**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>DANONE S.A.<br>and<br>THE WHITEWAVE FOODS COMPANY,<br>Defendants. | CASE NO.: 17-cv-0592 (KBJ)<br><br>JUDGE: Ketanji Brown Jackson |

## 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

Pursuant to an Agreement and Plan of Merger dated July 6, 2016, Danone S.A. ("Danone") has agreed to purchase The WhiteWave Foods Company ("WhiteWave") for approximately $12.5 billion. Danone has participated in the raw organic milk and fluid organic milk markets for the past two decades through a strategic partnership with WhiteWave's closest competitor, CROPP Cooperative ("CROPP"). As a result, Danone's acquisition of WhiteWave effectively brings together WhiteWave and CROPP, the top purchasers of raw organic milk in

the northeast United States and the producers of the three leading brands of fluid organic milk in the United States.

The United States filed a civil antitrust Complaint on April 3, 2017, seeking to enjoin the proposed acquisition. The Complaint alleges that the acquisition likely would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, in the purchase of raw organic milk in the northeast United States and in the manufacture and sale of fluid organic milk in the United States. That loss of competition likely would result in less favorable contract terms for northeast farmers for raw organic milk and higher prices for fluid organic milk consumers in the United States.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of Danone's acquisition of WhiteWave. Under the proposed Final Judgment, which is explained more fully below, the defendants are required to divest Stonyfield Farm, Inc. ("Stonyfield"), including its headquarters, facility and warehouse in Londonderry, New Hampshire; certain classes of tangible property used exclusively by Stonyfield; all other tangible property relating to Stonyfield; and all of the intangible assets (*i.e.*, intellectual property and know-how) owned, licensed, controlled, maintained or used primarily by the business. Under the terms of the Hold Separate Stipulation and Order, defendants will take certain steps to ensure that Stonyfield is operated as a competitively independent, economically viable and ongoing business concern; that it will remain 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

Danone S.A., a société anonyme organized under the laws of France, is the ultimate parent company of Stonyfield Farms, Inc., the leading U.S. manufacturer of organic yogurt, and one of the largest consumers of raw and processed organic milk in the nation. Danone's 2015 annual sales were approximately $24.3 billion. Stonyfield is Danone's U.S. organic dairy subsidiary. It is a Delaware corporation that manufactures yogurt at a facility in Londonderry, New Hampshire.

The WhiteWave Foods Company is a Delaware corporation headquartered in Denver, Colorado. WhiteWave's premium dairy division is one of the largest purchasers of raw organic milk in the northeast, and sells fluid organic milk, organic yogurt, and other organic dairy products nationwide through its Horizon dairy and Wallaby organic yogurt food businesses. WhiteWave's 2015 annual sales were $3.86 billion.

### B. The Markets

#### 1. Industry Background

Milk that has been collected from a cow but not pasteurized and processed is called raw milk. Conventional raw milk comes from non-organic cows. Raw organic milk is collected

from organic cows on organic farms that must meet rigorous USDA regulations governing grazing practices, hauling, handling, and processing.

Individual farmers typically sell their raw organic milk either in affiliation with a cooperative, which negotiates a sales price for its farmers, or through a contract, at a specified price. Farmers choose to affiliate with purchasers on the basis of service, price, and other financial incentives. Purchasers strive to form networks of farmers that meet their needs for raw organic milk and that permit efficient hauling routes. Raw organic milk purchasers compete to attract farmers to their networks.

Purchasers arrange for raw organic milk to be picked up from farms and transported to milk processing plants. Raw organic milk will spoil if not processed within 72 hours of collection from a cow. At the processing plant, raw organic milk is separated into fat and skim milk, pasteurized to kill bacteria, and homogenized to reduce the size of the remaining milk fat particles. The final result of this process is fluid organic milk. Most raw organic milk becomes fluid organic milk, and most fluid organic milk is packaged for retail sale as branded or private-label products that can be shipped to retail customers nationally. Some fluid organic milk is transported by bulk tanker to a manufacturer for conversion into another product, such as organic yogurt.

