UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. ECOLAB INC., and PERMIAN MUD SERVICE, INC., *Defendants*.	Case No.: FILED: JUDGE:

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

Defendant Ecolab Inc. ("Ecolab") and Defendant Permian Mud Service, Inc. ("Permian") entered into an Agreement and Plan of Merger, dated October 11, 2012, pursuant to which Ecolab would acquire Permian ("proposed transaction"). Ecolab's wholly-owned subsidiary, Nalco Company ("Nalco") and Permian's wholly-owned subsidiary, Champion Technologies, Inc. ("Champion"), compete head-to-head to provide production chemical management services for oil and gas wells drilled in over 1,000 feet of water ("deepwater PCMS") in the United States Gulf of Mexico ("Gulf"). Nalco and Champion are the two leading providers of deepwater PCMS in the Gulf and together control over 70% of the market.

The United States filed a civil antitrust Complaint on April 8, 2013, seeking to enjoin Ecolab's acquisition of Permian. The Complaint alleges that the proposed transaction is likely to lessen competition substantially for deepwater PCMS in the Gulf in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition is likely to lead to higher prices, reduced service quality, and diminished innovation for deepwater PCMS in the Gulf.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the transaction. Under the proposed Final Judgment, the terms of which are explained more fully below, Ecolab is required to divest a package of assets that Champion has been using to provide deepwater PCMS in the Gulf. Under the terms of the Hold Separate Stipulation and Order, Ecolab will take certain steps to ensure that Champion is operated as a competitively independent, economically viable and ongoing business concern, that competition is maintained during the pendency of the ordered divestiture, and that the divestiture assets are preserved and maintained.

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 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.

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

A. The Defendants and the Industry

Ecolab provides products and services to the energy, foodservice, and healthcare, industries. Nalco, its wholly-owned subsidiary, supplies the oil and gas industry with deepwater

PCMS through its Energy Services Division, which generated $1.87 billion in revenues in 2011. Nalco is currently the largest provider of deepwater PCMS in the Gulf.

Permian provides specialty chemicals and services to the oil and gas industry through its subsidiaries, which jointly generated $1.25 billion in revenues in 2011. Permian supplies deepwater PCMS through its wholly-owned subsidiary, Champion, which is currently the second largest provider of deepwater PCMS in the Gulf.

Deepwater PCMS providers treat deepwater oil and gas wells with blends of chemicals that prevent naturally occurring material, such as scale, paraffin, and hydrates, from blocking the flow of hydrocarbons to the production platform; protect well infrastructure and equipment from corrosion and damage; enable efficient separation of the mix of oil, water, and gas produced by the well; and remove or neutralize unwanted substances, such as hydrogen sulfide gas, from the production.

Oil and gas exploration and production companies ("E&P companies"), who own and operate oil and gas wells, must purchase production chemical management services to safely and efficiently produce oil and gas from onshore, shallow water, and deepwater wells (those drilled in over 1,000 feet of water). However, the complex infrastructure of deepwater wells often requires deepwater PCMS providers to develop solutions that are generally unnecessary onshore or in shallow water. For instance, due to the time and expense required to construct a new production platform in deepwater, E&P companies frequently opt to build deepwater "subsea wells," which can connect to existing offshore production platforms up to 70 miles away, instead of "dry-tree" wells, which must be stationed very close to the production platform.

To service these wells, deepwater PCMS providers must deliver chemicals through

"umbilicals," which are clusters of extremely narrow chemical injection, hydraulic, and fiber-optic lines that extend from the production platform to the well. Because of the complexities of this delivery system and the expense of repairing a chemical line clogged by impure or unstable chemicals, E&P companies impose strict qualification and quality control requirements on chemicals administered through umbilicals.

Strings of narrow piping called "flow lines" transport oil and gas from a subsea well to the production platform. Because flow lines run along the seafloor, they expose the produced oil, water, and gas to cold temperatures that cause solids to form and block the flow line. Deepwater PCMS providers must specially formulate chemicals for deepwater subsea wells that inhibit the formation or accumulation of solids during prolonged exposure to seafloor temperatures.

In addition to these operational complexities, deepwater wells often present challenging production issues stemming from the high pressures and temperatures common in such wells. Each deepwater well has unique characteristics, which PCMS providers must assess to identify production challenges and develop an appropriate treatment plan. Deepwater wells also typically contain large reserves and are more expensive to repair than onshore or shallow water wells. For these reasons, most E&P companies operating deepwater wells are extremely risk-averse and seek out PCMS providers and personnel with Gulf-specific deepwater experience and expertise to service their wells. They also typically require deepwater PCMS providers to have more sophisticated laboratories, research and development ("R&D") programs, and supply chain and quality control operations than onshore or shallow water PCMS providers.

