IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MONSANTO COMPANY and DELTA AND PINE LAND COMPANY, Defendants.	Civil Action No.: 1:07-cv-00992 Hon. Ricardo M. Urbina

PLAINTIFF UNITED STATES'S RESPONSE TO PUBLIC COMMENTS

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PLAINTIFF UNITED STATES'S RESPONSE TO PUBLIC COMMENTS

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case. After careful consideration of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

On May 31, 2007, the United States filed the Complaint in this matter alleging that the proposed acquisition of Delta and Pine Land Company ("DPL") by Monsanto Company ("Monsanto") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Simultaneously with the filing of the Complaint, the United States filed the proposed Final Judgment and a Stipulation signed by plaintiff and defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed a Competitive Impact Statement ("CIS") in this Court on May 31, 2007; published the proposed Final Judgment and CIS in the *Federal Register* on June 15, 2007, *see United States v. Monsanto Co. and Delta and Pine Land Co.*, 72 Fed. Reg. 33336-01, 2007 WL 1708314; and published summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in *The Washington Post* for seven days beginning on June 28, 2007 and ending on July 4, 2007. The 60-day period for public comments ended on August 27, 2007, and eleven

comments were received as described below and are attached hereto.

I. BACKGROUND

A. The United States's Investigation of the Transaction

On August 14, 2006, Monsanto entered into an agreement to acquire DPL for approximately $1.5 billion. Over the following nine and a half months, the United States conducted an extensive, detailed investigation into the competitive effects of the proposed transaction. As part of this investigation, the United States issued Second Requests to the merging parties, as well as Civil Investigative Demands to all of the major cottonseed companies and cottonseed trait developers. The United States received and considered more than a million pages of responsive material and deposed relevant Monsanto and DPL executives. More than 125 interviews were conducted with customers, competitors, and others with knowledge of the industry and competitive conditions, including national and regional agricultural supply companies, grower organization representatives, USDA cotton experts, and agricultural economists and academics. The United States met repeatedly with concerned parties, including DuPont, one of the commenters, analyzing their allegations and submissions.[1]

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[1] The United States also spoke multiple times with representatives from the offices of the Attorneys General of 27 states interested in the progress of the United States's investigation, including representatives of 16 of the 17 states where cotton is grown in the United States (Georgia's office elected not to participate). In this proceeding, thirteen states, representing less than 20% of U.S. cotton production, have signed onto a comment (discussed *infra*) questioning the proposed Final Judgment. Of the states signing the comment, Delaware, Kentucky, Rhode Island, Utah and West Virginia elected not to participate in any of the communications between the United States and states's representatives during the United States's investigation. The comment does not explain either the scope of the investigation, if any, those non-participating states undertook to reach their conclusions or the reasons why none of the commenting states has initiated independent legal action to enjoin the transaction.

In its investigation, the United States considered the potential competitive effects of this transaction on numerous products and geographic areas. For several of these, the United States concluded that the proposed merger was unlikely to reduce competition.[2] As the Complaint alleges, the transaction did, however, threaten competition with respect to traited cottonseed sales in two geographic regions – the MidSouth and the Southeast.[3]

B. The Traited Cottonseed Markets

Most cottonseed sold today contains "transgenic traits" – genetic material from other organisms that is inserted into the cottonseed germplasm to give the cotton plant desirable characteristics. Two types of transgenic traits currently are available: (1) herbicide tolerance traits, such as Monsanto's "Roundup Ready" and recently introduced "Roundup Ready Flex" ("Flex"), which make the cotton plant able to withstand spraying with particular herbicides, and (2) insect resistance traits, such as Monsanto's "Bollgard" and new "Bollgard II," which make the cotton plant toxic to certain pests.

Cotton farmers overwhelmingly prefer traited seeds because their use significantly reduces labor and input costs. In 2006, farmers planted about 87% of the cotton acres in the U.S. with traited seeds. *USDA Cotton Varieties Planted 2006 Crop Report*. Most traited cottonseed is "stacked" to include both herbicide-tolerant and insect-resistant traits. In the Southeast and

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[2] Indeed, the United States concluded that, viewed as a whole, the transaction was likely to create some efficiencies that could benefit consumers. A Monsanto-DPL combination brings together firms with complementary strengths and assets. Monsanto has proficiency in transgenic trait development, and DPL had expertise in cottonseed breeding. Merging allows the two programs to operate in tandem. Through the integration of trait development and cottonseed breeding, traited cottonseed could reach consumers faster and at lower cost.

[3] *See* Complaint at 12-13.

MidSouth, 90.8% and 89.3% (respectively) of the seed sold in 2006 included both types of traits, and farmers now rarely purchase seed that contains only an insect-resistant trait.[4]

At the time the Complaint was filed, DPL and Monsanto, via its Stoneville business unit, were significant producers of traited cottonseed in the United States. Indeed, DPL and Stoneville together accounted for over 90% of traited cottonseed sales in the MidSouth and Southeast regions of the United States where cotton farmers place the most value on insect-resistant and herbicide-tolerant traits. That vigorous competition would have been lost as a result of the transaction.

As the Complaint alleges, Monsanto is currently the dominant provider of insect-resistant and herbicide-tolerant traits for cotton.[5] Monsanto's insect-resistant and herbicide-tolerant traits accounted for over 96% of the transgenic traits in cottonseed nationwide in 2006; over 98% of the traited cottonseed sold in 2006 in the MidSouth and Southeast contained Monsanto's traits. Indeed, Monsanto's traits are the only traits found in *any* of the traited cottonseed DPL sold prior to the merger.

DPL was, however, positioning itself to move away from Monsanto's traits by exploring options with several trait producers that were developing insect-resistant and herbicide-tolerant cotton traits. The most advanced of these efforts was work with Syngenta to introduce VipCot – an insect-resistant trait that would compete with Monsanto's Bollgard traits. DPL's work with Syngenta had reached a stage where DPL had successfully introduced VipCot into 42 of its elite

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[4] Today, traited cottonseeds that contain only insect resistance account for less than 2% of total traited acres.

[5] *See* Complaint at 2-3.

breeding lines.[6] DPL had already stacked five of the VipCot traited lines with Flex prior to the merger and anticipated commercializing those lines in approximately 2009. Following DPL's breeding protocols, DPL anticipated that stacked versions of the other 37 VipCot lines would have been ready for commercialization sometime between 2012 through 2016.

DPL's efforts with respect to a non-Monsanto herbicide-tolerant trait were at a more preliminary stage. In the summer of 2006, DPL entered into a licensing agreement with DuPont to introduce seed with OptimumGat, an herbicide-tolerant trait that would compete with Monsanto's Flex trait. At the time the Complaint was filed, DPL had not successfully introduced OptimumGat into any of its elite breeding lines. Rather, development work to advance the OptimumGat project remained primarily with DuPont. As a backup to the OptimumGat venture, DPL had also entered into agreements to test two other herbicide-tolerant traits that would compete with Monsanto's Flex, including a trait being developed by Bayer called Glytol.

Using VipCot in combination with one of the three herbicide tolerance options that DPL was exploring, DPL envisioned bringing a limited quantity of cottonseed with a non-Monsanto stack of insect-resistant and herbicide-tolerant traits to market as early as 2012. But in light of standard breeding and testing time requirements, it likely would have taken DPL several years longer to entirely phase out Monsanto's traits. Equally important, DPL's ability or willingness to switch totally away from Monsanto's traits was dependent on several assumptions – namely that farmers were satisfied with VipCot's performance versus Monsanto's Bollgard traits, and that

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[6] As discussed below, the relief provided by the proposed Final Judgment calls for divestiture of 43 DPL lines containing VipCot. The 43rd line included in the VipCot Assets is a line that DPL acquired from Syngenta in 2006 that already contained VipCot.

DPL found a successful non-Monsanto herbicide-tolerant trait in the next few years.

As the Complaint further alleges, Monsanto knew that DPL was working with other trait companies and feared that a possible outcome of those partnerships would be that DPL ceased offering Monsanto's traits in its cottonseeds.[7] Monsanto thus had begun to take steps to strengthen its own proprietary seed platform to support its cottonseed trait business. In fact, the United States's investigation revealed that Monsanto was making a concerted effort to grow its share of traited cottonseed sales.

Foremost among these efforts was Monsanto's acquisition in 2005 of Stoneville, which had approximately 15% of the market for traited cottonseed nationwide and a 33% and 9% share of the MidSouth and Southeast markets, respectively. After acquiring Stoneville, Monsanto made significant investments in the company, including: investing in upgrades of new buildings and greenhouses, lab equipment, ginning and delinting equipment, and warehouse and equipment storage; hiring additional employees for the breeding facilities, particularly at its Maricopa, Arizona, breeding facility which targeted creating varieties for the Southeast; improving Stoneville's manufacturing facilities, such as adding bagging, dust collection, and handling equipment; and improving Stoneville's molecular marker capabilities and library.

Monsanto also had been engaging in other efforts to develop proprietary cotton germplasm. Those included (a) researching exotic strains of cottonseed (which the proposed Final Judgment refers to as the "Advanced Exotic Yield Lines"), (b) mapping molecular markers for select breeding crosses that would enable Monsanto to expedite identification and further

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[7] *See* Complaint at 9-10.

breeding of the most promising progeny from those crosses (which the proposed Final Judgment refers to as the "MAB Populations"), and (c) establishing the Cotton States program, through which Monsanto obtains licenses to promising germplasm from university breeding programs and private breeders, and, after introducing traits, licenses the resulting traited cottonseed varieties to small cottonseed companies and distributors seeking to sell traited cottonseed under their own brands.

Monsanto's internal business plans projected that as a result of these efforts, Stoneville's market share in the Southeast and MidSouth would grow substantially over the next few years. Indeed, Monsanto projected that Stoneville, with Monsanto traits, and DPL, with non-Monsanto traits, would have roughly equal market shares by approximately 2015, with Dow and Bayer traited seeds holding much smaller shares. Accordingly, if unremedied, the combination of Monsanto and DPL would have combined the two largest traited cottonseed options for farmers in the MidSouth and Southeast.[8]

C. The Competitive Effects of the Transaction

Based on this evidence, the United States determined that the merger of the two companies would likely lessen competition in the near, medium and long term. In the near term, absent the transaction, Monsanto's efforts to increase Stoneville share in the MidSouth and

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[8] The United States's investigation found that Bayer's efforts prior to the merger to develop germplasm for the Southeast and MidSouth, if successful, would not likely bear fruit any sooner than 2016. Given the early stage of Bayer's breeding efforts in those geographic areas, the United States did not rely on this as a source of potential entry. In contrast, Dow has developed some varieties suitable for the MidSouth and potentially the Southeast, which will enter the market some time in the 2008 to 2011 time frame. However, given limitations in its current trait licensing agreements with Monsanto, it was unclear that entry of Dow varieties would have a significant competitive effect in those markets.

