IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil Action No. 5:11-cv-00043
	)	
v.	)	
	)	
GEORGE'S FOODS, LLC,	)	
	)	By: Glen E. Conrad
GEORGE'S FAMILY FARMS, LLC,	)	Chief United States District Judge
	)	
and	)	
	)	
GEORGE'S, 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

The Complaint in this case alleges that the acquisition by George's Foods, LLC; George's Family Farms, LLC; and George's, Inc. (collectively, "Defendants" or "George's") of the Harrisonburg, Virginia chicken processing complex from Tyson Foods, Inc., Tyson Farms, Inc. and Tyson Breeders, Inc. ("Tyson") likely would substantially lessen competition for the services of broiler growers operating in and around the Shenandoah Valley area of Virginia and West Virginia, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

On June 23, 2011, the United States filed a proposed Final Judgment designed to remedy the effect of the competitive harm caused by George's acquisition of the Harrisonburg facility ("the Transaction"). The proposed Final Judgment, which is explained more fully below, requires George's to make certain capital improvements and modifications at the Harrisonburg complex.

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. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendants and the Transaction

George's Foods, LLC is a limited liability company organized and existing under the laws of the Commonwealth of Virginia. George's Family Farms, LLC is a limited liability company organized and existing under the laws of the Commonwealth of Virginia. George's, Inc. is a corporation organized and existing under the laws of the State of Arkansas. Related George's entities operate production facilities in Springdale, Arkansas; Cassville, Missouri; and Edinburg, Virginia.

On March 18, 2011, Tyson and George's publicly announced George's intent to buy Tyson's Harrisonburg processing complex and related assets (including a feed mill and hatchery). The Antitrust Division of the United States Department of Justice opened an investigation of the potential competitive effects of the proposed acquisition. On May 7, 2011, George's closed the acquisition, for a purchase price of approximately $3.1

million for the facilities and an additional amount for equipment and current inventory. On May 10, 2011, the United States filed this lawsuit, challenging the acquisition as a violation of Section 7 of the Clayton Act.[1]

B. Background

George's and Tyson are competing chicken processors, each operating facilities involved in the production, processing, and distribution of "broilers," which are chickens raised for meat products. Chicken processors, such as George's and Tyson, rely on the services of farmers, called "growers," to care for and raise chicks from the time they are hatched until the time they are ready for slaughter.

Growers work under production contracts with a nearby processor. The processor usually provides the chicks, feed, and any necessary medicine. The processor also transports the chicks and feed to the farms, and transports the chickens to the processing plant. The grower typically provides the chicken houses, equipment, labor, and other miscellaneous expenses related to chicken care. The processor maintains ownership of the birds throughout the process.

There is no cash market for the purchase of broilers, so farmers who want to raise broilers must contract with a nearby processor to raise chicks owned by that processor.

Transportation costs (in particular, for the regular deliveries by the processors of feed to their growers) are such that processors typically contract with growers within a limited geographic area surrounding their facilities. Thus, broiler processors compete with each other for growers in geographic areas where the processors' plants are close together. Prior to the Transaction, the Shenandoah Valley region of Virginia and West

[1] After notifying the parties of the Antitrust Division's concerns regarding the Transaction, the parties failed to provide the Division the information it requested to fully examine the Transaction.

Virginia was one such area where George's and Tyson competed head-to-head for broiler grower services.

Tyson's Harrisonburg, Virginia facility has the capacity to process approximately 625,000 birds per week. The plant is relatively small by industry standards, and is located on a site that prevents expansion to increase its overall processing capacity. Prior to the Transaction, Tyson consistently had been operating the plant at a level of approximately 450,000 birds per week, well below its capacity. Tyson had contracts with approximately 120 growers located in the Shenandoah Valley region to supply birds to the Harrisonburg facility.

George's Edinburg, Virginia facility has the capacity to process approximately 1,650,000 birds per week. George's has contracts with approximately 190 growers located in the Shenandoah Valley region to supply birds to the Edinburg facility.

JBS/Pilgrim's Pride also operates facilities in the Shenandoah Valley region. It has a processing plant in Timberville, Virginia with an approximate capacity of 660,000 birds per week and a processing plant in Moorefield, West Virginia, with an approximate capacity of 2,400,000 birds per week.

George's facility in Edinburg and the Tyson facility in Harrisonburg that George's acquired are approximately 30 miles away from each other. Because of the close proximity of the two facilities, the area from which Tyson and George's recruited growers for their respective facilities overlapped substantially.

C. The Relevant Market

The purchase of broiler grower services from chicken farmers in the Shenandoah Valley region is a line of commerce and a relevant market within the meaning of Section

7 of the Clayton Act. In response to a small but significant, non-transitory price decrease by processors, growers within fifty to seventy-five miles of the Edinburg and/or Harrisonburg facilities would not switch to processors outside the Shenandoah Valley region, switch to providing any other service, or cease growing chickens, in sufficient numbers to render such a price decrease unprofitable.