Fluid organic milk is packaged and sold directly to consumers in a variety of retail outlets. Most retailers prefer to carry at least one brand of packaged fluid organic milk in addition to their own private-label fluid organic milk. By monitoring retail shelves, fluid organic milk competitors can track which rival brands are carried by particular retail customers.

### 2. Pre-Acquisition Relationships Between WhiteWave, Danone, and CROPP

#### a. Danone and CROPP

For more than twenty years, Danone's Stonyfield subsidiary has cultivated a strategic partnership with CROPP. Stonyfield, the leading manufacturer of organic yogurt in the United States, relies on CROPP for the supply of almost all of its organic milk requirements. CROPP, in turn, relies on the revenue stream from Stonyfield's organic milk purchases to retain and compensate its farmer members, as Stonyfield has been CROPP's largest customer for the same period of time. Presently, CROPP supplies Danone with at least 90 percent of Stonyfield's requirements for raw organic milk, fluid organic milk, and milk equivalents (e.g., cream, condensed, or powdered organic milk) in the United States.

This supply relationship, memorialized in a longstanding "Supply Agreement" is critical to the viability of both Danone and CROPP's businesses, and this dependence over the years has forged a strong relationship. This relationship includes the sharing of competitively sensitive information regarding, for example, costs, sales, products, and customers.

Danone's strategic partnership with CROPP deepened in 2009, when it granted CROPP an exclusive license allowing CROPP to produce and sell Stonyfield branded fluid organic milk, in exchange for a royalty payment ("License Agreement"). This License Agreement has allowed CROPP to expand its sales in the northeast, and to add the well-known Stonyfield trademark to a portfolio that already included the cooperative's own Organic Valley fluid organic milk brand.

As a result of the License Agreement, Danone and CROPP share the Stonyfield brand, which competes with WhiteWave's market-leading Horizon brand. The Stonyfield brand-sharing allowed under the License Agreement necessitates frequent meetings between Danone

and CROPP to discuss marketing and to collaborate on promotions, which have required the sharing of confidential and competitively sensitive business information. CROPP's Stonyfield fluid organic milk benefits from Danone's investments in the Stonyfield organic yogurt brand. Danone, in turn, receives a royalty payment while also benefitting from the perception of a broader Stonyfield portfolio, without requiring an investment in the production of Stonyfield fluid organic milk.

#### b. WhiteWave and CROPP

WhiteWave and CROPP are the first- and second-largest purchasers of raw organic milk in the northeast, respectively. To supply its needs, WhiteWave contracts with approximately 600 farms in the northeast and 800 farms in total nationwide. To supply Danone and its own needs, CROPP contracts with 500 northeast farms and 1,500 farms in total nationwide.

WhiteWave and CROPP compete to offer farmers the best price for their raw organic milk, the highest quality service, and the most attractive incentives to convert from conventional to organic dairy farming. Farmers, in turn, request concessions from WhiteWave based on CROPP's offers, and vice versa.

WhiteWave's Horizon brand is the only nationwide competitor to CROPP's Organic Valley brand and Danone-CROPP's Stonyfield brand for the sale of fluid organic milk to retailers.

### 3. The Purchase of Raw Organic Milk in the Northeast

The purchase of raw organic milk is a relevant product market and line of commerce under Section 7 of the Clayton Act. Although raw organic milk could be sold by farmers as conventional milk, the milk would typically be sold at a loss because conventional milk prices do

not cover the organic farmer's production costs. Therefore, farmers who sell raw organic milk cannot economically switch to supplying purchasers of conventional milk.