Southeast would give farmers more choices and could lead to lower prices.[9] Also in the near term (beginning in approximately 2009), the entry of DPL seed containing Syngenta's VipCot trait stacked with Monsanto's Flex trait could have offered farmers a new insect-resistant trait option and put some pressure on the price for insect-resistant traits.[10] The United States's investigation revealed that the most significant competitive effect of the transaction likely would have occurred in the medium term (beginning in approximately 2012) when DPL would first be able to offer cottonseed stacked solely with non-Monsanto traits and farmers in the MidSouth and Southeast would benefit from the emergence of competition between two germplasm/trait platforms, namely, Stoneville seed with Monsanto traits and DPL seed with VipCot and a non-Monsanto herbicide-tolerant trait.

The United States also found that Monsanto's acquisition of DPL, if unremedied, would threaten longer term harm by deterring or delaying the entry of new types of cotton traits in the MidSouth and Southeast.[11] Cotton trait developers would not have a seed partner independent of Monsanto with seeds suitable for the MidSouth and Southeast. Given the significance of the MidSouth and Southeast cotton growing regions, the inability to reach farmers in these regions would reduce potential returns from investments in developing cotton traits. And even if other

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[9] With its dominance in traits, Monsanto might have recaptured any seed price reductions through higher trait fees.

[10] Because DPL would have had to combine VipCot with a Monsanto herbicide-tolerant trait, Monsanto might have recaptured any reduction in fees for an insect-resistant trait through increases in fees for Monsanto's herbicide-tolerant trait.

[11] In addition to potentially new insect resistant and herbicide tolerant traits, there is current transgenic trait research regarding, among other things, drought tolerance, nematode resistence and yield.

potential sources of revenue for trait developers were sufficient to support continued investment in cotton trait development,[12] the benefits of these investments would not reach farmers in the MidSouth and Southeast.

D. The Proposed Remedy

The proposed Final Judgment remedies the anticompetitive effects of the acquisition alleged in the Complaint – the elimination of competition between DPL and Monsanto for the development, breeding and sale of traited cottonseed and the elimination of DPL as a partner independent of Monsanto for developers of traits that would compete against Monsanto – in three principal ways:

First, the proposed Final Judgment requires Monsanto to divest the Enhanced Stoneville Assets to an acquirer who is capable of using the assets to compete effectively. The Enhanced Stoneville Assets include Stoneville's U.S. cottonseed business, key cottonseed lines developed by DPL for the MidSouth and Southeast, and additional Monsanto cotton breeding assets.

The Enhanced Stoneville Assets provide the acquirer what it needs to continue Monsanto's efforts to increase Stoneville's share and be an effective ongoing seed competitor in the near term and beyond. Moreover, the acquirer will be able to use these assets, on its own or in partnership with other trait developers, to breed and commercialize high quality cottonseed for the MidSouth and Southeast with non-Monsanto traits, preserving medium and longer-term

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[12] These other revenue opportunities arise from the fact that (a) many potential cotton traits have applications across other crops, including corn and soy, that offer significantly more revenue potential than cotton, (b) the demand for traited cottonseed outside the United States is significant and growing, and (c) there is substantial cotton acreage within the United States in regions other than the MidSouth and Southeast, namely the Southwest and West.

competition that would otherwise have been lost as a result of the merger.

Second, the proposed Final Judgment requires Monsanto to divest the VipCot assets to Syngenta and to allow Syngenta to breed with the VipCot traited lines. This will preserve the potential for near term benefits from VipCot entry, as well as medium and longer term benefits from stacking VipCot with non-Monsanto herbicide traits (including other nascent traits) and developing improved germplasm.

Third, the proposed Final Judgment requires Monsanto to modify two sets of licenses to eliminate restrictions on the use of non-Monsanto traits: (1) its cottonseed trait licenses with seed companies to permit licensees to breed and sell, without penalty, cottonseed containing non-Monsanto traits and cottonseed containing both licensed Monsanto traits and non-Monsanto traits, and (2) its Cotton States licenses to remove any provision that allows Monsanto to terminate the license if the licensee sells cottonseed containing other traits.

In the United States's judgment, the asset divestitures and license modifications required by the proposed Final Judgment remedy the competitive harms identified in the Complaint.

II. DEVELOPMENTS SINCE THE FILING OF THE COMPLAINT

The United States filed the Complaint and Proposed Final Judgment on May 31, 2007. The Court entered the Hold Separate and Preservation of Assets Stipulation and Order on June 1, 2007, and Monsanto completed its acquisition of DPL on that same date. Since the filing of the Complaint, the following events have occurred in furtherance of the requirements set forth in the proposed Final Judgment and the Tunney Act:

A. Approval of Acquirers of the Enhanced Stoneville Assets

Section IV.E. of the proposed Final Judgment requires defendants to divest the Enhanced

Stoneville Assets to an acquirer acceptable to the United States. The acquirer must have a credible commitment to the traited cottonseed market and have the intent and capability of competing effectively. Shortly after acquiring DPL, Monsanto proffered Bayer CropScience ("Bayer") and Americot Inc. ("Americot") to the United States as potential acquirers of the Enhanced Stoneville Assets, with Bayer set to acquire all of the divestiture package except for certain assets relating to the Southwest market which would be sold to Americot. The United States evaluated the proposed acquirers, including analyzing the terms of the proposed purchase agreements, the terms of other recent contracts between Monsanto and Bayer, the market presence of both proposed acquirers, and other information bearing upon the acquirers' capabilities to use the divested assets effectively in competition with Monsanto/DPL.[13]

Bayer proposed to purchase the bulk of the Enhanced Stoneville Assets for $310 million. Its commitment to the cottonseed market is demonstrated by, among other things, its successful entry into the Southwest cottonseed market under the Fibermax and AFD brands.[14] Bayer's growth in this market has been impressive; it entered the Southwest market in 1999 and, by 2006, had a significant share of seed sales in that region and had displaced DPL as the market leader. In addition to cottonseed sales, Bayer has had an active cottonseed trait development program,

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[13] The United States was already familiar with both Bayer and Americot's existing U.S. cottonseed operations, having interviewed representatives of these companies on numerous occasions and reviewed business documents provided by both companies during the Monsanto/DPL investigation.

[14] Bayer's willingness to commit such a large amount of capital to acquiring the assets also tends to indicate Bayer's interest in using the Enhanced Stoneville Assets to create a viable competitor to Monsanto/DPL.

which has resulted in the marketplace introduction of its Liberty Link herbicide-tolerant trait.[15] In addition to these cottonseed efforts, Bayer also operates one of the world's largest crop protection and agricultural chemical companies, providing it ready access to agricultural distribution channels in the MidSouth and Southeast as well as pesticide, herbicide, and seed treatment products to complement its cottonseed offerings.

Despite these strengths, Bayer has not been successful in cottonseed sales in the MidSouth and Southeast, largely as a result of inferior germplasm for those regions. Acquiring the Enhanced Stoneville Assets will enable Bayer to become a more effective competitor in the MidSouth and Southeast[16] by giving Bayer high-quality germplasm specifically targeted toward the regions' growing conditions, breeding stations focused on developing varieties for those regions, and experienced personnel.[17]

To avoid creating any competitive issue in the Southwest where Bayer is strong, Bayer

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[15] Liberty Link makes cotton tolerant to glufosinate herbicides and is only available in Bayer's FiberMax cottonseeds, which are primarily used in the Southwest where they perform well.

[16] Upon acquiring Stoneville, Bayer publicly noted, "[t]he new germplasm and the geographic reach of the Stoneville business East of Texas ideally complement Bayer's cotton seed and trait business." *See* May 31, 2007 press release, "Bayer CropScience agrees to acquire US cotton seed company Stoneville for US-$310 million," available at <http://www.bayercropscience.com/bayer/cropscience/cscms.nsf/id/20070529_EN?open&ccm=400>.

[17] In its submitted comments, DuPont specifically questions Bayer's ability to compete in the MidSouth and Southeast, citing the fact that Bayer had not successfully penetrated those markets in the past. DuPont Comments at 18. *See also* AAI Comments at 16. However, DuPont's claim merely highlights Bayer's prior difficulty in accessing or developing competitive germplasm for these regions, rather than speaking to Bayer's ability to succeed once it has such germplasm. That Bayer can fully succeed when it has access to competitive germplasm is well documented by its successful entry in the Southwest market.

did not acquire that portion of the Enhanced Stoneville Assets best suited for producing traited cottonseed for the Southwest region of the United States – *i.e.*, the assets related to Stoneville's NexGen brand of cottonseed.[18] Those assets, which include cottonseed lines and a dedicated breeding program targeting the Southwest, generated over $16 million in sales for Stoneville in 2006, and Monsanto projected they would generate $36 million in sales by 2010. Americot, a regional cottonseed company founded in 1987 that sells seed predominantly in west Texas, acquired the NexGen assets for just over $6 million. With a recently-upgraded breeding facility dedicated to developing lines for the Southwest, Americot is well positioned to use the NexGen assets effectively.

Based on analysis of these factors, the United States determined that divestiture of the Enhanced Stoneville Assets to Bayer and Americot satisfied the objectives of the proposed Final Judgment and approved the proposed acquirers. Monsanto divested the Enhanced Stoneville Assets on June 19, 2007.[19]

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[18] Stoneville started its NexGen germplasm program to develop cottonseed adapted to growing conditions in the Southwest growing region. Bayer's Fibermax and AFD brands also have a significant presence in this region.

[19] The sale of divestiture assets during the pendency of the Tunney Act review of a proposed final judgment is consistent with the United States's standard practice, as is permitting closing of the transaction challenged in the Complaint. The materials filed with the Complaint included a Hold Separate and Preservation of Assets Stipulation, requiring the parties to maintain certain assets separate after the close of the merger (in this instance, DPL's assets) until the United States was assured that the acquirer or acquirers proposed by Monsanto for the Enhanced Stoneville Assets would meet the standards set forth in the proposed Final Judgment (*i.e.*, the acquirer was capable of operating a viable cottonseed business using the divested assets). This procedural setting allowed Monsanto and DPL to close their merger shortly after the Complaint and Proposed Final Judgment were filed and to expeditiously complete the sale of the Enhanced Stoneville Assets to Bayer and Americot, thereby ensuring that neither the Enhanced Stoneville Assets nor DPL were held in competitive limbo during the pendency of the Court's review.

B. VipCot Assets Offered to Syngenta

Section V of the proposed Final Judgment requires Monsanto to offer certain DPL cottonseed lines containing Syngenta's traits (the "VipCot Assets") to Syngenta. Under the proposed Final Judgment, Monsanto cannot satisfy the required divestiture of the VipCot Assets without the United States first approving the terms of the licenses pursuant to which Monsanto offers Syngenta the assets. Since May 31, 2007, the United States had numerous discussions with Monsanto and Syngenta regarding the terms of these licenses. On August 27, 2007, Monsanto and Syngenta entered into an interim Material Transfer and Use Agreement to facilitate transfer of VipCot traited cottonseed to Syngenta for further development prior to Monsanto providing final licenses that meet the terms of the proposed Final Judgment. Pursuant to that agreement, Monsanto delivered to Syngenta certain seeds that the proposed Final Judgment requires Monsanto to offer to Syngenta. After obtaining approval from the United States, Monsanto, on November 27, 2007, offered to Syngenta the licenses required by the proposed Final Judgment.