The purchase of broiler grower services is a relevant product market. To enter the chicken growing business, growers make significant investments that are highly specific to broiler production. They must build chicken houses that may cost from $100,000 to $300,000 and often take out substantial loans to make those investments. Chicken houses have no practical alternative use and most growers would not abandon their investments in chicken houses in response to small decreases in the prices (or degradations of other contract terms) they receive for their services.

Processors typically contract with growers who are located close to their processing complexes as processors must bear the cost of transporting feed and live birds to the grower. In the Shenandoah Valley region, processors rarely contract with growers located more than fifty to seventy-five miles from the processor's feed mill and processing plant. The overlapping draw areas of Tyson and George's in the Shenandoah Valley region (*i.e.*, the areas within which the companies deliver chicks and feed and pick up mature broilers for their processing facilities) is a relevant geographic market within the meaning of Section 7 of the Clayton Act and growers would not switch to processors outside the overlapping draw areas in response to small decreases in the prices (or degradations of other contract terms) they receive for their services.

D. Competitive Effects of the Transaction

The Complaint alleges that the Transaction would likely lessen competition for purchases of grower services in the relevant geographic market. Prior to the Transaction, George's, Tyson and JBS/Pilgrims' Pride competed against each other for grower services in the Shenandoah Valley region. The transaction will reduce the number of competitors in the relevant market from three to two and will leave George's with approximately 40% of the processing capacity in the market. The Complaint alleges that the reduction in the number of processors resulting from the Transaction would likely have the effect of enhancing George's incentive and ability to force growers to accept lower prices and less favorable contractual terms for grower services; in short, the Transaction would lead George's to exercise monopsony power.[2]

E. Entry into Chicken Processing

New entry into the processing of broiler chickens is costly and time consuming. Entry or repositioning into broiler chicken processing in the Shenandoah Valley region would therefore not be timely, likely, or sufficient to counteract a reduction in demand for grower services resulting from the Transaction.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment requires George's to acquire and install certain assets and improvements for its Shenandoah Valley poultry processing facilities. As explained below, requiring the described improvements will enhance George's ability and financial incentive to operate the Harrisonburg facility acquired from Tyson at a greater scale than occurred pre-Transaction. Requiring these improvements gives the

[2] This loss of competition could take the form of lower base prices, fewer allowances for miscellaneous expenses, longer layouts between broiler growing services, or other unfavorable adjustments to growers' contracts.

United States confidence that George's will have an increased demand for chickens and, consequently, an increased demand for grower services that will benefit growers in the Shenandoah Valley region.

A. Terms of the proposed Final Judgment

Specifically, Section IV of the proposed Final Judgment requires George's within 60 days following entry of the proposed Final Judgment (subject to two 30-day extensions at the discretion of the United States) to enter into contracts to implement the following improvements:

First, George's must install at the Harrisonburg plant an individually frozen ("IF") freezer with a rated capacity of 5,000 pounds per hour. Installation of the IF freezer will be made as soon as practicable after the signing of the purchase contract, but no later than twelve months following the date on which the contract is executed. IF freezers are highly specialized equipment designed for the uniform individual freezing of small food items, such as chicken wings and other parts, at a high rate of throughput. The freezers typically cost in excess of $1.5 million and require significant expense for installation. George's will be able to use the IF freezer to process chicken that it slaughters at both its Harrisonburg and Edinburg facilities.

Second, George's must purchase and install at either the Harrisonburg or Edinburg complex a whole leg or thigh deboning line with the capacity to debone a minimum of fifty legs per minute or new automated lines with similar capacities. Installation of this equipment will be made as soon as practicable after the signing of the purchase contract, but no later than twelve months following the date on which the contract is executed. George's will be able to use the deboning equipment to enhance the

mix of the types of chicken products that are processed at both its Harrisonburg and Edinburg facilities.

Third, George's will make significant repairs to the roof of the processing plant at the Harrisonburg complex. Completion of the roof repairs will be made as soon as practicable after the signing of the repair contract, but no later than six months following the date on which the contract is executed.

Section V of the proposed Final Judgment grants the United States access, upon reasonable notice, to Defendants' records and documents (including relevant contracts) relating to matters contained in the proposed Final Judgment. Defendants also, upon request, must make their employees available for interviews or depositions and answer interrogatories and prepare written reports relating to matters contained in the proposed Final Judgment.

The Final Judgment will remain in effect until notification by the United States, or motion by the Defendants, to the Court of Defendants' completion of all of the improvements and modifications required to be made by the Final Judgment.