Transporting raw organic milk produced by northeast farmers beyond the northeast is expensive, risks spoilage of the raw organic milk, and stretches the outer bounds of regulatory requirements that raw organic milk be processed within 72 hours of its collection. Most raw organic milk is processed within several hundred miles of the location where it is produced. Indeed, the relevant geographic market for the purchase of raw organic milk is referred to in the dairy industry as "the northeast," because the farmers who sell raw organic milk to WhiteWave and to Danone (through CROPP) are located in the northeast. For these purposes, the northeast includes Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Maryland. A hypothetical monopsonist purchaser of raw organic milk from farmers in the northeast would profitably impose a reduction in the price of raw organic milk paid to farmers by at least a small but significant and non-transitory amount (*e.g.*, five percent).

**4. The Sale of Fluid Organic Milk in the United States**

Fluid organic milk is a relevant product market and line of commerce under Section 7 of the Clayton Act. Consumers do not significantly switch away from fluid organic milk, for example to conventional milk, when the price increases by a significant non-transitory amount. The relevant geographic market for the sale of fluid organic milk is no larger than the United States. Fluid organic milk is pasteurized using methods that allow for a longer shelf life than most conventional milk, allowing it to be shipped long distances when necessary. A hypothetical

monopolist seller of fluid organic milk in the United States would profitably impose at least a small but significant and non-transitory price increase.

**5. Anticompetitive Effects**

Given the strategic partnership between Danone and CROPP, this transaction gives Danone the incentive and ability to limit the existing competition between WhiteWave and CROPP for both farmer contracts and retail customer accounts. Danone and CROPP are linked together by the Supply Agreement, the License Agreement, and years of operational cooperation. They are dependent on each other for supply and revenue, respectively, and they share the Stonyfield brand. Their aligned interests and mutual dependence make it unlikely, therefore, that CROPP would continue to compete fiercely with Danone-WhiteWave post merger.

Concentrated markets, coupled with the entanglements created by these agreements, increase the likelihood of anticompetitive effects. WhiteWave and CROPP collectively purchase approximately 70 percent of the available northeast raw organic milk supply. The small, regional dairies that make up the remaining 30 percent cannot expand their farmer networks (thereby increasing their own purchases) without access to the fluid organic milk customers currently supplied by WhiteWave and CROPP.

In retail fluid organic milk sales, Horizon, Organic Valley, and Stonyfield account for 41 percent, 10 percent, and 5 percent of shares, respectively. For branded fluid organic milk, specifically, Horizon, Organic Valley, and Stonyfield represent 67 percent, 16 percent, and 8 percent of national retail sales, respectively. The merger links these three firms, which together control almost 56 percent of all fluid organic milk sales, and 91 percent of all branded fluid organic milk sales.

CROPP and WhiteWave generally can identify when and where they are competing against each other for farmers or retail customers. Affiliations between farmers and purchasers are well known because there are relatively few purchasers and one can readily observe which farmers are in a given purchaser's network. Relationships between fluid organic milk sellers and their retail customers are also well known because it is easy to observe which brands are available in each retail store. These highly transparent supply and customer relationships allow market participants to identify their particular rival in most competitive interactions. Given the transparency of these markets, the merger would curtail competition between the Danone-CROPP partnership and WhiteWave.

The merger would have reduced the incentives for the combined Danone-WhiteWave to compete aggressively against CROPP, and the supply and license relationships linking the merged entity to CROPP would have provided opportunities for WhiteWave and CROPP to interact, strategize, coordinate marketing, and exchange confidential and competitively sensitive information.

The only way for CROPP to continue to compete aggressively against WhiteWave post merger would have been to sever its Supply Agreement and License Agreement with Danone. This would have had significant costs and risks. In light of these costs and risks, and as CROPP's ability to compete with WhiteWave is undermined by the merger, it likely would have found it more profitable to remain in the partnership than to abandon it. The result would have been a likely lessening of competition in the purchase of raw organic milk from farmers and in the sale of fluid organic milk to retailers.

### 6. Difficulty of Entry or Expansion

New entry and expansion by existing competitors are unlikely to prevent or remedy the acquisition's likely anticompetitive effects. Barriers to entry and expansion in the raw organic and fluid organic milk markets include: (1) the substantial time and expense required to build a brand reputation sufficient to provide an outlet for raw organic milk purchases and fluid organic milk sales; (2) substantial sunk costs to be able to sell fluid organic milk in wholesale and retail outlets; (3) the expense of capital investments necessary to manufacture fluid organic milk; and (4) the investments necessary to develop raw organic milk hauling, fluid organic milk distributor relationships, and fluid organic milk delivery routes.