C. Third Party License Modifications

Section VI of the proposed Final Judgment requires Monsanto to revise certain third-party cottonseed licenses and gives the United States sole discretion to approve the proposed revisions. The United States engaged in continuing negotiations with Monsanto to ensure that the revisions satisfied the terms of the proposed Final Judgment. On November 15, 2007, Monsanto, pursuant to Section VI.B. of the proposed Final Judgment, provided to the United States for its approval copies of the modified licenses Monsanto intended to offer to third party seed companies; the United States approved the modified licenses on November 20, 2007. Monsanto then provided

to the licensees the offers containing the modified license language. The offers remain open until March 31, 2008.

D. Filing of Public Comments

During the 60-day public comment period called for by the Tunney Act, the United States received comments from the following eleven organizations and groups: the American Antitrust Institute ("AAI"); Attorneys General of Virginia, Arkansas, Delaware, Kentucky, Maryland, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Utah, and West Virginia (the "States"); California Consumers United ("CCU"); E.I. du Pont de Nemours & Co. ("DuPont"); the Illinois Stewardship Alliance ("ISA"); the International Center for Technology Assessment/Food Safety ("ICTA"); a comment signed by the president of Plains Justice, the president of the Women, Food, and Agriculture Network, and the president of the Iowa Farmers Union ("Plains Justice"); a comment signed by a group of Texas cotton gins and other cotton-based associations ("Texas Cotton Associations"); the Ohio Farmers Union ("OFU"); the Organization for Competitive Markets ("OCM"); and the Wisconsin Farmers Union (WFU").

The criticisms offered by the Commenters generally fall into four areas: (1) the appropriate standard of review; (2) the sufficiency of the divestiture to preserve competition in the relevant markets; (3) the workability of the remedy; and (4) purported competitive harms not alleged in the Complaint. Upon careful review, the United States believes that nothing in the comments warrants any changes to the proposed Final Judgment or is sufficient to suggest that entry of the proposed Final Judgment is not in the public interest. We address these issues below and explain why the criticisms raised in the comments are not valid.

III. THE STANDARDS GOVERNING THE COURT'S PUBLIC INTEREST DETERMINATION

A. The Appropriate Legal Standard

As discussed in detail in the Competitive Impact Statement (at 23-27), the Court, in making the public interest determination called for by the Tunney Act, is required to consider certain factors listed in the Act relating to the competitive impact of the judgment and whether it adequately remedies the harm alleged in the complaint.[20] This public interest inquiry is necessarily a limited one as the United States is entitled to deference in crafting its antitrust settlements, especially with respect to the scope of its complaint and the adequacy of its remedy. *See generally United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995); *United States v. SBC Commc'ns*, 489 F.Supp.2d 1, 12-17 (D.D.C. 2007).

With respect to the scope of the complaint, the Tunney Act review does not provide for an examination of possible competitive harms the United States did not allege. *See, e.g., Microsoft*, 56 F.3d at 1459 (stating that the district judge may not "reach beyond the complaint to evaluate claims that the government did *not* make").[21] The reviewing court may look beyond the

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[20] *See* 15 U.S.C. § 16(e)(1)(A) & (B). The *Microsoft* court explained that a court making a public interest determination under the Act should consider, 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. *Microsoft*, 56 F.3d at 1458-62.

[21] Were a court to reject a proposed decree on the grounds that it failed to address harm not alleged in the complaint, it would offer the United States what the Court of Appeals for the D.C. Circuit referred to as a "difficult, perhaps Hobson's choice," in that the United States would have to either redraft the complaint and pursue a case it believed had no merit, or drop its case and allow conduct it believed to be anticompetitive to go unremedied. *Microsoft,* 56 F.3d at 1456.

scope of the complaint only when the complaint has been "drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F.Supp.2d at 14. That is not the case here as the Complaint properly alleges the harm the transaction is likely to cause in the relevant product and geographic markets. Indeed, multiple commentors recognized the sufficiency of the Complaint: The States, for example, note that "the United States acknowledges the significant anticompetitive effects that the acquisition will have on the development, production and distribution of cotton biotech traits and seeds."[22] DuPont similarly states that "the Complaint filed by the Justice Department's Antitrust Division details the serious harm to farmers and consumers that will result," and further acknowledges that the "Complaint sets forth a clear and compelling story of the competitive injury that will result from the proposed transaction."[23]

With respect to the sufficiency of the proposed remedy, a district court must accord due respect to the United States's views of the nature of the case, its perception of the market structure, and its predictions as to the effect of proposed remedies. *E.g.*, *SBC Commc'ns*, 489 F.Supp.2d at 17 (United States entitled to "deference" as to "predictions about the efficacy of its remedies"); *see also* CIS at 24-26. Under 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. DuPont, referencing the Division's review of Monsanto's abandoned attempt to purchase DPL in 1998, suggests that the "government has an

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[22] States Comments at 6.

[23] DuPont Comments at 2 & 19.

extra burden . . . when it changes its view on an identical transaction."[24] But the assertion finds no support in the language of the statute or the caselaw. This is not surprising given that it contravenes long-established precedent holding that a prosecutor's exercise of discretion carries no estoppel effect. Moreover, DuPont's position would inappropriately require the court to engage in extensive fact finding of historical events – in essence, a trial within a trial – simply to determine whether the two transactions were in fact "identical" and whether the government accepted a less effective remedy than it would have the first time.[25]

B. The Appropriate Inquiry Is Whether the Remedy Preserves Competition, Not Whether It Replicates DPL

Some of the commentors criticize the remedy, particularly the Enhanced Stoneville Assets divestiture, for not creating a competitor that mirrors DPL in scope and independence.[26] But they pose the wrong standard for evaluating the effectiveness of the remedy. Because the antitrust laws seek to protect competition, the purpose of the remedy is not to recreate DPL but to preserve the competition that DPL brought to the market – to ensure that cotton farmers continue to realize the competitive benefits they would have had but for the merger.

Thus, the key questions in evaluating the remedy are: (1) Does it ensure that farmers will

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[24] DuPont Comments at 3.

[25] In fact, DuPont's factual premise is flawed. Contrary to DuPont's suggestion, the fact that Monsanto abandoned its initial proposed acquisition of DPL in the face of a threatened enforcement action by the United States does not imply that no remedy would have been acceptable to the United States in 1999. Rather, it implies only that Monsanto was at that time unwilling to agree to remedies deemed necessary by the United States.

[26] *See, e.g.*, States Comments at 7 ("divested Stoneville is not the equivalent of DPL"); WFU Comment at 1 (proposed remedy "does not even come close to replacing independent DPL").

continue to benefit from competition to develop, commercialize and sell cottonseed in the MidSouth and Southeast?, and (2) Does it preserve the likely benefits to competition that would have arisen from development of cottonseed for the MidSouth and Southeast containing non-Monsanto traits? The proposed remedy does both, as we explain in more detail below.

For some commentors, however, no remedy would suffice for this transaction or even any other potential acquisition of DPL. They essentially argue not only that the sole effective remedy in this case would be to block the transaction outright but that DPL must be kept as it is – independent of any trait provider – in perpetuity, available at any time for partnership with any trait provider that chooses to work with it.[27] This is a extraordinary proposition, and it is wrong. It relies on a static view of the market, presuming that DPL is essential to a competitive traited cottonseed market; it discounts the incentives and abilities of others, such as Bayer and Syngenta, to compete; it ignores market facts, such as Stoneville's efforts and growing success in the MidSouth and Southeast; and it would deny DPL and consumers the efficiencies that would come from vertical integration with a trait provider (evidenced by the significant number of seed companies that are vertically integrated into trait development).

In short, the remedy, when considered in light of the applicable legal standard and the appropriate inquiry, satisfies the public interest requirements set forth in the Tunney Act.

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[27] *See, e.g.*, States Comments at 7 ("[S]toneville has been divested to Bayer, a trait development competitor of Monsanto. Because of this, Stoneville can never duplicate DPL's unique position as an independent cotton seed company that can use its successful and high-quality germplasm to partner with several different biotech companies to develop viable competitive alternatives to Monsanto's monopolies in traits."); OFU Comments at 1 (Enhanced Stoneville Assets do "not take the place of an independent Delta and Pine Land").

IV. RESPONSE TO COMMENTS CRITICIZING THE SUFFICIENCY OF THE REMEDY

Several commenters offer criticisms regarding the sufficiency of particular aspects of the remedy.[28] Before addressing these criticisms, it is important to note that the remedy should be evaluated as a whole. It is not necessary that each asset included within the remedy package, on a stand-alone basis, sufficiently preserves competition. Rather, the key determination is whether, as directed by the proposed Final Judgment, the entire remedy maintains competition for the development, commercialization and sale of traited cottonseed in the relevant markets. The remedy here accomplishes this goal by bringing together:

- An ongoing, historically successful cottonseed company, Stoneville, that has sold cottonseed in the MidSouth and Southeast since 1922, and in which Monsanto has recently invested heavily;
- Changes in Stoneville's trait licenses with Monsanto that give the purchaser of the Enhanced Stoneville Assets terms similar to those held by DPL;
- All of Monsanto's ongoing germplasm enhancement efforts that supported its internal predictions of substantial Stoneville market share growth over the next five years;
- Eight DPL elite conventional breeding lines that serve as the germplasm source for approximately 60% of DPL's sales in the MidSouth and Southeast;
- Twelve DPL elite conventional breeding lines that DPL anticipated would be the

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[28] *See* States Comments at 6-8; ICTA Comments at 6-8; AAI Comments at 8-16; DuPont Comments at 9-18; OFU Comments at 1; WFU Comments at 1; Texas Cotton Associations at 2; ICTA Comments at 1; Plains Justice Comments at 1; ISA Comments at 1; OCM Comments at 2.

germplasm source for its next generation of traited seed in the MidSouth and Southeast;

- The requirement that the purchaser of the Enhanced Stoneville Assets be capable of and committed to using the assets to compete for traited cottonseed sales in the relevant markets;
- Divestiture to Syngenta of the VipCot development work to prevent any significant delay in bringing cottonseed with non-Monsanto traits to the marketplace; and
- Changes in Monsanto's trait license agreements with other cottonseed companies to allow them, without penalty, to stack non-Monsanto and Monsanto traits and to sell cottonseed that includes non-Monsanto traits.

This far-reaching remedy does not depend on the future success of each and every one of its components. Even if some component of the remedy were to fall short of expectations – *e.g.*, one of the next-generation DPL lines fails to continue exhibiting the high performance characteristics that it has exhibited thus far – it would not jeopardize the efficacy of the remedy. Taken as a whole, there is no question that the remedy satisfies its goal of curing the competitive harms alleged in the Complaint. Nevertheless, we respond below to commentors' particular concerns.

