UNITED STATES OF AMERICA
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

Plaintiff,

v.

CONAGRA FOODS, INC.,
HORIZON MILLING, LLC,
CARGILL, INCORPORATED, and
CHS INC.,

Defendants.

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the Proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Defendants ConAgra Foods, Inc. ("ConAgra"), Cargill, Incorporated ("Cargill"), and CHS Inc. ("CHS") entered into a Master Agreement, dated March 4, 2013, which would combine the wheat flour milling assets of ConAgra and defendant Horizon Milling, LLC ("Horizon") (a joint venture between Cargill and CHS) to form a joint venture to be known as Ardent Mills ("Ardent Mills" or "the joint venture").

The United States filed a civil antitrust Complaint on May 20, 2014, seeking to enjoin the joint venture. The Complaint alleges that the likely effect of the formation of Ardent Mills would be to substantially lessen competition for the provision of hard wheat

flour to customers in Northern California, Southern California, Northern Texas, and the Upper Midwest, and soft wheat flour to customers in Southern California and the Northern Texas, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1.

At the same time the Complaint was filed, the United States also filed a Proposed Final Judgment, which is designed to eliminate the anticompetitive effects of the joint venture. Under the Proposed Final Judgment, which is explained more fully below, Defendants are required to divest four flour mills located in Oakland, California; Los Angeles, California; Saginaw, Texas; and New Prague, Minnesota. The Proposed Final Judgment also prohibits Cargill, CHS, and ConAgra from disclosing to Ardent Mills certain non-public information relating to wheat sales to, and wheat use by, Cargill, CHS, and ConAgra wheat customers.

In a Hold Separate Stipulation and Order filed at the same time as the Complaint and Proposed Final Judgment, the United States and Defendants have stipulated that the Proposed Final Judgment may be entered after compliance with the APPA.[1] Entry of the Proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Proposed Final Judgment and to punish violations thereof.

[1] The Hold Separate Stipulation and Order requires Defendants to hold separate their entire wheat flour milling businesses until after the divestitures required by the Proposed Final Judgment have occurred.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendants and the Proposed Joint Venture

ConAgra is a Delaware corporation headquartered in Omaha, Nebraska. It is one of the largest food companies in the United States. Its ConAgra Mills subsidiary makes multiple types of flour, including hard wheat flour and soft wheat flour. ConAgra Mills operates twenty-one wheat flour mills in the United States. In terms of capacity, ConAgra Mills is one of the three largest wheat flour millers in the United States, capable of producing approximately 225,000 hundred weights ("cwt"), or about 23 million pounds, of flour per day. In 2012, ConAgra reported revenues of $13.3 billion; ConAgra Mills reported revenues of $1.8 billion.

Horizon is a joint venture between Cargill and CHS that is headquartered in Wayzata, Minnesota. Cargill owns 76 percent of Horizon, and CHS owns the remaining 24 percent of Horizon. Horizon makes several types of flour, including hard wheat flour and soft wheat flour. In terms of capacity, Horizon is one of the three largest wheat flour millers in the country, with twenty mills in the United States, capable of producing approximately 270,000 cwt, or about 27 million pounds, of flour per day. In 2012, Horizon reported revenues of approximately $2.5 billion.

Cargill is a privately held Delaware corporation headquartered in Wayzata, Minnesota. Cargill produces agricultural products and food ingredients; it also markets wheat to flour mills. The Horizon joint venture includes fifteen mills located in the United States that were contributed by Cargill. In 2012, Cargill reported revenues of $133.8 billion.

CHS is a Minnesota corporation headquartered in Inver Grove Heights, Minnesota. It sells, among other things, grains and grain marketing services (including wheat for flour milling), animal feed, food, and food ingredients; it also markets wheat to flour mills. The Horizon joint venture includes five mills owned by CHS, located in the United States, leased by CHS to Horizon. In 2012, CHS reported revenues of $40.1 billion.