## 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 markets for the purchase of raw organic milk in the northeast and the manufacture and sale of fluid organic milk nationwide by establishing a new, independent, and economically viable competitor. The divestiture of Stonyfield effectively eliminates both the entanglements between Danone and CROPP and the increased incentive to reduce competition between the major brands of fluid organic milk, which otherwise would have resulted from the transaction. Pursuant to Paragraph IV(A) of the proposed Final Judgment, the defendants are required to divest Stonyfield within ninety (90) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later. 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 production and sale of Stonyfield products.

Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

Post merger, Danone's long-term Supply and License Agreements with CROPP would have connected CROPP with WhiteWave, its primary pre-merger competitor. These entanglements between the merged entity and CROPP would have provided incentives and opportunities for the two companies to interact, strategize, coordinate marketing and exchange confidential information. As a result of these incentives and opportunities, the companies would likely have competed less aggressively to recruit and retain organic farmers and customer accounts post merger. Consequently, organic farmers in the northeast would likely have received less favorable contract terms, and fluid organic milk customers nationwide would likely have paid higher prices. The Final Judgment requires the divestiture of the entire Stonyfield business, which will sever Danone's contractual relationships with CROPP and reduce the likelihood of anticompetitive effects in the markets for the purchase of raw organic milk in the northeast and the manufacture and sale of fluid organic milk in the United States.

**A. Divestiture Assets**

The Divestiture Assets, as defined in Paragraph II(M), encompass the entire Stonyfield business, including its headquarters, facility and warehouse in Londonderry, New Hampshire. Stonyfield manufactures and sells organic yogurt to customers throughout the United States and raw and fluid organic milk are its key ingredients. Stonyfield's facility in Londonderry has an established record as a high-quality, efficient production facility with sufficient capacity to meet current and future demand for its products.

Pursuant to Paragraph II(M)(2), the proposed Final Judgment requires the divestiture of

certain tangible assets used exclusively by Stonyfield and other tangible assets relating to Stonyfield. For the tangible assets shared by Danone and Stonyfield, Danone and Stonyfield will each be entitled to retain that portion of the asset that relates to its respective business.

The proposed Final Judgment also requires the divestiture of all intangible assets owned, licensed, controlled, maintained or used primarily by Stonyfield. For all other intangible assets that Stonyfield uses in connection with the development, production, manufacture or sale of any Stonyfield product, but does not own or have specific rights to (including intangible assets related to the design and manufacture of certain plastic bottles), the Divestiture Assets include non-exclusive, perpetual, royalty-free licenses in accordance with Paragraphs II(M)(3)(c) and II(M)(3)(d). If Danone's consent or waiver of exclusive rights is required for the Acquirer to access or utilize these licenses, Danone will take all steps necessary to remove any impediments that could prevent the Acquirer from utilizing these licenses. The Divestiture Assets do not include the intellectual property rights to the Oikos and Activia brands. Stonyfield does not currently manufacture any products under these brands, but Danone manufactures two successful product lines under these trademarks. Accordingly, in an effort to minimize future entanglements between Danone and the Acquirer, the Acquirer will not receive the rights to use the Oikos and Activia trademarks.

Paragraph II(M)(3)(b) of the proposed Final Judgment includes a conditional non-exclusive, perpetual, royalty-free license for the Acquirer to use Danone's intellectual property relating to the formula, recipe, and specifications for the production of Stonyfield's conventional Greek yogurt products manufactured under the Brown Cow trademark (or "Brown Cow Greek Formula," as defined in Paragraph II(H) of the proposed Final Judgment). This license is

conditioned on Stonyfield's continued use of the Brown Cow Greek Formula. If prior to the divestiture Stonyfield elects to produce its Brown Cow conventional Greek yogurts at its Londonderry facility, and no longer uses the Brown Cow Greek Formula, the condition will not have been met.