A. Divestiture of the Stoneville Business Unit and Monsanto Germplasm Provide the Acquirer a Firm Foundation on Which to Compete in the MidSouth and Southeast Markets

Some commenters claim that Stoneville will not provide the acquirer of the Enhanced Stoneville Assets with an adequate foundation on which to compete against Monsanto/DPL.[29]

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[29] See DuPont Comments at 6, 13 and 14; OCM Comments at 2; States Comments at 4 and 7.

Stoneville, however, is an ongoing business, which has operated in the relevant markets for over 80 years and has significant capabilities and growth potential. It offers high quality germplasm and has a strong developmental pipeline. Its divestiture, coupled with additional cotton germplasm from Monsanto's breeding programs, will provide the principal acquirer – Bayer – a well-developed infrastructure and significant germplasm assets.

1. Stoneville Infrastructure

When Monsanto acquired Stoneville in 2005, Stoneville was a freestanding cottonseed company with a strong breeding program, as well as a national sales and marketing force. These existing assets had been sufficient to position Stoneville as a national provider of traited cottonseed – second only to DPL in the MidSouth and Southeast. As described above, Monsanto nonetheless took several steps to enhance Stoneville's breeding capabilities. With these investments, Stoneville is poised for significant growth, as reflected by Monsanto's internal projections.

DuPont nevertheless suggests that Stoneville's lack of viability as an ongoing business is evidenced by trait developers choosing not to work with Stoneville between 1999 and 2005, when Stoneville was independent of Monsanto.[30] In making this argument, DuPont fails to note the fundamental reason why trait companies, including DuPont, chose not to work with Stoneville; namely, that under Stoneville's licenses with Monsanto at that time, Stoneville could not stack a non-Monsanto trait with a Monsanto trait.[31] Similarly, Stoneville was likely to be reluctant to

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[30] DuPont Comments at 15.

[31] DuPont further suggests that Stoneville's inferiority as a trait partner is evidenced by Monsanto choosing to purchase DPL. DuPont overlooks the important fact that DPL had a pending lawsuit against Monsanto under which Monsanto faced a potential $2 billion liability.

provide a platform for an unproven trait because the terms of its Monsanto licenses became less lucrative if it worked with a non-Monsanto trait (*e.g.*, it received a smaller share of the trait fee collected by Monsanto from farmers). In contrast, DPL could freely work with non-Monsanto traits, including stacking them with Monsanto traits, without risking reduction in its fee share or losing its Monsanto trait license altogether. The Enhanced Stoneville Assets include trait licenses from Monsanto that are comparable to those held by DPL pre-merger, and free of the restrictions that previously existed in Stoneville's licenses.

DuPont also claims that the divestiture is insufficient in that it does not provide the acquirer enough breeding stations, comparing DPL's eleven global breeding stations with Stoneville's two breeding stations.[32] That comparison, however, is misleading. Though DPL has eleven breeding stations worldwide, only five develop varieties for the MidSouth and Southeast. The divestiture includes the two breeding facilities that Stoneville used for developing MidSouth and Southeast varieties,[33] and Bayer has two additional breeding stations located in those regions, bringing Bayer's total to four after the divestiture. Accordingly, as a result of the sale of Enhanced Stoneville assets to Bayer, DPL-Monsanto and Bayer will have breeding infrastructures

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By purchasing DPL, Monsanto eliminated that liability. Although not a merger-specific efficiency, eliminating this potential liability provides an explanation for Monsanto's decision to undertake the acquisition. Monsanto's desire to resolve that litigation also contradicts ISA's assertion that "the clear reason for Monsanto's acquisition of Delta is elimination of competition in seeds." ISA Comments at 1.

[32] DuPont Comments at 15; *see also* States Comments at 3.

[33] Monsanto also used facilities in Georgia and North Carolina in part for cottonseed development. Because Monsanto used those facilities for development of several crops besides cotton, and Monsanto included in the Enhanced Stoneville Assets the cottonseed-related tangible assets kept at those sites, the United States did not require divestiture of the real property supporting those facilities.

similar in size and scope focused upon developing varieties suited for the MidSouth and Southeast.

2. Monsanto/Stoneville Germplasm

The remedy provides the acquirer of the Enhanced Stoneville Assets all U.S. Stoneville cotton germplasm, as well as germplasm from Monsanto's Advanced Exotic Yield and Marker Assisted Breeding programs. For various reasons, commentors fail to understand the significance of these divestitures.

a. The Breeding Process

Much of the criticism results from lack of familiarity with the cottonseed breeding process. To address that deficiency, we provide below a short primer on cottonseed development.

There are two breeding stages in the development of quality, traited cottonseed. Breeders first develop elite conventional (nontraited) lines and, from those, they proceed to develop commercial traited varieties. In developing an elite conventional line, the breeder begins by crossing two elite lines that the breeder anticipates will produce quality offspring. The result of that cross will be many progeny plants with differing characteristics. The breeder then evaluates and selects some subset of the progeny as promising enough to continue in the breeding process. In the greenhouse, the breeder then self-pollinates the progeny plant (*i.e.*, crosses the plant with itself), evaluates its progeny, and makes further selections. This process is typically repeated four times in the greenhouse as the breeder continues to make selections based on observable plant characteristics. Promising lines then are grown in the field and subjected to additional testing.

At the end of this process, which takes approximately six years, the finished line can take either or both of two paths. If the seed company intends to commercialize the line as a

conventional variety, the company will subject the line to an additional year of field trials and then over the course of the next two years "bulk" the line up for commercial sale. If the seed company intends to use the finished line as a traited variety, the seed company will subject the line to a separate procedure. The finished line (the "recurrent parent") will first be crossed with a donor plant that contains the desired trait to introduce or "introgress" the trait into the recurrent parent line. After that initial cross, progeny plants are selected on the basis of agronomic characteristics and the presence of the trait. Those plants are then typically "backcrossed" with the recurrent parent, which involves pollinating the plants with pollen from the recurrent parent. Backcrossing brings the plant closer to the genetics of the recurrent parent, except that the trait is now present. Breeders typically backcross three to five times. Once the backcrossing is completed, the seed company puts the resulting traited seed through a period of increased testing and eventually bulking up for commercialization. Limited quantities of a traited variety from that recurrent parent will be commercially available approximately five years after the recurrent parent is available for breeding.[34]

b. Stoneville Germplasm

The proposed Final Judgment provides the acquirer of the Enhanced Stoneville Assets

[34] Breeding a traited variety from elite parents can take as little as four years or as long as seven. The seven year outer time frame can be reduced by several means, including: using counter-seasonal breeding; using molecular markers to reduce the number of crosses used in introgression and increase stages; using high quality germplasm as the trait donor; in the case of creating a stacked variety, using a trait donor that contains both of the desired traits; limiting the number of official variety trials prior to making the seed available for sale; and bringing a more limited volume of seed to market in the launch year.

with all of Stoneville's U.S. germplasm.[35] DuPont, however, questions the likelihood that the varieties in Stoneville's development pipeline will be successful.[36] The evidence, however, shows the strength of the pipeline and, as Monsanto itself had predicted, its strong likelihood of commercial success.

Stoneville has over fifty lines in its pipeline for possible commercialization in the MidSouth and Southeast between 2008 and 2012. Stoneville's pipeline is the product of its traditional focus on mid- to full-season varieties found in the MidSouth as well as a more-recent sustained and intensive research effort to develop germplasm suitable for the Southeast.[37] Stoneville has historically been more successful at capturing sales in the MidSouth than in the Southeast (as evidenced by its 2006 share of 16% share in the MidSouth versus 8% in the Southeast) because its breeding program had focused primarily on varieties harvestable early in the growing season. When Emergent Genetics ("Emergent") acquired Stoneville in 1999, however, it saw the Southeast as a lucrative growth area and began taking steps to increase Stoneville's efforts to breed mid- to full-season varieties (*i.e.*, varieties better suited to the longer growing season afforded in the more southern growing areas). To this end, in 2001 Emergent acquired Helena Chemical's breeding program, which included germplasm lines suited for the Southeast. In addition, Emergent established a breeding station in Arizona with the specific mission of breeding mid- and full-season varieties.

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[35] As discussed above, this includes all germplasm with the exception of the NexGen varieties Americot acquired.

[36] DuPont Comments at 9-10.

[37] Full season varieties typically perform better in the Southeast than the early- to mid-season varieties that excel in the MidSouth.

When Monsanto acquired Stoneville in 2005, it continued these efforts to breed varieties suitable for the Southeast, significantly increasing the number of testing plots and aggressively using counter-season production to accelerate the introduction of full-season varieties. According to Monsanto's internal field tests, conducted prior to entering the agreement to acquire DPL, several of Stoneville's lines are performing in yield trials on par with DPL's most successful varieties in the MidSouth and Southeast, DP555 and DP444. Indeed, Monsanto anticipated that its efforts to improve Stoneville's breeding program would result in Stoneville gradually increasing its national share from 13% in 2006 to nearly 20% by 2010 (this estimate did not include the likely share increases that would stem from germplasm being developed by Monsanto outside of Stoneville that the proposed Final Judgment also requires to be divested).[38]

c. Additional Monsanto Germplasm

The proposed Final Judgment also requires Monsanto to divest cotton lines from its valuable internal research and development efforts – the Advanced Exotic Yield lines and the Marker Assisted Breeding ("MAB") populations – regardless of whether Monsanto considered those lines to be part of Stoneville. In this way, the remedy ensures that the acquirer has the breadth of Monsanto's cottonseed development programs that would have been used to compete against DPL absent the transaction.

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[38] DuPont notes that Stoneville's share in the Southeast and MidSouth has been in decline as evidence that its potential to compete in the future is not bright. DuPont Comments at 14. However, because Emergent's and Monsanto's investments in Stoneville's breeding capabilities are so recent, Stoneville's share declines do not accurately reflect Stoneville's potential. In 2007, Stoneville reversed the trend of declining share. According to USDA's annual reports on cotton varieties planted, Stoneville's breeding efforts are, as Monsanto predicted, beginning to produce results. From 2006 to 2007, Stoneville's share increased from approximately 13% to 15% nationwide and from just over 8% to 11% in the Southeast.

i. Advanced Exotic Yield Lines

DuPont implicitly criticizes the inclusion of the Advanced Exotic Yield Lines in the divestiture package, suggesting that because the CIS describes the value of these developmental lines as "promising," the lines likely will be of little commercial value to the acquirer of the Enhanced Stoneville Assets.[39] Although Monsanto started its Advanced Exotic Yield program as a means of identifying traits in exotic cotton plants that would increase yields when bred into more traditional commercial lines, that program also resulted in the creation of finished elite lines that have achieved significantly better yields in field tests than the current leading varieties in the MidSouth and Southeast. As noted in the CIS, Monsanto planned to bring the first traited varieties from these lines to market by 2009. Monsanto forecasted that these traited varieties would be a significant driver of market share for Stoneville.[40]

AAI suggests that the acquirer will have little incentive to commercialize these varieties because they contain Monsanto traits. The comment offers no explanation of why the acquirer would forgo a significant profit opportunity by abandoning germplasm that appears to have significant advantages relative to competing germplasm that also contains Monsanto traits. In any case, Bayer has already publicly touted its acquisition of the Enhanced Stoneville Assets as including "access to additional high performing cotton products with insect-resistant and herbicide-tolerant Monsanto traits."[41]

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[39] DuPont Comments at 11 and 15.