Under the March 4, 2013 Master Agreement, ConAgra, Cargill, and CHS agreed to combine the wheat flour milling assets of ConAgra Mills and Horizon to form Ardent Mills. ConAgra and Cargill each would own a 44 percent share of the joint venture, and CHS would own the remaining 12 percent share. Under the Master Agreement, Cargill and CHS also would share with Ardent Mills certain information regarding wheat markets. The formation of the joint venture likely would substantially lessen competition as a result of Defendants' combination of their wheat flour milling assets. This proposed joint venture is the subject of the Complaint and Proposed Final Judgment filed by the United States on May 20, 2014.

B. Industry Background

1. Flour Milling and Flour Uses

Wheat flour is an important ingredient in many baked food products. It is made by grinding wheat into a fine powder. The process begins with a miller feeding wheat kernels into a flour mill's "breaker rollers," which crack open the hard outer shell of the wheat kernel, separating the exterior hull from the interior endosperm of each kernel. The separated exterior hulls, known as wheat middlings or "midds," often are sold to manufacturers of animal feed, who typically mix the midds with other inputs to

manufacture feed. The interior endosperm is further ground and sifted to produce wheat flour.

Hard wheat flour is milled from hard wheat, which has high gluten content and a hard endosperm. Soft wheat flour is milled from soft wheat, which has low gluten content and a soft endosperm. Soft wheat generally does not flow as easily through a mill as hard wheat, which necessitates certain design features in a soft wheat flour mill that are not required in a hard wheat flour mill. As a result, most flour mills are designed to produce hard wheat flour or soft wheat flour. Some mills can produce hard wheat flour and soft wheat flour using two or more milling units, each of which is dedicated to milling one type of flour using the appropriate equipment. Finally, some mills, known as "swing" mills, can produce both types of flour using the same equipment. The production of flour in a swing mill, however, usually entails a loss of efficiency, which increases the costs of producing wheat flour, making a mill less competitive.

The different gluten content of hard and soft wheat flour limits each to certain baked goods applications. Gluten is a type of protein found only in wheat that traps gasses produced during leavening and baking. The greater the gluten content of flour, the more it will rise during baking and the chewier will be the finished product. Hard wheat flour's high gluten content makes it well-suited for use in bread, rolls, bagels, pizza dough, and similar goods. Soft wheat flour, which has lower gluten content, is well-suited for use in lighter, flakier products like cakes, cookies, crackers, and pastries. Substituting hard wheat flour for soft wheat flour (or vice versa) in a specific application would compromise the finished-product characteristics that consumers demand. As a result, there is very little substitutability between hard and soft wheat flour.

2. Flour Customers and Flour Pricing

Wheat flour is purchased by four main types of customers: industrial bakers, food service companies, flour distributors, and retail flour sellers. Larger flour customers typically buy flour pursuant to a formal request for proposal or a less formal bidding-type process, wherein the customer seeks bids from multiple flour millers. These customers frequently specify the characteristics of the flour they seek to purchase (including protein content, which is an indicator of gluten content). Smaller flour customers often purchase standard types of flour at prices that are based on millers' daily or weekly price sheets. Whether they buy flour based on a bidding-type process or price sheets, customers frequently play millers against one another during negotiations, using price quotes from one or more millers as leverage to secure lower delivered flour prices from competing millers.

The price of delivered flour has five components: (i) the price of wheat, usually based on an organized wheat market price (*e.g.*, the price of wheat sold on the Minneapolis Grain Exchange, Kansas City Board of Trade, or Chicago Mercantile Exchange); (ii) the "basis," which is the difference between the price of wheat on an organized market and the local market price of wheat for the miller; (iii) the "millfeed credit," which is based on the price at which the miller can sell wheat middlings; (iv) transportation costs, that is, the cost of delivering flour from the mill to the customer; and (v) the "block" (sometimes referred to as the "margin"), which amounts to the miller's fee for converting wheat into flour.

