UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

STATE OF ILLINOIS,

STATE OF IOWA,

and

STATE OF MISSOURI,

Plaintiffs,

v.

TYSON FOODS, INC.,

and

THE HILLSHIRE BRANDS COMPANY,

Defendants.

COMPETITIVE IMPACT STATEMENT

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

I.
NATURE AND PURPOSE OF THE PROCEEDING

Defendant Tyson Foods, Inc. ("Tyson") and Defendant The Hillshire Brands Company ("Hillshire") (collectively, "Defendants") entered into an agreement on July 1, 2014, pursuant to

which Tyson will acquire all of the outstanding shares of Hillshire. The all-cash transaction, which includes Hillshire's outstanding net debt, is valued at approximately $8.55 billion. The United States filed a civil antitrust Complaint on August 27, 2014, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially in the market for the purchase of sows from farmers in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, Plaintiffs also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are to divest Tyson's sow purchasing business, also known as Heinold Hog Markets (the "Divestiture Assets"). Under the terms of the Hold Separate, the Defendants will take certain steps to ensure that Tyson Hog Markets, Inc., a subsidiary of Tyson that includes the Divestiture Assets, is operated as a competitively independent, economically viable and ongoing business concern that will remain independent of Hillshire's sow purchasing operation and will be uninfluenced by the consummation of the acquisition, and that competition between Tyson and Hillshire in the purchase of sows from farmers is maintained during the pendency of the ordered divestiture.

Plaintiffs and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

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

A. The Defendants and the Proposed Transaction

Defendant Tyson is a Delaware corporation with its headquarters in Springdale, Arkansas. In 2013, Tyson had total revenues of approximately $34.4 billion. Tyson is one of the world's largest meat companies, producing, distributing, and marketing chicken, beef, pork, and prepared foods. Tyson's subsidiary Tyson Fresh Meats, Inc. is responsible for the purchase of hogs and cattle for Tyson's processing facilities; hog purchases are handled by Tyson Hog Markets, Inc., a subsidiary of Tyson Fresh Meats. In addition to buying hogs for Tyson's processing facilities, Tyson Hog Markets' subsidiary Heinold Hog Markets ("Heinold"), buys and resells sows.[1] In 2013, Heinold had revenues of approximately $270 million.

Defendant Hillshire is a Maryland corporation headquartered in Chicago, Illinois. Hillshire is a manufacturer and marketer of brand name food products for the retail and foodservice markets, including sausage, hot dogs, and luncheon meats. Its brand names include Jimmy Dean, Ball Park, and Hillshire Farm. Hillshire's total revenues were approximately $3.9 billion for the year ended June 29, 2013.

On July 1, 2014, Tyson and Hillshire entered into a definitive agreement for the acquisition by Tyson of Hillshire. On July 16, 2014, Tyson commenced a tender offer to purchase all of Hillshire's outstanding shares. The tender offer is conditioned on the valid tendering, without a valid withdrawal, of at least two-thirds of Hillshire's outstanding stock prior

[1] Sows are female hogs that have produced at least one litter and will no longer be used for breeding. Heinold also purchases boars and outs (runts or deformed hogs) from farmers.

to expiration of the offer. As of August 12, over 70% of Hillshire's outstanding shares had been validly tendered and not validly withdrawn.

B. Industry Background

Sows are female pigs raised for the purpose of breeding hogs. Sows are sold for slaughter at the end of their productive breeding lives. Packers use the meat from sows in the production of pork sausage. In contrast, hogs are swine raised solely for the purpose of slaughter; their meat is typically used for pork products other than sausage.

Sausage producers, other than Hillshire, primarily buy sows from marketers such as Heinold. Marketers purchase sows from individual farmers and assemble truck loads (with approximately 100 sows per load) for delivery to sausage plants. Marketers utilize buying stations to procure sows from farmers. The frequency and number of a particular farmer's sales of sows depends on the size of its breeding operations. Larger operations sell sows every week; smaller operations sell sows much less frequently. Some operations are of a sufficient size to be able to sell sows by the truckload whereas many farms sell lots of smaller sizes.