[40] Despite their origin in a trait research program, further breeding and commercialization of these lines requires only traditional breeding techniques.

[41] Bayer, *Investor Handout, Q2 2007*, www.investor.bayer.de/user_upload/2747/.

AAI also contends that many of the Advanced Exotic Yield Lines "are of extremely limited value to the acquirer" because they already contain Monsanto traits and "[b]reeding out Monsanto traits and then breeding in competing traits will take a long time."[42] AAI's criticism, however, reflects a misunderstanding of the value of the lines and the various methods by which the acquirer can use them. In the near term, the acquirer can commercialize varieties from the Advanced Exotic Yield Lines that currently contain Monsanto traits. Sales of such varieties likely would be important for the acquirer in growing Stoneville's market share. In the medium and longer terms, the acquirer can use the lines as breeding stock to introduce varieties containing, in whole or in part, non-Monsanto traits. It can do this by two different methods. First, it could simultaneously breed out any Monsanto traits that are not desired while breeding in new traits. Under this method, it could use any of the lines, including the four recurrent parents,[43] as a parent in crosses that ultimately result in commercial varieties containing the desired traits, including varieties containing only non-Monsanto traits. Such a process could be carried out within the five year time horizon during which DPL anticipated it could bring non-Monsanto traited seed to market.[44] Under the second method, which would take additional time, the acquirer could breed

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[42] AAI Comments at 13.

[43] One of the recurrent parents is a conventional line and can be used immediately for breeding a variety that contains only non-Monsanto traits. The other three recurrent parents were originally created by crossing a variety containing Bollgard with an exotic variety and those parents accordingly contain the Bollgard I trait. If Bayer chooses, it can use these three parents immediately to breed varieties that contain a stack of a non-Monsanto herbicide trait and Bollgard II (breeding in Bollgard II does not require breeding out Bollgard I).

[44] Under this method, a breeder would cross an Advance Exotic Yield Line containing Monsanto traits with a line that contains non-Monsanto traits. The breeder can then select from the progeny offspring that lack the Monsanto traits and advance those offspring through traditional breeding methods to create the desired variety.

out the Monsanto traits to make new conventional lines[45] and then use those conventional lines as breeding stock to launch varieties containing non-Monsanto traits.

Commenters' concerns regarding the rights retained by Monsanto to the Advanced Exotic Yield Lines also lack merit.[46] The rights retained by Monsanto to these lines merely allow Monsanto to continue a trait research program that, if successful in identifying a yield trait that could be introgressed into cotton varieties, would significantly benefit cotton farmers. Moreover, the proposed Final Judgment makes clear that, whether or not its research program is successful, Monsanto cannot encumber in any way the acquirer's use of the Advanced Exotic Yield Lines.

ii. MAB Populations

AAI and DuPont question the value of the MAB lines to the acquirer of the Enhanced Stoneville Assets, pointing to language in the CIS which states that some of the MAB lines contain Monsanto's traits.[47] In essence, such comments suggest that the Enhanced Stoneville Assets divestiture is only effective as a remedy to the extent the divestiture gives the acquirer access to conventional cotton lines. Since the acquirer would need to breed Monsanto's traits out of some of the MAB lines to create non–Monsanto traited lines, the commenters conclude that the competitive value of the MAB lines to the acquirer is limited in the near term and at most questionable in the longer term. That conclusion is incorrect.

Monsanto's MAB cotton program involved identifying genetic markers for important

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[45] Breeders can create a finished conventional line by crossing an Advanced Exotic Yield Line containing Monsanto traits with a conventional line and then selecting progeny that lack traits for further breeding.

[46] *See* ICTA Comments at 7; AAI Comments at 9.

[47] AAI Comments at 13; DuPont Comments at 11.

agronomic characteristics in the progeny resulting from the cross of two elite lines. The goal of the MAB program was two-fold. First, breeders could use these markers to make better informed selections from the progeny plants and could thereby produce a variety that likely was agronomically superior to, and bred more quickly than, a variety derived from traditional breeding selection methods. Monsanto anticipated that commercial varieties from the MAB program would become available as early as 2012. Second, and in the longer term, a large library of such genotypic information would offer breeders the ability to make better decisions about what elite varieties to cross in the first instance. Accordingly, divesting the MAB Populations and the accompanying molecular mapping data provides the acquirer of the Enhanced Stoneville Assets with germplasm and genetic information that will enhance its offerings over the medium term and provide a significant informational foundation for successful competition over the longer term.

With respect to the specific concern that the MAB populations are of little value to the acquirer because some contain Monsanto traits, the AAI overstates the scope of the limitation articulated in the CIS. While many of the MAB Populations are based on a cross involving a parent that contains a Monsanto trait, approximately 37% of them are not. Moreover, as explained above, the time line for creating and commercializing conventional versions from lines containing Monsanto traits, or creating versions containing traits other than Monsanto's, is approximately five years.

B. Additional DPL Germplasm Provides Important and Meaningful Value

Given the growth projections in Monsanto's business documents, the Stoneville germplasm combined with the Monsanto Advanced Exotic Yield and MAB cottonseed lines arguably would be sufficient to enable the acquirer of the Enhanced Stoneville Assets to compete

effectively against DPL cottonseed. However, the proposed Final Judgment seeks to further ensure effective competition by supplementing the Monsanto assets with certain key DPL germplasm lines consisting of 20 lines representing the pedigrees of many of DPL's popular current varieties in the MidSouth and Southeast as well as a significant portion of DPL's breeding pipeline for these areas. Commenters had several concerns regarding these 20 lines,[48] which we address below.

1. The DPL germplasm is of high quality

Some commenters question whether the 20 DPL lines will produce competitive traited varieties.[49] The United States used two methods to select the 20 lines, both of which were designed to identify the lines that had the greatest chance of commercial success in the MidSouth and the Southeast. First, the United States looked to the germplasm in the pedigrees of the DPL varieties currently performing best in the MidSouth and Southeast (based on total sales). The eight divested DPL lines that fall into this germplasm category[50] are prevalent in the pedigrees of the DPL varieties most successful in the MidSouth and Southeast today; five of these lines[51] are

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[48] *See* AAI Comments at 12; DuPont Comments at 12; and OCM Comments at 3.

[49] For example, DuPont raises questions about the process used in selecting these 20 lines. DuPont Comments at 12. The AAI suggests that the chances of the government picking good varieties is low. AAI Comments at 13.

[50] Lines DP 5690, DP 491, DP 2156, DP 565, DP 5305, DP 5415, and Delta Pearl.

[51] Lines AZ2099, DP 491, DP 565, DP 415, and Delta Pearl. Delta Pearl is the recurrent parent of DPL's wildly successful DP 555 BG/RR (which accounted for over 18% of all U.S. cottonseed sales in 2007 and over 80% of total cottonseed sales in the Southeast in 2007). Dupont notes "the CIS does not disclose how many other DPL germplasm lines are represented in the lineage of these currently popular varieties." DuPont Comments at 12. No other DPL germplasm lines are represented in the lineage of the traited varieties derived from these five lines.

the recurrent parents of the DPL varieties accounting for about 60% of DPL's 2006 cottonseed sales in the Southeast – the growing region where DPL holds the greatest share advantage.[52] Any of these lines could be used immediately as a recurrent parent for a traited variety, as well as for breeding stock for developing new elite lines.

Second, the United States examined what germplasm DPL was counting on for its future seed sales, recognizing that breeding programs are not static. Thus, the other twelve DPL lines included in the divestiture package – even though not currently offered for sale or found in the pedigrees of current bestsellers – were selected because DPL gave them the highest rating of the select group of lines that it had in the pipeline for trait introduction in its MidSouth and Southeast breeding programs.[53] DPL had in fact already introgressed Syngenta's VipCot trait – the foundation of DPL's effort to move away from Monsanto – into these lines, revealing DPL's confidence that they were most likely to produce high yielding varieties suitable for the MidSouth and Southeast.[54] These lines would likely have been the source for any non-Monsanto traited

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[52] OCM's and AAI's representation that these eight lines reflect only 1% of cotton acreage is based only on their share of sales when offered as conventional commercial varieties. OCM Comments at 3; AAI Comments at 12. However, the relevant statistic is the one cited above and in the CIS; namely, the role these lines have had in fostering DPL's current share of *traited* varieties in the MidSouth and Southeast.

[53] The United States's investigation revealed that over the past several years DPL's breeders have established a four-tier system for ranking the potential of germplasm the breeders have under development. From 2004 (when DPL set up the rating system) to 2007, only *fifteen* lines across DPL's five MidSouth and Southeast oriented breeding stations received DPL's highest internal ranking. The ranks assigned by DPL reflect the results of extensive field testing. Under the proposed Final Judgment, twelve of those lines will go to the acquirer of the Enhanced Stoneville Assets.

[54] Similarly, in 2006 DPL attempted to introduce potential OptimumGat events into seven DPL lines, hoping by that process to create a plant in which OptimumGat successfully imparted herbicide tolerance. While that attempt by DPL and DuPont failed to produce any

varieties that DPL would have brought to market in the MidSouth and Southeast from 2012 to 2016. Because these lines are finished elite lines, any competent breeder (such as the breeding personnel at Stoneville and Bayer) could have traited versions of any of these lines ready for commercialization within approximately the next five years, *i.e.*, within the same time frame that DPL could bring a non-Monsanto herbicide-tolerant seed to market.[55]

Finally, some commenters opine that the mere fact that this germplasm has not yet been tested in the marketplace inherently diminishes its value.[56] As discussed above, the divested material is hardly of unpredictable quality. The twelve lines of DPL germplasm were selected precisely because those lines' superior performance had already been observed and relied upon by DPL's breeders.[57] DPL was developing the next generation of germplasm that it planned to use in

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potential candidates for use as an OptimumGat donor parent, the fact that all seven of the lines used in that experiment are among the twelve divested further demonstrates the high regard DPL had for these lines.

[55] Thus, AAI's criticism (p. 12) that the "acquirer is therefore obtaining only the raw inputs necessary to breed varieties that could be commercially viable in the future and only after considerable expenditure" is incorrect.

[56] *See, e.g.*, ICTA Comments at 7 ("Twelve of the 20 lines are experimental lines with unproven and hence uncertain commercial potential.").