The first four components largely are determined by market forces beyond the control of an individual miller, and they account for the overwhelming majority of the

cost of delivered flour. The block, on the other hand, is a relatively small portion of the price of delivered flour. Although millers competing with one another to supply a customer may seek to minimize the cost of the other components to keep the delivered price of flour low, the block is the primary term that millers can control, and it is the primary term on which they compete.

3. Transportation Costs and Customers' Supply Options

Although transportation costs tend to be a relatively small portion of the delivered price of flour, they frequently determine whether a flour miller can supply a customer cost effectively. Transportation costs increase as the distance flour must travel from a mill to a customer increases. Therefore, a miller's ability to economically supply a customer will depend in part on how far away its mills are from the customer's delivery point, which usually is a flour-using facility, such as a bakery, food processing plant, or distribution center. Mills located close enough to customers to which they can cost effectively deliver flour by truck typically are the lowest cost competitors for those customers' business. The maximum distance flour can economically travel via truck typically is 150 to 200 miles.

Although some customers are capable of receiving flour delivery from distant mills by rail or "rail-to-truck transfer" (which entails shipping flour by rail, then transferring it to truck for delivery), neither is a viable option for many customers. Customers not located on a rail spur cannot physically receive direct rail shipments. Even for customers with rail access, rail shipments from distant mills are typically more expensive, slower, and less reliable than direct truck shipments from local mills. Many customers also find that shipments by rail-to-truck transfer have all the disadvantages of

rail, plus the risk that using two modes of transportation (and the need to transfer flour from rail to truck) will degrade the quality of the delivered flour. Thus, competition for flour sales to a customer takes place primarily among millers located no more than 150 to 200 miles from a customer.

C. The Relevant Product Markets

The Complaint alleges that hard wheat flour and soft wheat flour are relevant product markets and lines of commerce.

Due to hard wheat flour's unique characteristics, flour consumers use it for specific applications and cannot use other types of flour for those applications. For example, a baker that produces crusty, chewy baked goods, such as bread, rolls, bagels, pizza dough, or similar products, cannot use soft wheat flour in place of hard wheat flour to produce those goods because the finished goods will not "rise" or have the texture that baked-goods consumers expect and demand. Consequently, hard wheat flour customers generally do not regard other types of flour as adequate substitutes for hard wheat flour. Thus, hard wheat flour is a relevant product market.

Due to soft wheat flour's unique characteristics, flour consumers also use soft wheat flour for specific applications and cannot use other types of flour for those applications. For example, a baker that produces lighter, flakier products, such as cakes, cookies, crackers, or pastries, cannot use hard wheat flour in place of soft wheat flour to produce those goods because the finished goods will not remain flat – as is desirable for crackers or pastries – or have the texture that that baked-goods consumers expect and demand. Consequently, soft wheat flour customers generally do not regard other types of

flour as adequate substitutes for soft wheat flour. Thus, soft wheat flour is a relevant product market.

D. Relevant Geographic Markets

The Complaint alleges that the relevant geographic markets are Northern California, Southern California, Northern Texas, and the Upper Midwest. These markets are defined based on metropolitan statistical areas ("MSAs") as follows:

- Northern California encompasses the Santa Rosa-Petaluma, Napa, Sacramento-Arden-Arcade-Roseville, Stockton, Vallejo-Fairfield, San Francisco-Oakland-Fremont, Santa Cruz-Watsonville, San Jose-Sunnyvale-Santa Clara, Merced, and Modesto MSAs;

- Southern California encompasses the Los Angeles-Long Beach-Santa Ana, Riverside-San Bernardino-Ontario, and San Diego-Carlsbad-San Marcos MSAs;

- Northern Texas encompasses the Dallas-Fort Worth-Arlington MSA; and the

- Upper Midwest encompasses the Minneapolis-St. Paul-Bloomington, Eau Claire, Madison, La Crosse, and Rochester MSAs.

