and related trade secrets, know-how, confidential business information and related data that were used by Kraft Heinz for the production of cheese sold under both the Polly-O Brand Name and any other Kraft Heinz brand name. The Shared Recipes License will enable the acquirer to produce and sell Polly-O cheeses that share recipes with any other Kraft Heinz product.

Paragraph V.H of the proposed Final Judgment also contains provisions intended to facilitate the acquirer's efforts to hire employees whose job responsibilities relate in any way to the Polly-O Divestiture Assets. These provisions are the same as those applicable to employees whose job responsibilities relate in any way to the Athenos Divestiture Assets, as described above. Specifically, Paragraph V.H of the proposed Final Judgment requires Defendants to provide the acquirer and the United States with organization charts and information relating to these employees and to make them available for interviews with the acquirer. It also prohibits Defendants from interfering 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, incentives, other salary, benefits, or other compensation fully or partially accrued at the time of transfer; vest any unvested pension and other equity rights; and provide all other benefits that the employees would generally be provided had those employees continued employment with Defendants, including any retention bonuses or payments. Finally, the timeline for when these

employees may be hired by the acquirer has been set to ensure that employees providing any transition services pursuant to a transition services agreement entered into pursuant to Paragraph V.N of the proposed Final Judgment are not interrupted.

Paragraph V.H of the proposed Final Judgment further provides that Defendants may not directly solicit to rehire any Polly-O-related employees who were hired by the acquirer, unless an employee is terminated or laid off by the acquirer or the acquirer agrees in writing that Defendants may solicit to rehire that individual. This non-solicitation period runs for 12 months from the date of the divestiture. This provision serves two purposes. First, it promotes a period of stability that will aid the acquirer in assuming control of the Athenos business. Second, many food retailers conduct periodic category reviews in which they evaluate their brand offerings and shelf space allocations, so a one-year non-solicitation period permits the acquirer to complete at least one such category review at most food retailers. It is important to note, however, that this non-solicitation provision does not prohibit Defendants from advertising employment openings using general solicitations or advertisements and rehiring anyone who applies for an opening through a general solicitation or advertisement.

Paragraph II.U of the proposed Final Judgment defines Polly-O Excluded Contracts. These are contracts that BelGioioso has informed Defendants that it does not want included as part of the Polly-O Divestiture Assets. The Polly-O Excluded Contracts are contracts and agreements between Kraft Heinz and Foremost Farms USA Cooperative, Marathon Cheese Corporation, Saputo Cheese USA Inc., Amcor Flexibles North America, Inc., International Paper Company, Berry Global, Inc, Transcontinental US LLC, and J. Rettenmaier USA LP. As an established producer of cheese that has an existing series of suppliers and contracts, BelGioioso reviewed these contracts and determined that it did not need them in order to effectively operate the Polly-O Divestiture Business. To avoid saddling BelGioioso with unnecessary or potentially

duplicative contracts, those contracts are excluded from the Polly-O Divestiture Assets. However, if Defendants divest the Polly-O Divestiture Assets to an acquirer other than BelGioioso, and that alternative acquirer determines it needs these Polly-O Excluded Contracts, Paragraph V.K of the proposed Final Judgment requires Defendants to assign, subcontract, or otherwise transfer any of the Polly-O Excluded Contracts to any such acquirer of the Polly-O Divestiture Assets.

As with the Athenos Divestiture Business, the proposed Final Judgment contains several provisions to facilitate the transition of the Polly-O Divestiture Business to the acquirer. First, Paragraph V.J of the proposed Final Judgment will facilitate the transfer to the acquirer of customer and other contractual relationships that are included within the Polly-O Divestiture Assets. As with the Athenos divestiture provisions above, Defendants must transfer all such contracts, agreements, and customer relationships (or portions of such contracts, agreements, and customer relationships), including all supply and sales contracts and co-packing and packaging supplier agreements, 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 otherwise transferring. Defendants must not interfere with any negotiations between the acquirer and a contracting party. These protections also apply to any of the Polly-O Excluded Contracts that an acquirer other than BelGioioso elects to have assigned under Paragraph V.K of the proposed Final Judgment.