[57] In further support of its claim that 20 lines are insufficient, DuPont claims that "DPL introduced 64 unique cotton varieties in the past eight years, but only 14 ever came to represent 1% or more of annual U.S. cottonseed acres." DuPont Comments at 16. The statistic, however, is misleading. One elite breeding line can result in multiple unique varieties in two independent ways: varieties with the same recurrent parent can be differentiated based on their trait composition; additionally, the process of introgressing a trait into a conventional elite parent may yield multiple promising and distinctive progeny that have commercial potential. For example, Delta Pearl is the recurrent parent of five traited varieties introduced by DPL between 2000 and 2006 as well as being offered as a conventional variety. Similarly, DP491 is the recurrent parent of four traited varieties as well as being offered as a conventional variety. Thus, divesting 20 lines provides the potential for many more than 20 commercial varieties.

connection with marketing non-Monsanto traits. Divestiture of this germplasm will allow the acquirer to continue these efforts and not rely solely on currently available material.

2. The acquirer will be able to use this germplasm effectively

Some commenters suggest that it will take the acquirer anywhere from eight to fifteen years to commercialize traited varieties from these 20 lines.[58] In fact, it should take far less time. Because all 20 of the DPL lines in the Enhanced Stoneville Assets are finished elite conventional lines, they can be immediately used as a recurrent parent for a cross with a trait donor. Assuming competing traits are available to breed into them, traited varieties from these lines could reach the market in approximately five years – the same general time frame in which DPL could have introduced non-Monsanto traited varieties absent the merger.[59]

Contrary to DuPont's suggestion,[60] the acquirer of the Enhanced Stoneville Assets will not be at a disadvantage with respect to effectively using the DPL germplasm lines included in the package. The proposed Final Judgment specifically provides that the acquirer will receive

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[58] Several commenters, citing provisions in the Complaint (¶ 15) and the CIS (at p. 16), provide time frames ranging from eight to fifteen years for how long it would take the acquirer to bring traited varieties of the DPL germplasm to market. *E.g.*, States Comments at 6 (8-10 years); AAI Comments at 12 (10 years); and OCM Comments at 2 (8-15 years).

[59] Commentors ignore the fact that DPL has already completed the bulk of the breeding process on the divested lines (*i.e.*, the first six or seven years of making crosses and winnowing progeny). Commenters' citations to the Complaint and CIS are thus inapplicable. *See* Complaint ¶ 15 (referring to the time period for bringing a new variety to market from an initial cross of two cotton lines – the divested lines are well past that stage) and CIS at 16 (referring to DPL using the divested lines to bring varieties to market "over" the course of the next decade, not, as AAI suggests, for at least another ten years).

[60] DuPont Comments at 13.

applicable performance data and other information.[61] Such information transfers are a routine practice in the seed industry when germplasm or seed companies are bought or sold (which also occurs routinely) – the books, logs, and other documentation about a breeding line are transferred with the line even if the breeder does not go to the new owner of the line. These materials will readily allow the Stoneville breeders to understand the work that has been done on these lines to date and to move the lines forward in their breeding program.[62]

The States also contend that "even post-acquisition, Monsanto retains the right to . . . preclude [the acquirer of the divested DPL lines from] us[ing] them with non-Monsanto cotton biotech traits." States Comments at 7. Under the proposed Final Judgment, the acquirer of the DPL lines can freely use them to create varieties that contain (a) solely non-Monsanto traits, (b) Monsanto's Bollgard II and non-Monsanto herbicide tolerant traits, and (c) Monsanto's Flex, non-Monsanto insect resistant traits and non-Monsanto herbicide tolerant traits. The only limitation regarding use of non-Monsanto traits is that for a period of seven years the acquirer cannot commercialize varieties from the DPL lines that solely have Bollgard II, Flex and a non-glyphosate cotton herbicide tolerant trait currently commercialized in cotton. The only non-glyphosate cotton herbicide tolerant trait currently commercialized in cotton is Bayer's Liberty Link. This limitation adds to Bayer's incentive to introduce a non-Monsanto glyphosate tolerant cotton trait as a substitute for Monsanto's Flex.

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[61] *See* proposed Final Judgment Schedule B, Section 2.

[62] Bayer has already received this information from DPL in conjunction with the divestiture of the 20 DPL lines.

3. Monsanto/DPL's use of the germplasm does not diminish its value to the acquirer and provides farmers continued benefits

Some commenters claim that the fact that Monsanto retained the right to continue working with the DPL lines, so long as the commercialized variety contains Monsanto-only traits, means that these lines have little value to the acquirer[63] and provides Monsanto an improper benefit.[64] First, to the extent that the DPL germplasm provides the acquirer of the Enhanced Stoneville Assets with a variety that has strong agronomic characteristics, the acquirer will have every incentive to market that product. Indeed, rather than being reason for concern, Monsanto's desire to retain rights to these lines is further indication of the value of this germplasm within DPL's breeding program.

Second, the licensing back of the lines to Monsanto/DPL benefits cotton farmers. For example, if Monsanto did not have a license for the to-be-divested DPL lines that are recurrent parents to existing DPL traited varieties (including DP555, which contains Monsanto's traits), Monsanto would have to remove these varieties from the market, significantly limiting options for cotton farmers. Similarly, without such a license, Monsanto would have to discard any varieties in DPL's developmental pipeline that have the divested lines as a recurrent parent, even if those lines already contain only Monsanto's traits. The commenters do not explain why competition would be served by denying cotton farmers these varieties.[65]

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[63] States Comments at 7 ("even post-acquisition, Monsanto retains the right to sell the most popular seeds from those lines"); OAG at 3 (20 lines "is not even a true divestiture"); DuPont Comments at 13 (divestiture of DPL germplasm is non-exclusive).

[64] ICTA Comments at 7; *see also* AAI Comments at 10; DuPont Comments at 13.

[65] ICTA's concern about the provision allowing DPL to sell conventional versions of the DPL divested lines is also misplaced. ICTA Comments at 4 ("DoJ has absolutely no basis for

C. The Remedy Preserves Incentives and Opportunities for Effective Traited Cottonseed and Trait Development Competition

Commentors expressed concern about the opportunities for trait developers. Those concerns, however, are misplaced as discussed below.

1. Syngenta will be able to effectively use the VipCot Assets

Some commenters[66] express concern that certain provisions of the license agreements accompanying the divestiture of the VipCot Assets will unnecessarily restrict Syngenta's use of the assets.[67]

As noted above, the development of Syngenta's VipCot trait in DPL seed was at an advanced stage when Monsanto's acquisition of DPL was proposed. The United States required the divestiture of the most advanced of DPL's VipCot lines not to ensure that Syngenta could replace Stoneville as a competitor against DPL – the Enhanced Stoneville Assets divestiture addresses that harm – but to prevent any delay to VipCot's commercialization as a result of the merger. The terms of the proposed Final Judgment will provide Syngenta the rights it needs to bring VipCot to market and, thus, fulfill the goal that the VipCot Assets divestiture is intended to accomplish.

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proposing, or assessing the adequacy of the remedy cited above"). At the time the Complaint was filed, the 2007 seed purchasing season was already under way and DPL was selling some of the divested lines as conventional varieties. Thus, the provision permitting DPL to continue to sell these varieties in 2007 merely avoided disruption to farmers who wanted to buy these conventional varieties for that season.

[66] *See e.g.*, ICTA Comments at 7-8; AAI Comments at 10.

[67] The proposed Final Judgment requires Monsanto to divest to Syngenta 43 advanced DPL germplasm lines traited with VipCot and related assets necessary to bring varieties from these lines to market.

As provided in the proposed Final Judgment, the divestiture of these 43 lines to Syngenta offers several possible paths to market for this traited germplasm.[68] Syngenta could start its own seed company using this germplasm as a base – either on its own or via a joint venture – and make sales of the traited seed directly to distributors or farmers. Syngenta already operates soy and corn seed companies in the United States and is one of the largest providers of cotton-related herbicides and insecticides in the world. Syngenta also is a partner with DuPont in a recently formed joint venture called Greenleaf Genetics, which the companies established to out-license the companies' proprietary corn and soybean genetics and biotechnology. In addition, Syngenta has the option of licensing the traited germplasm to other seed companies, such as Bayer, Dow and Americot, which already have breeding and distribution programs in place.[69]

The requirement in the proposed Final Judgment that a commercialized variety derived from the VipCot Assets contain one of four listed Syngenta insect-resistant events is not unduly restrictive.[70] These are the four "versions" of the insect-resistant trait that Syngenta and DPL were most confident could achieve commercial success in the near-to-medium-term. This restriction, therefore, is directly tied to the harm that divesting the VipCot Assets is designed to remedy; namely, delay in the introduction of the VipCot traits that DPL and Syngenta had been positioning

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[68] The United States has worked with Monsanto and Syngenta to ensure that the divestiture (including access to any required licenses) is accomplished under terms that do not restrict Syngenta's competitiveness and are commercially reasonable.

[69] Of course, Syngenta also could license just the VipCot trait to seed companies if the DPL-traited germplasm is not attractive to potential licensees or if Syngenta wished to keep the DPL germplasm for its own branded seed product.

[70] *See* AAI Comments at 10.

to enter the market.[71] It is unlikely that any new insect-resistant traits developed by Syngenta other than VipCot would be available for more than a decade, and any such trait likely could in any event be stacked with one of the four existing events consistent with the proposed Final Judgment.

2. The remedy will preserve opportunities for trait developers to market non-Monsanto traits in competitive cottonseed

Some commenters expressed concern that post-merger there will no longer be a sufficient base of non-Monsanto controlled cottonseed to support future trait development.[72] However, the Enhanced Stoneville Assets divestiture provided for in the proposed Final Judgment establishes a substantial future platform for cotton trait developers to use to reach farmers in the MidSouth and Southeast. In addition, the third party license changes required by the proposed Final Judgment promote the development and commercialization of competitive cottonseed with non-Monsanto traits by giving cottonseed companies the ability to partner with trait developers other than Monsanto without any financial penalty. Currently, DPL seed accounts for approximately 43 percent of U.S. cottonseed acres, leaving over half of all U.S. cottonseed acres available to trait developers who seek to compete against the merged Monsanto/DPL. Commenters fail to explain why this amount of acreage is insufficient, especially given the additional returns on investment in

[71] Contrary to the apparent perception of some commentors (*see, e.g.*, ICTA Comments at 8), this aspect of the proposed Final Judgment is not designed to ensure, by itself, an adequate platform of high-quality germplasm for future trait developers. The limitations on Syngenta's use of the germplasm are appropriate to match this aspect of the remedy to its more-narrow objective – preventing the merger from delaying VipCot's commercialization – and unrestricted access to this germplasm is unnecessary in light of the other elements of the proposed Final Judgment.

[72] *See, e.g.*, OFU Comments at 1 ("competing seed trait developers will have great difficulty gaining access to the market"); OCM Comments at 3.

cotton trait research that could be gained from Stoneville's likely growth in the MidSouth and Southeast, possible cross-crop trait applications, and international cottonseed markets.