B. The Competitive Effects of the Transaction in the Market for Deepwater PCMS in the Gulf

1. The Provision of Deepwater PCMS Is a Relevant Product Market

The United States alleges that the provision of deepwater PCMS is a line of commerce and a relevant market within the meaning of Section 7 of the Clayton Act. E&P companies are unlikely to forego use of PCMS providers or switch to PCMS providers that only have experience onshore or in shallow water in response to a small but significant and non-transitory increase in deepwater PCMS prices.

The risks of not using a PCMS provider, or using a PCMS provider without deepwater operations or experience, greatly outweigh the potential cost savings. Deepwater PCMS represent a fraction of the overall cost of producing oil and gas from a deepwater well, but improper deepwater PCMS treatment can cost an E&P company millions in lost production or compromise the well's infrastructure. As a result, E&P companies are unlikely to forego use of PCMS providers or switch to PCMS providers that only have experience onshore or in shallow water in response to a small but significant and non-transitory increase in deepwater PCMS prices.

Deepwater PCMS are not reasonably interchangeable with onshore or shallow water PCMS. Because deepwater basins have unique characteristics and well infrastructure, providers of onshore or shallow water PCMS typically do not have the relevant know-how and experience required to effectively treat deepwater wells. Although there are some subsea wells in shallow water, they are typically closer to the production platform than deepwater subsea wells, so the operational difficulties engendered by umbilicals and flow lines are often less severe in shallow water. Additionally, the geological characteristics of shallow-water areas of the Gulf differ from

its deepwater areas, so PCMS providers active in shallow water do not have the same familiarity or experience with the formation rocks or hydrocarbons found in deepwater. Importantly, because deepwater operations differ, onshore and shallow water PCMS providers also typically lack a complete suite of chemicals that can tolerate umbilical injection or the high pressures and temperatures typically found in deepwater wells and generally do not have the necessary lab and filtration equipment to develop and qualify a chemical for umbilical injection or deepwater use.

2. The United States Gulf of Mexico Is a Relevant Geographic Market

The United States Gulf of Mexico is a relevant geographic market for the provision of deepwater PCMS under Section 7 of the Clayton Act. E&P companies operating in the Gulf are unlikely to switch to a PCMS provider without local infrastructure or Gulf-specific deepwater experience and expertise in the event of a small but significant and non-transitory increase in price.

E&P companies operating deepwater wells in the Gulf require their PCMS suppliers to have local infrastructure, such as distribution centers, blending facilities, analytical laboratories, and sales and technical personnel, so that the PCMS provider can have the resources it needs nearby to monitor the well and quickly address production challenges. These E&P companies will not select a deepwater PCMS provider that lacks the Gulf-based infrastructure necessary to effectively service the E&P companies' projects.

Although experience in another deepwater basin may be relevant to deepwater Gulf operations, each deepwater basin presents unique production challenges resulting from its unique combination of hydrocarbons, produced water, and geological characteristics. PCMS providers operating in other deepwater basins are unlikely to have the depth of experience with the

particular production challenges that frequently affect deepwater wells in the Gulf. E&P companies are unlikely to entrust their wells to PCMS providers without this essential experience.

3. The Anticompetitive Effects of the Proposed Transaction

The market for the provision of deepwater PCMS in the Gulf is highly concentrated and would become more concentrated as a result of the proposed transaction. Based on 2012 revenues, a combined Champion and Nalco would control 70% of the market for deepwater PCMS in the Gulf.

The proposed transaction would eliminate the significant head-to-head competition between Nalco and Champion to provide deepwater PCMS in the Gulf. Nalco and Champion frequently compete for the same deepwater opportunities in the Gulf. They have spurred each other to develop and improve products, performance and technology, and customers have benefitted from this competition.

Nalco's acquisition of Champion would eliminate many customers' preferred alternative to Nalco and reduce the number of preferred or capable bidders on many projects from three to two. Post-acquisition, Nalco would gain the incentive and ability to profitably raise its bid prices significantly above pre-acquisition levels, reduce its investment in R&D, or provide lower levels of service.

4. Entry and Expansion Are Unlikely to Prevent the Competitive Effects of the Proposed Transaction

Entry by a new PCMS service provider or expansion of existing suppliers would not be timely, likely, and sufficient to prevent the substantial lessening of competition caused by the elimination of Champion as an independent competitor.