B. The proposed Final Judgment is in the public interest

The improvements required by the proposed Final Judgment serve the public interest by ensuring that George's has the ability and incentive to increase production at its Shenandoah Valley poultry processing facilities. This will increase George's demand for grower services and thereby benefit Shenandoah Valley growers.

The key aspects of the remedy are the installation of the IF freezer, which will allow George's to produce higher margin items at both of its Shenandoah Valley facilities, and the deboning equipment, which will allow George's to alter the mix of

products produced at these facilities. Together, these improvements will allow George's to produce products more highly valued in the marketplace and thereby earn higher margins. The improvements also will reduce the variable costs George's incurs in its Shenandoah Valley operations. The improvements are merger-specific in that an alternative purchaser of the Harrisonburg plant would not likely have been able to justify the equipment's high cost without the ability to spread the overhead cost across the output of two plants, as George's can.

These improvements likely will result in the following procompetitive effects:[3] The additions of the IF freezer and the deboning line will provide George's with an incentive to maintain high production levels at both plants so as to spread the Harrisonburg plant's increased fixed costs over a greater volume. For George's to fully realize the cost savings from the Transaction and to maximize its return on the investments required by the Final Judgment, George's will need to operate the plant at capacity – something Tyson had only rarely done in the past few years. The significant cost of the improvements (as well as the roofing repairs to the Harrisonburg facility) thus provides a substantial economic incentive that is consistent with George's public commitment to keeping the Harrisonburg plant open and fully operational.[4]

The increases in output from the improvements will in turn lead to a significant increase in total number of chickens George's must procure from area growers.[5] This

[3] George's also estimates that area-specific synergies between its two Shenandoah Valley plants – such as rationalizing feed deliveries in the draw areas and combining product from both plants to fill customer orders in a single shipment – will lead to significant annual savings.

[4] Altogether, the cost for the improvements will likely exceed George's purchase price for the Harrisonburg facility.

[5] George's has already assumed the contracts of all the broiler growers with whom Tyson had written agreements at the time of the Transaction and has offered those growers a contractual

increased demand for chickens will increase demand for grower services in the Shenandoah Valley region beyond the level demanded when Tyson owned the Harrisonburg plant.

The remedy called for in the proposed Final Judgment does not re-create an independent competitor. The remedy is, however, an effective one given the particular facts and circumstances of this matter because George's increased demand for grower services is likely to be sufficient to counteract potential adverse effects from the Transaction. The Horizontal Merger Guidelines ("the Guidelines") state that incremental cost reductions flowing from "merger-generated efficiencies" may "reduce or reverse any increases in the merged firm's incentive to elevate price" post transaction.[6] *Horizontal Merger Guidelines* § 10. The Guidelines instruct that in analyzing the competitive effects of a transaction, the United States can consider whether verifiable, transaction-specific efficiencies "would be sufficient to reverse the [transaction's] potential harm to [growers] in the relevant market, *e.g.*, by preventing price [decreases] in that market." *Id.* As discussed above, the improvements required by the proposed Final Judgment give the United States confidence that the resulting increased output will serve to counteract any potential competitive harm.

Moreover, there were significant concerns associated with the viability of the Harrisonburg processing plant. With a capacity of 625,000 birds per week, the Harrisonburg plant is relatively small compared to other industry slaughter plants (other than plants typically used to process birds for narrow specialty markets). The

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addendum extending the contract terms to 2018. Tyson only had contracts in place sufficient to increase the Harrisonburg plant output to 525,000 head per week.

[6] The Guidelines' reference to price elevation relates to acquisitions causing effects on the selling side (*i.e.*, downstream). In the instant case, the focus is on the buying side with the concern that the Transaction will enhance George's incentive to decrease prices paid to growers.

Harrisonburg plant has operated at a loss over the past few years, with Tyson losing more than $10 million in the three years preceding the sale to George's. For well over half of that time, output at the plant was under 525,000 birds per week.

Taking all the facts and circumstances into consideration, including the likely benefits resulting from the required improvements, the proposed Final Judgment is an effective remedy that is in the public interest.

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 George's.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States

written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the 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 and published in the Federal Register.

Written comments should be submitted to:

William H. Stallings
Chief, Transportation, Energy and Agriculture Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, 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, incurring the time, expense, and risk of a full trial on the merits in order to force George's to divest the Harrisonburg processing complex. The United States is satisfied, however, that the improvements and modification George's will implement at the Harrisonburg complex pursuant to the Final Judgment will ensure continued, and increasing, demand for grower services in the Shenandoah Valley region.

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 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *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 mechanisms 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 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

[7] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a 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).

[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.

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.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous

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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'").

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.[9]

[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.").

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: June 23, 2011

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that on June 23, 2011, I caused the Competitive Impact Statement to be electronically filed with the Clerk of the Court using the CM/ECF system, which will provide electronic notice to the following counsel.

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Respectfully Submitted,

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