The relevant geographic markets in this case are best defined by the locations of customers. Flour millers take into account rivals' mills that can economically supply a customer when determining the price at which to sell to that customer. Because transportation costs are an important component of the delivered price of flour, local mills tend to be more cost-effective sources of supply than mills located further away from the customer. When a customer has few local mills capable of supplying it with the flour it needs at a relatively low cost, a miller will charge a higher price to the customer. On the other hand, when a customer has many nearby mills capable of supplying it, a miller will charge a lower price. Thus, flour millers price differently to different customers depending on their location.

Most flour customers are unable to defeat such pricing by arbitrage. That is, they cannot secure flour at a lower price from customers in other areas. Customers' ability to arbitrage is limited by transportation costs, which limit the distance that flour can be shipped cost effectively. In addition, securing flour from other customers increases the number of times that flour changes hands, and potentially increases the number of transportation modes used, which increases food safety and quality risks, making arbitrage by buying flour from customers in other areas undesirable.

Because of differential pricing and the inability of most wheat flour customers to arbitrage, a hypothetical monopolist controlling the sale of all hard wheat flour to customers in Northern California, Southern California, Northern Texas, or the Upper Midwest, or the sale of all soft wheat flour to customers in Southern California or Northern Texas, would profitably impose a small but significant and nontransitory increase in the price ("SSNIP") of each relevant product. It is appropriate to aggregate flour customers in each of these areas because each customer in the area faces similar supply options and, hence, would similarly be affected by the formation of Ardent Mills.

E. Relevant SSNIP

The Division applies the hypothetical monopolist test to help define relevant markets. This test asks whether a hypothetical monopolist of a product, or of a product in an area, would profitably impose a SSNIP. When applying the hypothetical monopolist test, the Division typically bases the SSNIP on the price of the final product to a consumer. In this case, however, the Division based the SSNIP primarily on the "block," which is the primary component of the delivered price of flour that is determined by competition among millers.

The use of a smaller SSNIP in this case is consistent with the Horizontal Merger Guidelines, which state that "[w]here explicit or implicit prices for . . . firms' specific contribution to value can be identified with reasonable clarity," those prices (instead of the total price paid by customers) may be the relevant benchmark for analyzing whether a hypothetical monopolist would profitably impose a SSNIP.[2] This method of analysis better directs attention to what "might result from a significant lessening of competition caused by" the joint venture.[3]

Flour millers' specific contribution to value largely involves the conversion of wheat into flour, for which the block is the primary form of compensation. Moreover, competition among wheat flour millers largely is centered on the block, whether explicitly (for customers who seek to identify each of the five components of delivered price) or implicitly (for customers who pay a flat delivered price). Thus, the lessening of competition resulting from the formation of Ardent Mills largely would result in an increase in the block, which in turn would increase the delivered price of flour to customers. As a result, basing the SSNIP primarily on the block, rather than the delivered price of flour, is appropriate in this case.

F. Competitive Effects of the Proposed Joint Venture

The Complaint alleges that the formation of Ardent Mills would eliminate head-to-head competition between ConAgra Mills and Horizon for sales to individual customers, increase the likelihood of capacity closures, and increase the likelihood of anticompetitive coordination among wheat flour millers.

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[2] *See* U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 4.1.2 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010 html.

[3] *Id.*

1. Market Shares and Concentration

The Complaint alleges that the formation of Ardent Mills would increase concentration in each relevant market. Market concentration levels often indicate the likely competitive effects of a transaction – the higher the concentration, and the more the proposed transaction would increase concentration, the greater the likelihood that the transaction would reduce competition. The Complaint alleges that each relevant market is already concentrated, and that the joint venture would significantly increase concentration in each market, indicating that the joint venture likely would substantially lessen competition in the relevant markets.

Due to transportation costs – which increase as shipping distances increase – most competition in the relevant markets occurs among millers with flour mills that are close to customers in the relevant geographic markets. In particular, mills located close enough to customers to allow for economical direct truck shipments of flour (*i.e.*, no more than 150 to 200 miles from customers) typically are the most effective competitors for those customers' business. Although some millers located more than 200 miles from a customer may sell flour into a geographic market, higher transportation costs typically render distant millers less competitive.