Heinold operates eight buying stations located in Atkinson, Illinois; Burlington, Indiana; Randall and Sioux City, Iowa; Jones, Michigan; Windom, Minnesota; Monroe City, Missouri, and St. Paul, Nebraska. Heinold buys sows from more than 2,400 farmers located throughout the United States. In 2013, Heinold purchased about 660,000 sows from farmers in the United States, paying more than $150 million to farmers.

Hillshire slaughters sows and produces sausage at a facility in Newbern, Tennessee. Whereas most other sausage producers purchase nearly all of their sows from marketers, Hillshire is unique in that it purchases over half of its sows directly from farmers. The sows that Hillshire purchases from farmers are usually transported directly by truck from the farm to

Hillshire's Tennessee facility. Hillshire purchases sows from approximately 100 farmers located throughout the United States. In 2013, it purchased more than 250,000 sows from farmers in the United States, paying approximately $80 million to farmers.

C. Relevant Markets

There are no economic uses for slaughtered sows other than for the production of pork sausage. It is highly unlikely that a small decrease in the prices paid for sows would be rendered unprofitable by farmers switching to selling sows to other purchasers for any other uses.

The purchase of sows from farmers is a relevant antitrust product market. In part because income from sow sales represents a small percentage of the overall revenues of a hog breeding operation, a small decrease in the prices farmers receive for sows typically would not affect farmers' decisions about when to slaughter sows, the size of their breeding operations, or whether to abandon their investments in hog breeding altogether. Although the sale of sows constitutes a small percentage of overall revenues, farmers rely on this source of income as an important contribution to their earnings.

Hog breeding operations are concentrated in the central area of the United States, including Iowa, Illinois, and Missouri, and in North Carolina. All else equal, farmers prefer to transport sows as short a distance as possible, unless the price that the farmer receives justifies shipping the sows farther. For instance, Hillshire sometimes fully compensates the farmer for transportation costs, which makes it economical for farmers located hundreds of miles away from the Hillshire plant to sell to Hillshire. Sows are commonly shipped throughout the central area of the United States where the purchasing facilities of the merging parties are located and where a major portion of sow sales and slaughter take place. The overwhelming majority of sow purchases occur within this region. As sows are also shipped even farther distances to slaughter

facilities throughout the nation, the United States is the outer bounds of a relevant geographic market.

Thus, the purchase of sows from farmers in the United States is a relevant market (i.e., a line of commerce and a section of the country) under Section 7 of the Clayton Act, 15 U.S.C. § 18.

D. Anticompetitive Effects of Tyson's Acquisition of Hillshire

The market for the purchase of sows from farmers is concentrated. The acquisition of Hillshire by Tyson will combine two of the major purchasers of sows from farmers in the United States and would create a company that accounts for approximately 35% of all purchases in this market. Using the Herfindahl-Hirschman Index, the post-acquisition HHI would increase by more than 500 points, resulting in a post-acquisition HHI of approximately 2100.

Farmers have benefited from competition between Tyson and Hillshire in a variety of ways. Farmers track prices offered by sow purchasers. For many farmers, at particular points in time, the merging parties constitute their two best alternatives. The purchasing facilities of the merging parties are two of a small number of potential buyers from whom farmers seek or receive quotes. As the transaction eliminates a significant competing bidder, bidding is likely to be less aggressive and farmers are likely to receive lower prices for sows. As the prices offered decrease, farmers may need to ship sows to more distant purchasers. This additional shipping time and cost constitute an economic inefficiency that would follow from the elimination of competition between Hillshire and Tyson.[2]

[2] Mergers of competing buyers can enhance market power on the buying side of a market, raising significant antitrust concerns. *See* U.S. Dep't of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES (2010), §12.

