IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **Plaintiff,** **v.** **CARGILL, INCORPORATED and CONTINENTAL GRAIN COMPANY,** **Defendants.**	**CASE NUMBER 1:99CV01875 (GK)** **JUDGE: Gladys Kessler** **DECK TYPE: Antitrust** **DATE STAMP:**

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 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 July 8, 1999, the United States filed a civil antitrust Complaint alleging that the proposed acquisition by Cargill, Incorporated ("Cargill") of the Commodity Marketing Group of Continental Grain Company ("Continental") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Cargill is the second largest grain trader in North America, and that, until recently, Continental was the third largest grain trader in North America. The Complaint alleges that if the acquisition is permitted to proceed, it will substantially lessen competition for grain purchasing services to farmers and other suppliers in a number of areas in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint further alleges that unless the acquisition is enjoined, many American farmers and other

suppliers likely will receive lower prices for their grain and oilseed crops, including corn, soybeans, and wheat (collectively referred to as "grain"). The request for relief in the Complaint seeks: (1) preliminary and permanent injunctive relief preventing the consummation of the transaction; and (2) such other relief as is proper.

When the Complaint was filed, the United States also filed a proposed consent decree ("Final Judgment") that would permit Cargill to complete its acquisition of Continental's commodity marketing business, but requires divestitures and other relief that would preserve competition for grain purchasing services to farmers and other suppliers in a number of areas in the United States.[1/] The proposed Final Judgment orders defendant Cargill to divest all of its property rights in the river elevators located in East Dubuque, Illinois and Morris, Illinois within five (5) months after the filing of the proposed Final Judgment or within five (5) calendar days after notice of entry of the Final Judgment, whichever is later. The proposed Final Judgment also orders defendant Cargill to divest all of its property rights in the Seattle port elevator within six (6) months after the filing of the proposed Final Judgment or within five (5) calendar days after notice of entry of the Final Judgment, whichever is later. The proposed Final Judgment orders defendant Continental to divest all of its property rights in the river elevators located at Lockport, Illinois and Caruthersville, Missouri, the rail elevators located at Salina, Kansas and Troy, Ohio, and the port elevators located at Beaumont, Texas, Stockton, California, and Chicago, Illinois within five (5) months after the filing of the proposed Final Judgment or within five (5) calendar days after notice of entry of the Final Judgment, whichever is later. The

[1] Cargill and Continental entered into a Stipulation (filed contemporaneously with the Final Judgment) in which they agreed to be bound by the proposed Final Judgment pending final determination by the Court.

proposed Final Judgment also requires defendant Cargill to enter into a "throughput agreement" -- an agreement providing for one grain trader to lease elevator capacity from another -- to make one-third of the loading capacity at its Havana, Illinois river elevator available to an independent grain company, within five (5) months after the filing of the proposed Final Judgment or within five (5) calendar days after notice of entry of the Final Judgment, whichever is later.

In addition, the proposed Final Judgment prohibits defendant Cargill from acquiring any interest in the facilities to be divested by Continental, or the river elevator located at Birds Point, Missouri, in which Continental until recently had held a minority interest. The proposed Final Judgment also makes defendant Cargill subject to various restrictions in the event it seeks to enter into a throughput agreement with the acquirer of the Seattle port facility.

If the defendants should fail to accomplish the divestitures or to enter into a Havana throughput agreement within the prescribed time periods, a trustee appointed by the Court would be empowered to divest these assets or otherwise satisfy the Havana throughput requirement.

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

II.

EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS

A. The Defendants and the Proposed Transaction

Cargill is a Delaware corporation with its principal place of business in Minnetonka, Minnesota. It is the second largest grain trader in North America. Continental is a Delaware

corporation with its principal place of business in New York City, New York. It was, as recently as 1997, North America's third largest grain trader. The defendants are also the first and third largest U.S. grain exporters, collectively exporting approximately 40 percent of all U.S. agricultural commodities. Both Cargill and Continental purchase grain and other crops from farmers, brokers, and elevator operators throughout the United States.

On October 9, 1998, Cargill and Continental entered into an agreement entitled "Purchase Agreement" under which Cargill agreed to purchase Continental's Commodity Marketing Group.

B. The Grain Purchasing Market

Grain traders such as Cargill and Continental operate extensive grain distribution networks, which facilitate the movement of grain from farms to domestic consumers of these commodities and to foreign markets. Country elevators are often the first stage of the grain distribution system, with producers hauling wheat, corn, and soybeans by truck from their farms for sale to the country elevators. Here, the grain is off-loaded, sampled, graded, and put into storage. Sometimes other services are offered by the country elevators, such as grain drying and conditioning services. The grain is then transported by truck, rail, or barge to larger distribution facilities, such as river, rail, or port elevators, which may or may not be affiliated with the country elevators, or to feedlots or processors.

River elevators or rail terminals may receive grain directly from the farm or from country elevators. From the river elevator, grain typically moves outbound by barge to port elevators. From the rail terminal, grain typically moves outbound by rail to port elevators or to domestic feedlots or processors.