Detailed information on the sales and costs of each miller selling into a geographic market would permit one to compute sales shares for each relevant market. Absent that information, market shares and concentration levels based on milling capacity within 200 miles of key cities within each market serve to illuminate the likely competitive effects of the joint venture. Each such 200-mile area includes the flour

millers who typically can serve customers at the lowest cost, and competition will most directly be affected by a loss of competition among those millers.

The market shares and concentration levels identified in the Complaint indicate that the formation of Ardent Mills would give it a large share of capacity – as well as a large share of sales – presumptively enhancing market power in each relevant market. Transactions are presumed likely to enhance market power where they would raise a measure of market concentration called the Herfindahl-Hirschman Index ("HHI")[4] more than 200 points to a total of more than 2500 points. In each relevant market, the formation of Ardent Mills would do so:

- Northern California. Ardent Mills would own two mills in this area comprising approximately 70 percent of the hard wheat flour capacity within 200 miles of San Francisco. The joint venture would increase the HHI for hard wheat flour in this market to more than 5,000.

- Southern California. Ardent Mills would own three mills in this area comprising more than 40 percent of hard wheat flour milling capacity within 200 miles of Los Angeles; the joint venture would increase the HHI for hard wheat flour in this market to more than 2,500. Ardent Mills would also own two mills comprising more than 70 percent of soft wheat flour milling capacity; the joint venture would increase the HHI for soft wheat flour in this market to more than 5,500.

- Northern Texas. Ardent Mills would own three mills in this area comprising more than 75 percent of hard wheat flour milling capacity within 200 miles of Dallas–Ft. Worth. The joint venture would increase the HHI for hard wheat

[4] *See* U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 5.3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010 html. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 (302 + 302 + 202 + 202 = 2,600). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

flour to more than 6,000. Ardent Mills would also own two mills comprising all soft wheat flour milling capacity, increasing the HHI for soft wheat flour to 10,000.

- Upper Midwest. Ardent Mills would control six mills in this area comprising more than 60 percent of the hard wheat flour milling capacity within 200 miles of Minneapolis. The joint venture would increase the HHI for hard wheat flour in this market to more than 4,500.

2. Elimination of Head-to-Head Competition

The Complaint alleges that the formation of the joint venture likely would substantially lessen competition in the relevant markets by eliminating head-to-head competition between ConAgra Mills and Horizon. Horizon and ConAgra Mills operate mills that are close to one another in the relevant geographic markets, and that are among those closest to many customers in those markets. Because their mills are the closest mills to many customers, Horizon's and ConAgra's delivered flour costs tend to be lower than those of their rivals' more distant mills. Moreover, because their mills are located close to one another, Horizon's and ConAgra's flour transportation costs tend to be similar.

As a result of the proximity of their mills to one another – and to one another's customers – Horizon and ConAgra frequently are among the lowest-cost flour suppliers in the relevant markets, and they compete aggressively against one another to make sales in those markets by offering a lower delivered price to their customers. Indeed, wheat flour customers in the relevant markets have obtained lower flour prices – largely by securing a smaller block – by playing ConAgra Mills and Horizon against one another during negotiations. The formation of Ardent Mills would eliminate that competition, resulting in higher hard wheat flour prices for customers in Northern California, Southern

California, Northern Texas, and the Upper Midwest, and higher soft wheat flour prices for customers in Southern California and Northern Texas.

3. Increased Likelihood of Capacity Closures

The Complaint alleges that the formation of Ardent Mills likely would substantially lessen competition in the relevant markets by increasing the likelihood of unilateral, anticompetitive capacity closures.