Second, Paragraph V.M of the proposed Final Judgment requires Defendants, at the acquirer's option, to enter into a supply contract or contracts for the production and packaging of Polly-O Products sufficient to meet the acquirer's needs for a period of up to 12 months on terms and conditions reasonably related to market conditions for the production and packaging of

Polly-O Products. As with the Athenos divestiture provisions above, supply contracts of this nature are common in this industry; indeed, Kraft Heinz today outsources much of its cheese production to other cheese manufacturers, including its ricotta cheese production. Companies operating in this industry have experience negotiating and managing these types of supply contracts, and such arrangements are used by other natural cheese brands. In addition, Paragraph V.M of the proposed Final Judgment prohibits employees of Defendants tasked with providing services pursuant to any supply contract from sharing any competitively sensitive information of the acquirer with any other employee of Defendants.

The acquirer may terminate any supply contract described in Paragraph V.M of the proposed Final Judgment, or any portion of any such supply contract, without cost or penalty at any time upon commercially reasonable written notice. The United States, in its sole discretion, may approve one or more extensions of any supply contract for up to an additional 12 months, and if the acquirer requests such an extension, Defendants must notify the United States in writing at least three months prior to the date the supply contract expires. Any amendments to or modifications of any provisions of a supply contract are subject to approval by the United States, in its sole discretion.

Finally, Paragraph V.N of the proposed Final Judgment requires Defendants, at the acquirer's option and subject to approval by the United States in its sole discretion, to enter into a transition services agreement for a period of up to six months. Among other things, this transition services agreement will ensure that the acquirer has sufficient access to Polly-O-related enterprise data and personnel that are knowledgeable about this data, so as to avoid disruption to the Polly-O Divestiture Business while Defendants work to transfer this data to the acquirer and the acquirer interviews and makes offers of employment to Athenos personnel. 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 United States, in its sole discretion, may approve one or more extensions of any transition services agreement for a total of up to an additional six months, and if the acquirer requests such an extension, Defendants must notify the United States in writing at least 30 days prior to the date the transition services agreement expires. Any amendments to or modifications of any provisions of a transition services agreement are also subject to approval by the United States, in its sole discretion. The employees of Defendants tasked with providing transition services must not share any competitively sensitive information of the acquirer of the Polly-O Divestiture Assets with any other employee of Defendants.

C. Divestiture Trustee Provisions

If Defendants do not accomplish the divestitures within the time periods prescribed in Paragraphs IV.A and V.A of the proposed Final Judgment, Section VI of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect any remaining divestitures. If a divestiture trustee is appointed, the proposed Final Judgment provides that Defendants must pay all costs and expenses of the trustee. The divestiture trustee's commission must 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 must provide monthly reports to the United States setting forth his or her efforts to accomplish the remaining divestitures. If the remaining divestitures have 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.

D. Ricotta Notification Requirement Provisions

Section XII of the proposed Final Judgment requires Lactalis to notify the United States at least 30 days in advance of acquiring, directly or indirectly, in a transaction that would not otherwise be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), any assets or any interest in any entity involved in the sale of ricotta cheese to retailers in the United States. Pursuant to the proposed Final Judgment, Lactalis 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, except that the information requested in Items 5 through 8 of the instructions must be provided only about the sale of ricotta cheese to retailers in the United States. 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.

The reason for this requirement for ricotta cheese is that there is evidence of strong regional variation in brand strength in ricotta cheese. Accordingly, Lactalis could purchase a regional brand of ricotta that is very important to competition in that particular region, but that purchase might be small enough on a national level not to require a filing under the HSR Act. Given Lactalis's strong presence in the sale of ricotta cheese nationwide, it is important for the United States to receive notice of regional transactions which could have the potential to substantially reduce competition in this industry. Requiring notification from Lactalis before acquisition of an entity involved in the sale of ricotta cheese to retailers will permit the United

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

E. 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 result from 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 that effort to enforce this 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.

F. Term of the Final Judgment

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 divestitures have been completed and that the continuation of this 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:

Eric D. Welsh
Chief, Healthcare and Consumer Products Section
Antitrust Division
United States Department of Justice
450 Fifth Street NW, Suite 4100
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 Lactalis's proposed acquisition of Kraft Heinz's natural cheese business in the United States. 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 sale of feta cheese sold to retailers in the United States and ricotta cheese sold to retailers in the New York Metro Market and in each of the Florida Metro Markets. 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 mechanisms 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 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 also 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: December 20, 2021

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA:

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