Successful entry into the provision of deepwater PCMS in the Gulf is difficult, costly, and time-consuming. To compete, a deepwater PCMS supplier must have local infrastructure, a full line of production chemicals designed for deepwater use, experienced staff, and a track record of successfully treating deepwater wells in the Gulf. Because of the significant investment E&P companies make in deepwater wells and the high costs of any problem or delay, these firms disfavor using new suppliers or switching between established suppliers, making it difficult for new deepwater PCMS providers to enter the market or grow their business.

Developing a track record of successfully treating deepwater wells in the Gulf is arduous and takes substantial time. E&P companies typically avoid the cost and delay involved in evaluating and monitoring a new supplier unless the existing supplier exhibits poor performance over a long period of time. Additionally, many E&P companies refuse to be the first customer to use a new deepwater PCMS provider, while others will only use a deepwater PCMS provider after the provider has developed a track record over a number of years.

A new deepwater PCMS provider may also face challenges acquiring sufficient manpower to expand its business or enter at all. E&P companies require deepwater PCMS providers to commit a number of personnel with significant deepwater experience to the well, and also expect the provider to staff its laboratories and R&D facilities with deepwater experts. It takes existing deepwater PCMS providers years to train employees before they can accumulate deepwater experience and expertise.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will eliminate the likely anticompetitive effects of the merger in the market for deepwater PCMS in the Gulf by establishing a new, independent, and

economically viable competitor. The package of divestiture assets provides the acquirer with the assets it needs to establish a significant presence in the Gulf and become an effective competitor, including the tangible and intangible assets that Champion currently uses to provide PCMS to deepwater wells in the Gulf, the option to acquire Champion's storage, distribution, filtration, and quality control facility in Broussard, Louisiana, and a short-term chemical supply agreement that will allow the acquirer to immediately begin supplying Champion customers with the production chemicals they currently use and trust. In addition, because experienced personnel are critical to success in the deepwater PCMS business in the Gulf – and will be even more important to a new entrant seeking to secure the trust and business of risk-averse customers – the divestiture package provides the acquirer with an expansive right to hire relevant Champion personnel without interference from the merged firm.

A. Identification of an Upfront Buyer

The overriding goal of the proposed Final Judgment is to provide the acquirer with everything it needs to effectively compete to provide deepwater PCMS in the Gulf. Where possible, the United States favors the divestiture of an existing business unit that has already demonstrated its ability to compete in the relevant market. In this case, however, neither Defendant has a standalone deepwater PCMS business in the Gulf. Rather, the employees, facilities, and other assets relating to the Defendants' deepwater PCMS operations in the Gulf are deeply intertwined with the Defendants' PCMS operations in other regions and other business lines. To ensure that the acquirer will have all assets necessary to be an effective, long-term competitor, while minimizing disruption to Defendants' broader operations, the proposed Final

Judgment assembles a set of assets that will enable the acquirer to effectively preserve competition.

As explained in the *Antitrust Division Policy Guide to Merger Remedies*, the Antitrust Division may require an upfront buyer when a divestiture package is less than an existing business entity.[1] Here, Defendants have identified Clariant Corporation and its parent, Clariant International Ltd. (collectively, "Clariant"), as an upfront buyer for the divestiture package. Clariant International Ltd. is a Swiss corporation that develops, produces, and markets chemicals for a variety of industries around the world. Clariant's Oil & Mining Services Group, headquartered in Houston, Texas, provides PCMS throughout the world. Clariant is the fourth largest PCMS provider globally and has significant deepwater PCMS experience outside the Gulf. Its ability to successfully manage a deepwater PCMS business in other regions provides confidence that with the divestiture package, it will be able to do so in the Gulf. Clariant has targeted the deepwater PCMS market in the Gulf as an area for growth, and recently built a state-of-the-art deepwater PCMS laboratory in The Woodlands, Texas. For these reasons, the United States has concluded that Clariant has the intent and capability, as a result of this settlement, to be an effective competitor in the provision of deepwater PCMS in the Gulf and is an acceptable acquirer of the divestiture assets. Therefore, the proposed Final Judgment designates Clariant as the Acquirer.[2]

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

[2] The proposed Final Judgment provides for an alternative sale should a problem arise with the upfront buyer. If the Defendants fail to divest the Divestiture Assets to Clariant within ten days of the Court signing the Hold Separate Stipulation and Order in this matter, the United States may request that the Court appoint a trustee to sell the Divestiture assets. The trustee may sell the Divestiture Assets to an acquirer acceptable to the United States.