A miller will find it profitable to unilaterally close capacity if any lost profit due to lower sales would be more than offset by a corresponding increase in profit on sales made at a higher price due to the capacity closure. A wheat flour miller with a relatively large base of milling capacity that can benefit from a price increase has a greater incentive to shut capacity, forcing higher cost capacity to step in and increase flour production to meet demand. The joint venture would significantly increase Ardent Mills's base of capacity relative to that of ConAgra Mills or Horizon standing alone, giving Ardent Mills a greater incentive to unilaterally close capacity than either ConAgra Mills or Horizon would have had.

Ardent Mills also would have a greater ability to unilaterally close capacity than either ConAgra Mills or Horizon. Relatively high-cost mills make an attractive target for capacity closures. All else equal, higher-cost capacity yields lower profits. Closing high-cost capacity is more attractive than closing low-cost capacity because profits lost due to closing high-cost capacity are smaller. Because the joint venture would give Ardent Mills a broader array of capacity from which to choose capacity to close – including relatively high-cost capacity – it would increase the ability of the joint venture to profitably shut down capacity. When combined with the increased incentive to close

capacity, this increased ability increases the likelihood that Ardent Mills will close capacity, with the result that Ardent Mills and its remaining rivals will compete less aggressively for the business of flour customers, ultimately increasing prices in the relevant markets.

4. Increased Likelihood of Anticompetitive Coordination

The Complaint alleges that the formation of Ardent Mills likely would substantially lessen competition in the relevant markets by increasing the likelihood of anticompetitive coordination among flour millers. Such coordination occurs where competing firms reach implicit or explicit agreements on output, capacity, price, quality, or other aspects of competition. Such coordination also could occur as a result of parallel accommodating conduct. As described in Section 7 of the Merger Guidelines, "[p]arallel accommodating conduct [involves] situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms."

Several features of hard wheat flour and soft wheat flour markets render them susceptible to coordination. In particular, the Complaint alleges these markets are transparent; that soft and hard wheat flour are homogeneous and purchased frequently; that demand for soft and hard wheat flour is inelastic; and that larger millers compete against one another in multiple geographic markets. By eliminating a significant independent competitor from each of the relevant markets, which already are highly concentrated and are susceptible to anticompetitive coordination, the joint venture would

substantially increase the likelihood of coordination among Ardent Mills and its few remaining rivals.

The joint venture would further increase the likelihood of anticompetitive coordination by permitting Cargill and CHS to share certain wheat-related information with Ardent Mills. Under side agreements to the Master Agreement forming Ardent Mills, Cargill and CHS (both of which own grain trading businesses that would operate independently of Ardent) are to be preferred suppliers to the joint venture. These side agreements may permit Cargill and CHS to give Ardent Mills information regarding wheat purchases and wheat uses by the joint venture's rival millers. The exchange of such information would make it easier for Ardent to monitor its rivals' behavior and discipline deviations from coordinated strategies, substantially increasing the likelihood of coordination in the relevant markets.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestiture Requirement

The Proposed Final Judgment requires divestitures of individual wheat flour mills that will eliminate the anticompetitive effects of the formation of Ardent Mills by establishing a substantial, independent and economically viable competitor in each relevant market. The divestitures are to be made to Miller Milling Company, LLC ("Miller Milling"). As explained in the *Antitrust Division Policy Guide to Merger Remedies*, the Antitrust Division may require such upfront buyers when a divested package is less than an existing business entity.[5] In this case, the mills to be divested are

[5] U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies (June 2011), *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf (identifying an upfront buyer

not existing business entities; rather, the operation of each mill is intertwined with the operation of Defendants' other wheat flour mills.[6] An upfront buyer is appropriate to ensure that the acquirer will have all assets necessary to be an effective, long-term competitor in the production and sale of flour. The United States can evaluate the ability of a buyer to take the Divestiture Assets and operate them as part of a complete flour milling company that can replace the competition lost due to the proposed joint venture.