These tangible and intangible assets that comprise the Divestiture Assets will provide the Acquirer with the physical tools, knowledge and rights needed to develop, produce, manufacture and sell any product produced by Stonyfield.

**B. Transition Services and Co-Packing Agreements**

The Acquirer may require a transition services agreement for back office and information technology services to ensure the continuity of the operations of the Stonyfield business. The proposed Final Judgment, Paragraph IV(G), provides the Acquirer with the option of a transition services agreement for one (1) year, with one or more possible extensions of the term for not more than an additional twelve (12) months.

Additionally, Danone currently provides to Stonyfield certain raw materials and services related to operations, quality control and design to assist with its production and regulatory compliance. The Acquirer initially may require a ready supply of raw materials and the ability to access these specialized services. Therefore, Paragraph IV(H) of the proposed Final Judgment provides that, at the option of the Acquirer, Danone shall enter into one or more transition services agreements with the Acquirer to meet all or part of the Acquirer's needs for a period of up to six (6) months. Those agreements may relate to raw material purchases; the operation of Stonyfield's facilities; and/or quality control and design services for production and regulatory compliance. The United States, in its sole discretion, may approve extensions of these

agreements for a period totaling not more than twelve (12) months.

Stonyfield currently manufactures certain yogurt products at Danone's manufacturing facilities in Fort Worth, Texas and Minster, Ohio, facilities that are not being divested. The Acquirer may need some time to contract with a third-party co-packer for the manufacture of these products or to move them to Londonderry. Accordingly, Paragraph IV(I) of the proposed Final Judgment provides that, at the option of the Acquirer, Danone shall enter into one or more co-packing contracts with the Acquirer for a period of up to (1) one year for the continued production of Stonyfield products at the Fort Worth Facility and/or the Minster Facility. The United States, in its sole discretion, may approve one or more extensions of these agreements for a period totaling not more than six (6) months. The proposed Final Judgement also sets weekly volume and notice requirements to facilitate the smooth operation of any such co-packing agreements.

**C. Appointment of a Monitoring Trustee**

By providing for the possibility of transition services, co-packing agreements and other obligations, the proposed Final Judgment contemplates an ongoing relationship between defendants and the Acquirer for a period of time. Should the United States conclude that it would benefit from the assistance of a Monitoring Trustee, Section X of the proposed Final Judgment provides for the appointment of 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 but not limited to the terms and implementation of the transition services and co-packing agreements with Danone. 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 trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all 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 (6) 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, in order 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 that likely would result if Danone acquired WhiteWave, because they will establish a new, independent, and economically viable competitor in the markets for the purchase of raw organic milk in the northeast, and the sale of fluid organic milk nationwide.

## IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

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

## V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

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

comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 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 Danone's acquisition of WhiteWave. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the purchase of raw organic milk in the northeast and the manufacture and sale of fluid organic milk in the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

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

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

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.*, No. 13-cv-1236 (CKK), 2014-1 Trade Cas. (CCH) ¶ 78, 748, 2014 U.S. Dist. LEXIS 57801, at *7 (D.D.C. Apr. 25, 2014) (noting the court has broad discretion of the adequacy of the relief at issue); *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.").[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (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.

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[1] 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).

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).[2] 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 U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *16 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at

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[2] *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'").

*8 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461); *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 U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). 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. 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.[3] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9.

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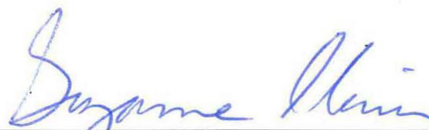
[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *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: April 13, 2017

Respectfully submitted,



Suzanne Morris
United States Department of Justice
Antitrust Division, Litigation II Section
Liberty Square Building
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 20530
Telephone.: (202) 307-1188
Facsimile: (202) 514-9033
suzanne.morris@usdoj.gov