B. The Divestiture Package

The divestiture package, which is fully described in the proposed Final Judgment, includes, among other things, Champion deepwater chemicals and know-how, a broad right to hire, the tangible and intangible assets Champion currently uses to serve customers in the Gulf, and additional rights and options designed to transfer know-how and customer accounts to the acquirer, which are discussed in more detail below.

1. Champion Deepwater Chemicals and Know-How

The proposed Final Judgment transfers to the acquirer the chemical formulations and know-how that allow Champion to successfully compete for deepwater PCMS opportunities in the Gulf. Going forward, the acquirer will have exclusive rights in the Gulf to provide the chemical formulations that Champion's current customers use and trust, and the know-how needed to apply these formulations effectively to current and future projects.

Defendants use a variety of specially-formulated chemical solutions to provide deepwater PCMS in the Gulf. Although many of the raw chemicals used in these blends are manufactured by third parties, each deepwater PCMS provider in the Gulf has its own unique formulations and know-how relating to the blending and use of these chemicals. These formulations and know-how represent an important qualitative aspect of the deepwater PCMS provided by the Defendants.

Established PCMS providers routinely rely on case histories and past performance data to identify the best chemical formulation for a new project and demonstrate its suitability to prospective customers. New entrants can only offer chemical formulations without a track record of success or wealth of instructive data points. The divestiture package gives the acquirer

the ability to offer tried and true chemical formulations, which are expected to reduce customers' aversion to trying a new deepwater PCMS provider.

The proposed Final Judgment provides the acquirer with a patent for Champion's most lucrative production chemical in the Gulf, a low dose hydrate inhibitor critical to many E&P companies' operations in the deepwater Gulf, and exclusive licenses within the deepwater Gulf for all other production chemicals used by Champion in the Gulf.[3] It also provides the acquirer with the know-how and other intangible assets (*e.g.*, case histories, formulations, product bulletins, and manufacturing instructions) needed to effectively make and apply these production chemicals.

2. Right to Hire

The proposed Final Judgment provides the acquirer with an expansive right to hire all Champion employees whose job responsibilities relate to the provision of deepwater PCMS in the Gulf. As discussed above, the provision of deepwater PCMS is a service business in which customers place great weight on the expertise, know-how and experience of the individuals working on their accounts. The acquirer's right to hire Champion personnel with deepwater PCMS experience in the Gulf will provide the acquirer with the qualified employees it needs to serve Champion's existing accounts and compete for new projects.

[3] Champion uses these production chemicals to support other product lines (e.g., onshore PCMS) and other geographic regions, and Clariant, the likely acquirer, already has a full suite of production chemicals that it uses in other regions and for other applications. Therefore, the Division has determined that it is appropriate in this case for Defendants to retain rights to use these production chemicals outside the Gulf. *See Antitrust Division Policy Guide to Merger Remedies,* at 11 n. 23 ("When a patent covers the right to compete in multiple product or geographic markets, yet the merger adversely affects competition in only a subset of these markets, the Division will insist on the sale or license of rights necessary to effectively preserve competition in the affected markets. In some cases, this may require that the purchaser or licensee obtain the rights to produce and sell only the relevant product.").

The proposed Final Judgment contains numerous provisions to facilitate the acquirer's ability to hire and retain these employees. The Defendants will provide the acquirer with detailed information about each relevant employee, including his or her responsibilities, job titles, past deepwater PCMS experience in the Gulf, education, training, and salary. The Defendants also will grant the acquirer reasonable access to employees and the ability to interview them. The Defendants are specifically prohibited from interfering with the acquirer's negotiations to hire any relevant employee. For example, if an employee agrees to work for the acquirer, the Defendants must vest such employees' unvested pensions or other equity rights. Importantly, the Defendants must also waive any applicable non-compete or non-disclosure agreement covering information related to the divestiture assets so that the employee may freely provide services to the acquirer and its customers. To allow the acquirer time to develop the business without the risk of Defendants targeting relevant employees to undermine the divestiture, the Defendants are also prohibited for a period of time from soliciting to hire or hiring any relevant employee that is hired by the acquirer.

3. Broussard Facility and Laboratory Equipment

The proposed Final Judgment grants the acquirer the option to purchase certain facilities and lab equipment that Champion uses in connection with its deepwater PCMS Gulf business. These optional divestiture assets include Champion's Broussard, Louisiana warehouse and distribution facility, which also contains chemical filtration equipment and a quality control laboratory; Champion laboratory equipment used in providing deepwater PCMS; and tangible assets used to provide deepwater PCMS to any customer that elects to transition its contract or business to the acquirer. Customers prefer PCMS providers to have facilities and equipment

close to the Gulf. Some potential acquirers – such as Clariant – already have similar facilities. The Final Judgment preserves maximum flexibility by granting the acquirer the option to secure the Champion facilities and equipment it needs to compete, without forcing it to purchase assets that are duplicative of its existing operations.

