UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. SYNGENTA AG, ASTRAZENECA PLC KONINKLIJKE COOPERATIE COSUN U.A. and ADVANTA B.V., *Defendants*.	CIVIL CASE NO.: 1:04CV01442 JUDGE: Reggie B. Walton DECK TYPE: Antitrust DATE STAMP: September 14, 2004

COMPETITIVE IMPACT STATEMENT

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

I.

NATURE AND PURPOSE OF THE PROCEEDING

On May 11, 2004, Syngenta AG (“Syngenta”), Syngenta Crop Protection AG, AstraZeneca Holdings B.V., AstraZeneca PLC, Koninklijke Vanderhave Groep B.V., and Koninklijke Cooperatie Cosun U.A. entered into an agreement under which Syngenta would

purchase all the assets of Advanta B.V. ("Advanta"), a seed company jointly owned by AstraZeneca Holdings B.V. and Koninklijke Vanderhave Groep, B.V. The United States filed a civil antitrust Complaint on August 25, 2004, seeking to enjoin the proposed acquisition. The Complaint alleges that the acquisition likely would substantially lessen competition in the market for sugar beet seeds suitable for growing in the United States, in violation of Section 7 of the Clayton Act. As a result of this loss of competition, prices of sugar beet seeds likely would increase and fewer new or improved sugar beet seed varieties likely would be developed, to the detriment of purchasers of sugar beet seeds, sugar beet processors, and consumers of sugar beet-based products.

At the same time the Complaint was filed, the United States also filed a proposed Final Judgment and Hold Separate Stipulation and Order, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Syngenta is required divest the worldwide sugar beet seed business of Advanta. Under the terms of the proposed Final Judgment and Hold Separate Stipulation and Order, Syngenta will take certain steps to ensure that Advanta's sugar beet seed business is operated as a competitively independent, economically viable, and ongoing business concern that remains independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or

enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendants and the Proposed Transaction

Syngenta is a corporation organized and existing under the laws of Switzerland, with its principal offices in Basel, Switzerland. Syngenta is the ultimate parent entity of Syngenta Crop Protection AG. Syngenta is engaged in the development, production, and sale of agricultural products, including pesticides and seeds. Syngenta's total sales in 2003 were approximately $6.6 billion. In 2003, Syngenta's sales of sugar beet seeds in the United States were approximately $10 million; its global sugar beet seed sales were $99 million.

AstraZeneca PLC is a private limited company with its headquarters in London, England. AstraZeneca PLC is the ultimate parent entity of AstraZeneca Holdings B.V. Koninklijke Cooperatie Cosun U.A. is a cooperative with its headquarters in Cosunpark 1, the Netherlands. Koninklijke Cooperatie Cosun U.A. is the ultimate parent entity of Koninklijke Vanderhave Groep B.V.

Advanta is a company incorporated in the Netherlands with its headquarters in Kapelle, the Netherlands. AstraZeneca Holdings B.V. and Koninklijke Vanderhave Groep B.V. each hold 50% of the shares of Advanta. Advanta sells various kinds of agricultural seeds throughout the world, with global sales of 444 million euros ($548 million) in 2003. Advanta sells sugar beet seeds in the United States through its business unit Interstate Seeds. Advanta also markets sugar beet seeds in the United States through collaborations with Holly Hybrids, Seedex, and Croplan.

In 2003, Advanta directly and through these collaborations had sugar beet seed sales of about $7 million in the United States.

Syngenta's acquisition of Advanta, as initially agreed to by Defendants on May 11, 2004, would lessen competition substantially in the market for sugar beet seeds suitable for growing in the United States. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on August 25, 2004.

B. The Effects of the Transaction on Competition for Sugar Beet Seeds Suitable for Growing in the United States

Sugar beet seeds are used by growers to produce sugar beets, which in turn are sold to sugar beet processors, who convert them into sugar for human consumption. Sugar beet growers in the United States purchased $50 million worth of sugar beet seeds in 2003.

Sugar beets are grown under many different climatic and environmental conditions throughout the United States. These different growing regions require sugar beet varieties with different characteristics. A sugar beet seed company identifies desirable traits for each region and breeds those traits into new varieties.

Advanta and Syngenta each have invested extensively in sugar beet seed research and development programs over a number of decades. Syngenta has breeding facilities in Longmont, Colorado and in Western Europe. Advanta also has several breeding facilities, all in Europe. Both develop sugar beet varieties specifically for the unique growing conditions found in various regions of the United States. For example, a sugar beet seed variety that is suitable for cultivation in France is not likely, without further development, to be suitable or attractive to

growers in Minnesota or Idaho. The seed companies have not been equally successful in developing seeds for the various growing regions of the United States, and they compete to improve their sales in each region by developing seeds with better disease resistance, yield per acre, and sugar content.