With regard to the license changes, AAI suggests that Monsanto's trait licensing practices should be addressed in a separate case, claiming that the required licensing modifications do not help to remedy the loss of competition alleged in the Complaint.[73] To the contrary, the modifications specifically address competition lost from Monsanto's acquisition of DPL, since DPL's licenses did not limit its ability and incentive to work with non-Monsanto trait providers.[74] These trait providers will now be able to work with cottonseed companies who previously had restricted licenses.

3. The remedy should not – and does not – guarantee the introduction of DuPont's OptimumGat trait

Several commenters express concern that the remedy is insufficient because it does not ensure that DuPont's OptimumGat trait will reach the market.[75] As discussed above, the proposed remedy preserves the potential for the development and introduction of competing herbicide-tolerant traits in the MidSouth and Southeast. OptimumGat may prove to be such a trait, but there was never any certainty of that even without the merger.[76] Indeed, DPL was itself exploring

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[73] AAI Comments at 15.

[74] In requiring these changes, the United States made no determination as to whether any provisions in Monsanto's licenses violated the antitrust laws.

[75] *See, e.g.*, DuPont Comments at 2 (DuPont terminating research and development for OptimumGat in cotton); States Comments at 4 (claiming that "because of DeltaMax's termination, Monsanto's cotton herbicide-tolerant trait dominance is assured for the foreseeable future").

[76] As noted above (*supra* p.5), development efforts for introducing OptimumGat in DPL germplasm were at a preliminary stage.

herbicide-tolerant trait alternatives with developers other than DuPont. For example, Bayer and Syngenta independently have been working on herbicide-tolerant traits for cotton that could be commercialized on or before the time when DPL could have brought OptimumGat to market absent the merger. Thus, there was never any guarantee that OptimumGat would ultimately be commercialized in cotton even if DuPont were able to continue working with an independent DPL,[77] and it would be inappropriate for an antitrust remedy to establish a guarantee that the market would not have provided.

4. The remedy will preserve the number of "platforms" for trait development that existed pre-merger

Commenters suggest that because Bayer itself develops traits it will not work with other trait developers and that the remedy thus fails to preserve trait development opportunities.[78] Even if the claim were true, the competitive harm identified in the Complaint is still addressed: pre-merger, farmers in the MidSouth and Southeast looked forward to a choice between Stoneville/Monsanto and DPL/non-Monsanto traited cottonseed; post-merger they still will have a choice as they will look forward to competition between Stoneville/Bayer and DPL/Monsanto.

It is important to bear in mind that DPL itself might not have continued to work with multiple competing trait developers. Contemporaneous DPL business documents indicate that DPL likely would have selected only one non-Monsanto stack to bring to market in light of the costs associated with breeding traited varieties, commercially distributing multiple varieties, and managing the requirements and earning potentials of licences with trait developers. Thus, DPL

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[77] *See* DPL 2006 Form 10K.

[78] States Comments at 7.

likely would have chosen only *one* non-Monsanto insect-resistant trait and *one* non-Monsanto herbicide-tolerant trait to promote. It is also likely that DPL would have continued offering a Monsanto stack because of the apparent market demand for Monsanto's traits.[79]

In any event, Bayer has very strong incentives to use other third-party traits if those traits are better than the traits it can develop on its own. Indeed, Monsanto will have the same incentive. Competition from one will spur the other to try to offer the best product, regardless of whether the included trait is developed in-house or licensed from a third-party.[80] (And, it bears remembering, such development of traits is, and would have been absent the merger, likely to occur nearly a decade in the future.)

V. RESPONSE TO COMMENTS THAT THE REMEDY IS NOT WORKABLE

A number of commenters posit that the remedy provided for in the proposed Final Judgment is not in the public interest because the remedy is "conduct-based"[81] as opposed to "structural," and because the required divestitures have "strings attached," such as licenses running between Monsanto and the acquirers of the divested assets. These commenters further assert that these provisions essentially render the remedy too costly to administer, or will require too much ongoing involvement and policing by the United States or the Court to be effective. As

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[79] DPL's agreements with Syngenta and DuPont did not require exclusivity, and future market conditions (especially demand by farmers for Monsanto's proven traits) might have dictated that DPL continue offering Monsanto traits. Internal DPL business documents suggest that it planned to follow this course.

[80] Recognizing this dynamic, third-party trait developers will have incentives to continue research efforts.

[81] *See e.g.*, AAI Comments at 9-10; CFS Comments at 7-9; DuPont Comments at 13-14; States Comment at 7.

explained below, the proposed Final Judgment provides an effective remedy that is clean and certain (*i.e.*, consisting of one-time, well-defined events that do not involve costly government regulation of the market), is consistent with the Merger Remedy Guide issued by the United States,[82] and does not involve cumbersome monitoring by the United States or the Court.

A. The Divestitures and License Changes Are One-Time Events, Not Ongoing Behavioral Remedies

The remedies proposed by the United States are one-time events calling for the divestiture of identifiable and transferable assets and intellectual property as well as modifications to certain licenses. These are not conduct remedies that involve ongoing entanglement in market operations or regulation of Monsanto's ongoing conduct.[83]

Specifically, the proposed Final Judgment calls for the divestiture of Stoneville, an ongoing cottonseed business that has been bought and sold on several occasions, including all of Stoneville's domestic germplasm, breeding, and sales and marketing assets, together with the information and intellectual property necessary to use those physical assets. In addition to the Stoneville business unit, the remedy calls for the divestiture of additional complementary assets, *i.e.*, the 20 DPL cotton germplasm lines.[84] The transfer of this package of assets is a one-time event that constitutes a workable remedy to preserve competition and provides clear lines of

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[82] *See* U.S. Dep't. of Justice, Antitrust Div., *Antitrust Division Policy Guide to Merger Remedies*, (October 2004), *available at* http://www.usdoj.gov/atr/public/guidelines/205108.pdf (hereinafter "Merger Remedy Guide").

[83] *See Merger Remedy Guide* at 7-12 (describing the differences between structural and conduct remedies).

[84] The Merger Remedy Guide recognizes that there may be instances when "additional assets from the merging firms will need to be included in the divestiture package." *Merger Remedy Guide* at 12.

ownership, with Bayer owning outright the Stoneville business, as well as the 20 lines formerly belonging to DPL. In its basic structure, this remedy is not different from the commercial transfer and licensing of germplasm and related intellectual property that occurs routinely in the marketplace.

Some commenters suggest that aspects of the remedy involving licensing arrangements are unworkable conduct remedies that are inconsistent with the United States's policies on merger remedies.[85] The United States's Merger Remedy Guide, however, explains that proper merger remedies can "involve the sale of physical assets" as well as the "sale or licensing of intellectual property."[86] Licensing is routine in this industry, where companies often combine the work of others (*e.g.*, germplasm, traits, intellectual property) with their own useful developments and introduce better products for the market. The licenses in this case were crafted so that each company would know which rights it would retain after the divestiture to help ensure a workable remedy.

The divestiture of the VipCot Assets to Syngenta is also a workable remedy. The germplasm divestiture is accomplished though a license to Syngenta rather than absolute ownership, but the method of transfer will not affect Syngenta's ability to compete effectively as Syngenta will have a non-terminable and royalty-free license to use the divested lines.[87] As discussed above, the provisions in the proposed Final Judgment offer Syngenta several

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[85] ICTA Comments at 6-8; AAI Comments at 9.

[86] *Merger Remedy Guide* at 7.

[87] *Merger Remedy Guide* at 15 n.22 (describing requirements that the Division typically imposes on structural remedies involving licensing).

alternatives for bringing the DPL germplasm to market, and entry of VipCot-traited varieties will alter the structure of the traited cottonseed market regardless of the means selected.

Finally, the proposed Final Judgment's requirement that Monsanto modify existing third-party licenses is also a one-time event. The changes to these licenses require modification of certain terms that will enable those third parties to work more readily with non-Monsanto trait providers.

B. Monitoring Compliance With the Remedy Will Not Unduly Burden the United States or the Court

Contrary to some commenters' suggestions, the terms of the proposed Final Judgment do not require cumbersome monitoring of the marketplace by the United States or the Court.[88] For example, pointing to certain conditions and limitations placed on the germplasm to be divested under the proposed Final Judgment, AAI asserts that the divestitures are a "conduct-based, regulatory-style 'fix' that imposes on this Court a monitoring and compliance burden that it should be loathe to undertake."[89] These criticisms grossly overstate monitoring issues associated with the proposed Final Judgment.

As stated above, the asset divestitures and license modifications are one-time events that, in fact, have already been accomplished in their entirety or have been implemented successfully in significant part. There remains, of course, the possibility that a dispute under one of the asset purchase agreements or licenses will arise in the future. Such a possibility exists in nearly every case in which the United States requires divestitures. As a general matter, such disputes would

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[88] *See* ICTA Comments at 8-9; AAI Comments at 11.

[89] AAI Comments at 11.

not require intervention by the United States, as the parties to the dispute can rely on contract procedures and other remedial steps to reach a resolution. Accordingly, while the United States will continue to monitor Monsanto's behavior to ensure compliance with the judgment, the prospect of the United States and this Court becoming enmeshed in the types of disputes enumerated by the commenters is both exaggerated and remote.

VI. RESPONSE TO COMMENTS THAT RAISE ISSUES BEYOND THE SCOPE OF THE COURT'S REVIEW

Several commenters express concerns about competitive issues not raised in the Complaint. As discussed above in Section III.A., issues beyond the scope of the Complaint are outside the purview of the Court. However, even if the Court were to consider the merits of these alleged concerns, the United States appropriately concluded that permitting the transaction will not give rise to the posited harms.

A. Crops Other Than Cotton

Several commenters expressed concern that the merger will have a detrimental impact on the development of traits for corn and soy.[90] These commenters argue that a reduced revenue opportunity in cotton will make trait producers hesitant to develop traits as they will have fewer opportunities to profit from their investment. Market conditions belie that prediction.

The revenue opportunities for corn and soy traits far exceed those for cotton, based on available acres. The market for biotech soy is more than four times greater than the market for biotech cotton in the United States, and more than three times greater worldwide. The market for

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[90] *See, e.g.*, States Comments at 5, 9; ISA Comments at 1; OFU Comments at 1; OCM Comments at 2; Plains Justice Comments at 1.

biotech corn is at least four times greater than that for cotton in the United States, and at least 1.3 times greater than that for cotton worldwide. Within the United States, the combined market opportunity to sell biotech soy and biotech corn is roughly 130 million acres, whereas there are only 15 million cotton acres.[91] That revenue opportunity has proven sufficient for DuPont to continue its commercialization of OptimumGat in corn and soy and to continue research and development of other transgenic traits[92] and likely would provide similar incentives for other trait developers.