Successful entry or repositioning into the market for the purchase of sows from farmers would not be timely, likely, or sufficient to deter the anticompetitive effects resulting from this transaction. Slaughterers that do not currently purchase sows directly from farmers are unlikely to begin to do so because they value the sorting and weighing services performed by marketers at their buying stations. Entry by new marketers or expansion by existing marketers sufficient to replace the market impact of the loss of competition resulting from the transaction is also unlikely. The process of locating and acquiring land, obtaining permits, and constructing buying stations would require an extensive period of time and would be unlikely to occur in response to anticompetitive price decreases resulting from the merger.

Tyson's acquisition of Hillshire would eliminate actual and potential competition between Tyson and Hillshire, leaving farmers with fewer outlets for their sows and lower prices in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

III.
EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the market for purchases of sows from U.S. farmers by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires the Defendants, within 90 days after the filing of the Complaint, or five days after notice of entry of the Final Judgment, whichever is later, to divest all of Heinold ("the Divestiture Assets"), which constitute all the assets Tyson currently uses to compete against Hillshire for sow purchases from U.S. farmers. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

The terms of the proposed Final Judgment require the Defendants to divest the

Divestiture Assets within 90 days. If Defendants are unable to accomplish the divestiture within this period, the United States, after consultation with the Plaintiff States, may extend this period up to 60 days and shall notify the Court in such circumstances. A prompt divestiture has the benefits of restoring competition lost as a result of the acquisition and reducing the possibility that the value of the assets will be diminished.

Section V(B) of the Hold Separate Stipulation and Order specifies that the Divestiture Assets will be maintained as a viable business and that Hillshire employees will not gain access to customer or supplier lists specific to the Divestiture Assets prior to divestiture.

Section IV(B) of the proposed Final Judgment requires the Defendants to furnish information to prospective acquirers in an attempt to sell the divestiture assets.

Section X of the proposed Final Judgment provides that the United States may appoint a Monitoring Trustee with the power and authority to investigate and report on the parties' compliance with the terms of the Final Judgment and the Hold Separate during the pendency of the divestiture, including keeping Tyson Hog Markets separate from the sow purchasing operations of Hillshire. The Monitoring Trustee would not have any responsibility or obligation for the operation of the parties' businesses. The Monitoring Trustee will serve at Defendants' expense, on such terms and conditions as the United States approves, and Defendants must assist the trustee in fulfilling its obligations. The Monitoring Trustee will file monthly reports and will serve until the divestitures are complete. The Monitoring Trustee shall serve until the divestiture of all the Divestiture Assets is finalized pursuant to either Section IV or Section V of the Final Judgment.

In the event that Defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, Section V of the proposed Final Judgment provides

that the Court will appoint a Divestiture Trustee selected by the United States to effect the sale of the Divestiture Assets. If a Divestiture Trustee is appointed, the proposed Final Judgment provides that Defendant Tyson will pay all costs and expenses of the Divestiture Trustee. The Divestiture Trustee's commission will be structured so as to incentivize the Divestiture Trustee to complete the divestiture as quickly as possible while trying to obtain the highest possible price for the Divestiture Assets. After his or her appointment becomes effective, the Divestiture Trustee will file monthly reports with the Court and the United States which set forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the Divestiture Trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the Divestiture Trustee's appointment.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the market for the purchase of sows from U.S. farmers.

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

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

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

William H. Stallings
Chief, Transportation, Energy, and Agriculture Section
Antitrust Division
United States Department of Justice
450 5th St. NW
Suite 8000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the

parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.
ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Tyson's acquisition of Hillshire. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition in the market for the purchase of sows from U.S. farmers. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

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

> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one, as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[3]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted

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

evaluation of what relief would best serve the public." *United States v. BNS Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[4] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting

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

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

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[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 Sen. John Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[5]

[5] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, at *22 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: August 27, 2014

Respectfully submitted,

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