Developing marketable sugar beet seeds can take five to ten years. During this development period, the seed developer will conduct coded registration trials in the region where the beet is intended to be grown. The results of these field trials are used to determine which new varieties will be submitted to sugar beet processors for coded registration trials. Each sugar beet processor in the United States annually conducts coded registration trials to select varieties of sugar beet seeds to recommend to the growers in the processor's growing region. These trials take two to three years to complete. Sugar beet growers typically will select for purchase only seed varieties that have been tested and recommended by the sugar processors to which they intend to market their crops.

Sugar beet seed companies that have processor-approved varieties compete for sales to growers based upon price and characteristics desired by growers, for example, traits that lower production costs, offer higher yield per acre, or provide resistance to diseases and pests prevalent in the growers' geographic region.

Syngenta develops and sells sugar beet seeds in the United States under the brand name Hilleshog. Syngenta accounts for nearly 20% of all the sugar beets seed developed and sold in the United States. Advanta sells sugar beet seeds through its business unit, Interstate Seeds, under the brand name Vanderhave. Sugar beet seeds bred from genetic material developed by

Advanta are also sold in the United States by Holly Hybrids and other companies. Advanta-bred sugar beet seeds account for more than 16% of the seeds sold in the United States.

The market in the United States for sugar beet seeds suitable for growing in the United States is highly concentrated. Syngenta and Advanta are two of only three significant firms that develop sugar beet seeds for cultivation in the United States. The market for sugar beet seeds suitable for growing in the United States will become substantially more concentrated if Syngenta acquires Advanta. Syngenta's acquisition of Advanta will lessen competition substantially and make more likely increased prices and a slower pace of innovation.

New entry is not likely to thwart these anticompetitive effects. Successful entry into the sugar beet seed business is difficult, time consuming, and costly. Developing a new sugar beet seed variety can take five to ten years. Completing the trial tests required by a sugar beet processing company for acceptance on the processor's approved list of varieties can take an additional two to three years.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in sugar beet seeds by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires Syngenta, within 90 days after the filing of the Complaint, or 5 days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as a viable ongoing business, Advanta's worldwide sugar beet seed business. These assets include all tangible and intangible assets necessary to run

Advanta's worldwide sugar beet seed operations, including research and development facilities, customer lists and contracts, all registered plant breeders rights, and licenses. The United States may extend the period of time available to Syngenta to complete the divestiture up to an additional 120 days.

The proposed Final Judgment requires divestment of Advanta's worldwide sugar beet seed business, including two major research facilities located in Europe that focus on sugar beet seeds: a facility in Rilland-Bath, the Netherlands; and a facility in Tienen, Belgium. At these facilities, Advanta also develops sugar beet seeds with characteristics desirable for production in the United States, such as beets that are resistant to diseases found in the U.S., but not in Europe. Advanta then contracts with a U.S.-based company to grow the varieties of seeds it intends for the U.S. market. Requiring the divestiture of Advanta's worldwide sugar beet seed business, including these European operations, will insure that the acquirer will have the assets necessary to continue to develop sugar beet seeds suitable for growing in the United States, as well as to produce and sell those seeds.

The assets must be divested in such a way as to satisfy the United States in its sole discretion that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that Syngenta does not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will

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

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition on the market for sugar beet seeds suitable for growing in the United States.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register. All comments received during this period will be considered by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Roger W. Fones
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
325 Seventh Street, NW, Suite 500
Washington, DC 20530

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

interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Syngenta's acquisition of Advanta. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the development, production, and sale of sugar beet seeds suitable for growing in the United States.

VII.

STANDARD OF REVIEW UNDER THE APPA
FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court shall consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. 15 U.S.C. § 16(e)(1)(A) & (B). As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to 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. *See United States v. Microsoft Corp*., 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

"Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). Thus, in conducting this inquiry, "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).[1] Rather:

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[1] *See United States v. Gillette Co*., 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed by the Department of Justice pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong., 2d Sess. 8-9 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538.

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should ... carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it

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[2] *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. AT&T*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F.Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id*. at 1459-60.

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that

were considered by the United States in formulating the proposed Final Judgment.

Dated: September 14, 2004

Respectfully submitted,

"/s/"

Angela L. Hughes
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