The Proposed Final Judgment requires Defendants, within ten (10) days after the Court signs the Hold Separate Stipulation and Order, to divest to Miller Milling four mills: ConAgra's mills located in New Prague, Minnesota; Oakland, California; and Saginaw, Texas; and Horizon's mill located in Los Angeles, California. In its sole discretion, the United States may agree to one or more extensions of this period not to exceed thirty (30) days in total. As the United States already has approved the acquirer, any such extensions need not be as long as ordinarily is the case when acquirers are not identified upfront. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that, through no action of the Defendants, the sale of any of the Divestiture Assets cannot be completed, the Final Judgment provides for the United States, in its sole discretion, to agree to the sale of the unsold Divestiture Assets to an alternative purchaser approved by the United States. If Defendants fail to sell the Divestiture assets to Miller Milling or approved alternative purchasers within the time

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provides greater assurance that the divestiture package contains the assets needed to create a viable entity that will preserve competition).

[6] The purchase of wheat, sale of flour, and arrangement of transportation of wheat and flour are examples of functions that are centralized rather than based at the mill sites.

permitted by the Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture.

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

In addition, because experienced, knowledgeable personnel are critical to success in the relevant markets—and may be even more critical to a new entrant seeking to secure customers' business—the Proposed Final Judgment provides the acquirer(s) with an expansive right to hire relevant personnel without interference. The Proposed Final Judgment gives the acquirer(s) the right to hire any and all of Defendants' employees who are employed at, purchase or advise on the purchase of wheat or wheat futures for, provide instructions, guidance, or assistance relating to food safety or quality assurance for, or sell or arrange for transportation of wheat flour or any wheat flour byproducts from the assets to be divested. The Proposed Final Judgment contains numerous provisions to facilitate the hiring and retention of these employees. These provisions require Defendants to provide detailed information about each relevant employee, to

grant reasonable access to relevant employees and the ability to interview them, and to refrain from interfering with negotiations to hire any relevant employee.

B. Nondisclosure of Wheat Customer Confidential Information Requirement

The Proposed Final Judgment prohibits Cargill, CHS, and ConAgra from disclosing to Ardent Mills any non-public, customer-specific information relating to wheat sales or usage, and it prohibits Ardent Mills from soliciting or receiving such information from Cargill, CHS, or ConAgra, or from using such information. No later than seven (7) calendar days after the Final Judgment is entered by the Court, the Proposed Final Judgment requires Defendants to distribute a copy of the Final Judgment to each of their employees with responsibility for wheat sales or flour sales. The Proposed Final Judgment requires Defendants to distribute a copy of the Final Judgment and this Competitive Impact Statement to each of their employees with responsibility for wheat sales or flour sales, as well as to any person who succeeds to a position with responsibility for wheat sales or flour sales within thirty (30) calendar days of that succession. These documents also are to be distributed annually to such employees.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the Proposed Final Judgment will neither impair nor assist 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 sixty (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 sixty (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 prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street NW, Suite 8700
Washington, DC 20530

The Proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the Proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Defendants' formation of Ardent Mills. The United States is satisfied, however, that the divestiture of assets requirement and the nondisclosure of wheat customer confidential information requirement described in the Proposed Final Judgment will preserve competition for the provision of hard wheat flour to customers in Northern California, Southern California, Northern Texas, and the Upper Midwest, and for the provision of soft wheat flour to customers in Southern California and Northern Texas, the relevant markets identified by the United States. Thus, the Proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-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 7 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); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing the public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust

violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").[7]

As the United States 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 set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [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. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[8] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the

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[7] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom*. *Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

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[8] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

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 the APPA 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 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. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding 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). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "The 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 Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[9]

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.

[9] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

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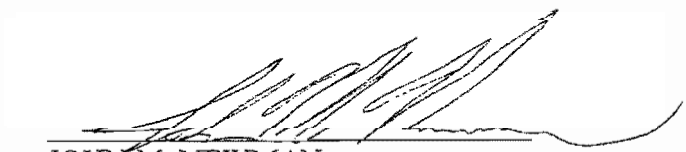
Respectfully submitted,



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