4. Supply of Chemicals

The proposed Final Judgment grants to the acquirer an option to enter into a short-term supply agreement with the Defendants for chemicals licensed or divested to the acquirer. This provision will provide the acquirer with a trusted supply chain while it makes arrangements to produce such chemicals in-house or obtain them from other manufacturers. The supply agreement will assure customers that they will receive the same chemicals from the acquirer that they are currently receiving from Champion.

The proposed Final Judgment does not require divestiture of Defendants' chemical manufacturing plants, which are substantial facilities that support their broader PCMS operations and have significantly more capacity than an acquirer would need to produce production chemicals for the deepwater Gulf.[4] Clariant has manufacturing capabilities that it can dedicate to production of chemicals for deepwater Gulf applications. Moreover, many chemical intermediates that are used to produce the finished production chemical are widely available commodities.

[4] Each of the Defendants' manufacturing facilities contains a variety of vessels capable of performing distinct chemical reactions. No manufacturing plant is capable of performing all of the chemical reactions needed to manufacture a full suite of deepwater suitable chemicals. As a result, it is not possible to allocate a portion of a single plant to the Acquirer.

5. Customer Transfer

The proposed Final Judgment contains provisions designed to facilitate the transfer of current customer contracts to provide deepwater PCMS in the Gulf from Champion to the acquirer. In a typical divestiture of a line of business, the ongoing customer contracts usually will transfer with the business unit being divested. Here, there is no line of business being divested and contracts cannot be assigned without customer consent. To encourage customers to transition their business to the acquirer, the proposed Final Judgment contains certain incentives. For example, as discussed above, the acquirer will have the exclusive right to provide the chemicals Champion is currently providing deepwater PCMS customers in the Gulf, and access to the know-how and employees that currently allow Champion to provide deepwater PCMS to customers in the Gulf. As such, the acquirer will be able to step into Champion's shoes and continue to provide ongoing services to customers.

In addition, the proposed Final Judgment requires that the Defendants use their "best efforts" to convince customers to move their business to the acquirer. As a way of assuring customers that such a transition will be smooth, the proposed Final Judgment permits the acquirer to purchase the tangible assets used to provide PCMS to any customer that elects to transition its contract or business to the acquirer. At the option of the acquirer, the Defendants also must provide transitional services sufficient to meet the acquirer's needs for assistance in matters relating to the design, manufacture, formulation, testing, provision, or application of production chemicals for any customer. This provision will allow the acquirer broad access to Champion know-how or expertise related to its provision of deepwater PCMS in the Gulf not ascertainable through its divestiture of case histories and other intangible assets. Deepwater

PCMS providers commonly cooperate to prevent operational challenges when a customer chooses a new provider to manage a platform or well. The proposed Final Judgment gives the acquirer the option of requesting additional assistance when taking over Champion's existing accounts.[5]

C. Procedures

The proposed Final Judgment requires Defendants to divest to Clariant the divestiture assets within 10 days after the Court signs the Hold Separate Stipulation and Order in this matter. 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 used by the purchaser to compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with the Acquirer.

In the event that Defendants do not accomplish the divestiture within the prescribed periods, the proposed Final Judgment provides that upon application by the United States, 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 of the trustee's costs and expenses. The trustee will have the authority to divest the divestiture assets to an acquirer acceptable to the United States. 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 his or her 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 (6) months, if the divestiture has not been accomplished, the

[5] Should a customer elect not to move its business to the acquirer, the proposed Final Judgment provides that Champion may continue to service that customer's business for a limited period of six months (extendable up to a total of one year at the sole discretion of the United States upon a showing of good cause).

trustee 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.

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 United States 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:

William H. Stallings
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8000
Washington, DC 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Ecolab's acquisition of certain Champion assets. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of deepwater PCMS in the Gulf, the relevant market 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 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 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.").[6]

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).[7] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the

[6] 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).

[7] *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'").

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.

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 *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20

("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court 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: "[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 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.[8]

[8] *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

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: April 8, 2013

Respectfully submitted,

Katherine A. Celeste
Trial Attorney
U.S. Department of Justice
Antitrust Division
Transportation, Energy, and
Agriculture
450 5th Street, NW; Suite 8000
Washington, DC 20530
Telephone: (202) 532-4713
Fax: (202) 616-2441
E-mail: Katherine.celeste@usdoj.gov

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.").