B. Conventional Cottonseed

ICTA suggests that the transaction will result in harm to a conventional cottonseed market.[93] The merger does not, however, substantially alter incentives of seed companies to offer conventional varieties. Absent the merger, DPL's share of the trait fee charged by Monsanto reflected a significant share of DPL's revenues, and DPL's revenues from trait fees would have become even larger as it shifted to non-Monsanto traits. Accordingly, even without the merger, DPL would have had substantial incentives to shift sales from conventional to traited seed so as to earn these fees. Further, ICTA fails to explain why, assuming there is a core set of farmers committed to using conventional seed, Monsanto or Bayer would not continue to have sufficient

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[91] Monsanto estimates, from Hugh Grant, Chairman, President, and CEO, Monsanto, Presentation at Sanford Bernstein Strategic Decisions Conference, slide 11 (May 30, 2007), http://www.monsanto.com/pdf/investors/2007/05-30-07.pdf.

[92] *See* Investor Day Presentation at slides 34, 36 and 40.

[93] *See, e.g.*, ICTA at 28, 43.

incentives to provide conventional seed to them.[94]

C. The Southwest and West Traited Cottonseed Markets

ICTA contends that the transaction will harm competition for traited cottonseed in the Southwest and West regions of the United States. A close examination of the facts reveals the lack of support for ICTA's claim.[95]

With respect to the Southwest,[96] DPL and Stoneville have a much smaller competitive presence than they do in the MidSouth or Southeast, in large part because their germplasm is not uniquely suited for the Southwest region. As reflected by the 2006 market shares for traited cottonseed in this region, there are a number of competing companies: Bayer 46%; DPL 26%; Stoneville 15% (Stoneville branded seed 5% and NexGen branded seed 10%); Americot 5%; All-Tex 3%; UAP 3% and Croplan 1%.[97] The divestiture of the Enhanced Stoneville Assets to Bayer

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[94] ICTA notes that "40%" of the 36 conventional varieties planted in 2006 were DPL varieties. According to USDA 2006 data, DPL offered fifteen conventional varieties, with seven of those fifteen having sales in the MidSouth and Southeast. Six of those seven were divested to Bayer as part of the Enhanced Stoneville Assets.

[95] ICTA Comments at 5.

[96] Though the USDA classifies the Southwest as comprising Texas, Oklahoma and Kansas, we have included New Mexico in our analysis of the region. New Mexico has two distinct cotton growing areas that can be roughly described as Eastern New Mexico and the Mesilla Valley. The same cotton varieties that grow successfully in Texas and Oklahoma are used in Eastern New Mexico whereas acala varieties are primarily grown in the Mesilla Valley. Because the vast majority of cotton acreage in New Mexico is in the eastern region, we have included data from that region in our analysis of the Southwest.

[97] The United States derived the above estimated shares of traited cottonseed sales in the Southwest (including New Mexico for the reasons discussed above) from USDA data and other data received during the course of the United States's investigation. These shares discount "saved seed" – conventional seed that a farmer saves from one year's crop to plant the next year (a practice that is more prevalent in the Southwest than the other regions due to the greater use of conventional seed which seed companies do not prohibit farmers from saving). USDA data

and Americot does not significantly alter the competitive situation. Because Stoneville developed its NexGen brand seed specifically for the Southwest market and Americot acquired Stoneville's NexGen-related assets, the Southwest market will continue to have three seed companies with significant shares (Bayer/Fibermax, Monsanto/DPL and Americot/NexGen) and three additional companies with a smaller presence (All-Tex, Croplan, and UAP).

With respect to the West, a proper analysis must recognize that Arizona and California are very different and relatively small markets.[98] In California, nearly all of the cotton grown is either pima or acala (a form of upland cotton).[99] Stoneville does not sell pima or acala varieties. Based on 2006 market shares for traited upland varieties grown in California (which ignores the large volume of pima cotton grown in California), Stoneville has only a 3% share, while Dow has a 43% share, Bayer 38%, DPL 13% and UAP 3%. Accordingly, the transaction does not significantly affect traited cottonseed competition in California.

Like the MidSouth and Southeast, the USDA data suggest there are two significant sources of upland cottonseed in Arizona: DPL with 73% and Stoneville with 20%. Because the proposed Final Judgment adequately addresses competition issues in the MidSouth and Southeast by requiring divestiture of the Enhanced Stoneville Assets, it also resolves any potential issues for

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ascribes saved seed to the seed company that originally produced the seed – even if the actual sale of that seed occurred in a previous year – and thus significantly overstates branded seed companies' shares in the region.

[98] As noted above, while classified by the USDA as part of the West, most of New Mexico's cotton production occurs in the eastern part of the state and requires the same varieties that perform well in the Southwest.

[99] There are two species of cotton grown in the United States: pima and upland. Furthermore, there are different types of upland cotton grown in the United States. In California, most of the upland cotton grown are acala varieties.

Arizona. Further, because Arizona's geography is well-suited for seed production of Southeast and MidSouth varieties, a significant amount of the upland cotton planted in Arizona is grown by farmers under contract with DPL and Stoneville for the purpose of producing cottonseed (rather than cotton fiber).[100] Thus, DPL's and Stoneville's shares in Arizona primarily reflect that they perform a substantial amount of seed production there.

D. Prices for Cottonseed Sold for Livestock Feed

OFU predicts that prices paid for cottonseed used in livestock feed will increase due to the merger.[101] The comment appears to misunderstand the source of cottonseed used for feed. Such seed does not come directly from the cottonseed companies. Rather, seed used for feed is the by-product of the cotton production process. The licensing agreements farmers sign in order to plant transgenic seed prevent them from planting the seed from their crop; hence, they typically sell any seed extracted from the cotton during the ginning process for oil or feed.[102] That seed does not pass through the hands of a cottonseed company on its way to be sold as feed. Nor does the OFU explain how the merger would affect prices of cottonseed sold for feed. Historically, the price of cottonseed used as livestock feed has remained fairly stable even as the price of transgenic planting seed has increased. Over the past ten years the price of seed for feed has averaged $107

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[100] The USDA survey data does not distinguish between cotton grown primarily for seed production and cotton grown as a crop.

[101] OFU Comments at 1.

[102] There would be excess seed even if farmers were able to replant transgenic seed because an acre of cotton yields far more seed than is necessary to replant that acre.

per short ton, a fraction of what farmers pay per bag of transgenic seed.[103] Moreover, the price of cottonseed sold for feed is likely affected by other sources of livestock feed. Finally, even if the price paid by farmers for cottonseed for planting did affect the price of feed cottonseed, since the proposed Final Judgment preserves traited cottonseed competition, the merger should have no adverse impact on the price of feed cottonseed.

E. Alleged Monsanto Exclusionary Business Practices

The States contend that Monsanto will engage in exclusionary business practices post-merger, such as "acquisitions of independent seed companies and germplasm providers to enhance its monopoly position in both seed and traits; long-term, highly restrictive licensing agreements that encourage the sale of Monsanto's biotech traits exclusively; licensing restrictions that prevent independent seed companies from combining Monsanto biotech traits with non-Monsanto traits; and bundling rebates on seeds, traits and chemicals to exclude competitors from retail distribution channels."[104]

Given both the breadth and lack of specificity of this contention, it is difficult to discern how it relates to the transaction at issue here. The actions on the laundry list articulated by the States are ones Monsanto could undertake with or without this merger, and the States do not explain why the transaction would change Monsanto's incentive or ability to engage in them. Nor do the States explain why such actions, if designed to have an anticompetitve effect, would be

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[103] USDA, *Oil Crop Situation and Outlook Yearbook*, May 2007, at 47. The price of $107 per short ton translates to a price of $2.75 per 50 pound bag. In contrast, a 50 pound bag-equivalent of DP555BGRR would cost a farmer in Georgia roughly $130 for the seed alone, plus an additional $292 for the trait fee.

[104] States Comments at 8.

successful in light of the preservation of competition achieved by the required divestiture of the Enhanced Stoneville Assets.[105]

Furthermore, though the United States made no determination regarding the competitive effect of certain business practices, some aspects of the proposed Final Judgment would make it difficult for Monsanto to engage in certain of the purportedly anticompetitive practices suggested by the States. For example, the proposed Final Judgment requires Monsanto to remove anti-stacking provisions in its licenses to other seed companies and penalties for working with competing trait providers. Also, it requires Monsanto to notify the United States in advance of purchases of independent cottonseed companies and germplasm providers, affording an opportunity to investigate and if necessary challenge any that might be anticompetitive.[106]

Finally, and most fundamentally, the antitrust laws will continue to apply and would proscribe conduct by Monsanto that runs afoul of applicable legal standards.

VII. CONCLUSION

After careful consideration of the public comments, the United States remains of the view that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint and that its entry would therefore be in the public interest. Although the proposed Final Judgment, like any settlement, was a product of negotiation and compromise,[107] it fully achieved the United States's goals in this action. Even if the court might

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[105] Bayer, Dow, DuPont and Syngenta all have agricultural products that could be added to a bundle that includes cottonseed.

[106] Proposed Final Judgment at 19.

[107] In this context, it is important to bear in mind that because Monsanto had committed to selling Stoneville as a condition of its acquisition agreement with DPL, a challenge to the

be inclined to view the issues differently, the purpose of Tunney Act review is not for the court to engage in an "unrestricted evaluation of what relief would best serve the public"[108] or to determine the relief "that will best serve society,"[109] it is simply to determine whether the proposed decree is within the reaches of the public interest – "even if it falls short of the remedy the court would impose on its own."[110]

The Court is to consider "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."[111] Because the markets identified in the Complaint are the only ones in which competition is likely to be lessened as a result of the merger, the impact of entry of the proposed Final Judgment will be to restore any competition lost as a result of the merger. Farmers in the MidSouth and Southeast who might have otherwise suffered injury from the violation set forth in the Complaint will retain their current and prospective competitive choices for traited cottonseed by virtue of the contemplated divestitures. Based on the factors set forth in the Tunney Act, the proposed Final Judgment is in the public interest.

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acquisition by the United States would have had to overcome the adequacy of a Stoneville divestiture to remedy any alleged harm.

[108] *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)).

[109] *Bechtel*, 648 F.2d at 666.

[110] *United States v. AT&T Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982).

[111] 15 U.S.C. § 16(e)(1)(B).

Pursuant to Section 16(d) of the Tunney Act, the United States is submitting the public comments and its Response to the Federal Register for publication. Our response is also being provided to each of the commenters. After the comments and the United States's Response to Comments are published in the Federal Register, the United States will move this Court to enter the proposed Final Judgment.

Dated: March 05, 2008

Respectfully submitted,

FOR PLAINTIFF:

/s/

Jill A. Ptacek (WA Bar #18756)

Trial Attorney
U.S. Department of Justice
Antitrust Division
Transportation, Energy &
Agriculture Section
325 7th Street, NW,
Suite 500
Washington, DC 20004
Telephone: (202) 307-6607
Facsimile: (202) 307-2784