The final stage in the grain distribution system for grain intended for export is a port elevator, where it is transferred to ocean vessels for shipment to foreign buyers. Grain normally comes to port elevators from river elevators (via barge) and rail terminals, although some port elevators receive grain directly from farmers and country elevators located within a relatively short distance from the port elevator.

Because the transportation of grain is relatively costly and time-consuming, farmers generally sell their grain within a limited geographic area surrounding their farms, usually to a country elevator -- although farmers located near river, rail, or port elevators sometimes bypass the country elevator and ship their grain directly to those facilities. Grain traders purchase grain at these country, rail, river, and port elevators from farmers and from other suppliers, such as brokers and independent elevator operators who have purchased grain from the farmers.

The Complaint alleges that the purchasing of wheat, corn, and soybeans each constitutes a relevant product market and a line of commerce within the meaning of the Clayton Act.

The draw area for a country, river, rail, or port elevator is the geographic area from which the facility receives grain. The draw area of one grain company's country, river, rail or port elevator will overlap the draw area of a competitor's elevator if their facilities are relatively close to each other -- and the cost of shipping grain from the producer to both elevators is comparable. Cargill and Continental operate a number of facilities with overlapping draw areas, and therefore compete with one another in a number of markets for the purchase of wheat, corn, and soybeans from the same producers or other suppliers.

Many farmers and other suppliers located within overlapping Cargill/Continental draw areas depend solely on competition among Cargill, Continental, and perhaps a small number of

other nearby grain companies to obtain a competitive price for their products. The areas in which these suppliers are located are referred to as "captive draw areas" in the Complaint. The Complaint alleges that these captive draw areas are relevant geographic markets and separate sections of the country within the meaning of the Clayton Act.

The following are the overlapping and captive draw areas for competing Cargill and Continental facilities:

- The Pacific Northwest. Cargill's port elevator in Seattle competes with Continental's port elevator in Tacoma for the purchase of corn and soybeans. The overlapping draw area for these facilities includes portions of North Dakota, South Dakota, Minnesota, Nebraska, and Iowa. Captive suppliers are located primarily in eastern North Dakota, eastern South Dakota, and western Minnesota.
- Central California. Cargill's port elevator in Sacramento competes with Continental's port elevator in Stockton for the purchase of wheat and corn. The overlapping draw area for these facilities is located in the Sacramento/Stockton area, where all suppliers are captive.
- Texas Gulf. Cargill's port elevator in Houston competes with Continental's port elevator in Beaumont for the purchase of soybeans and wheat. The overlapping draw area for these facilities includes portions of Texas, Louisiana, Oklahoma, Kansas, New Mexico, Colorado, Nebraska, Missouri, Iowa, and Illinois. Captive suppliers are located primarily in eastern Texas and western Louisiana.
- Rail and River Elevators. Cargill and Continental compete for the purchase of grain from captive suppliers located near their rail elevators in Salina, Kansas and Troy, Ohio, and

their river elevators in the vicinity of Morris, Illinois, Lockport, Illinois, Dubuque, Iowa/East Dubuque, Illinois, and New Madrid/Caruthersville, Missouri.

According to the Complaint, if Cargill were allowed to acquire the Continental facilities that purchase grain in these captive draw areas, it would be in a position unilaterally, or in coordinated interaction with the few remaining competitors, to depress prices paid to farmers and other suppliers, because transportation costs would preclude them from selling to other grain traders or purchasers in sufficient quantities to prevent an anticompetitive price decrease.

The Complaint also alleges that producers of corn, soybeans, and wheat would not switch to an alternative crop in sufficient numbers to prevent a small but significant decrease in price because of the length of growing seasons and of the suitability of those crops to certain climates and regions. Nor are processors or feedlots that purchase grain to manufacture food products or fatten livestock likely to constrain pricing decisions by grain trading companies because their purchasing decisions are based on factors other than small but significant changes in crop prices. Therefore, significant changes in concentration among grain trading companies can have an anticompetitive impact upon prices received by farmers and other suppliers.

C. The Chicago Board of Trade Futures Markets

In addition, Cargill and Continental compete to purchase corn and soybeans from grain sellers seeking to deliver these crops to river elevators on the Illinois River that, beginning in year 2000, will be authorized as delivery points for the settlement of Chicago Board of Trade (CBOT) corn and soybean futures contracts. The provision of authorized delivery points for corn and soybean futures contracts is a relevant product market within the meaning of the Clayton Act. These delivery points are regulated by the Commodities Futures Trading

Commission. The authorized delivery points, running the entire length of the Illinois River for soybeans, and from Chicago to Peoria, Illinois for corn, each constitutes a relevant geographic market within the meaning of the Clayton Act; and undue concentration in these markets would increase the possibilities of anticompetitive manipulations of the futures markets.

D. Harm to Competition as a Consequence of the Acquisition

The Complaint alleges that Cargill's acquisition of Continental's Commodity Marketing Group will substantially lessen competition for the purchase of corn, soybeans, and wheat in each of the relevant geographic markets by enabling Cargill unilaterally to depress the prices paid to farmers and other suppliers. The Complaint further alleges that the proposed transaction will also make it more likely that the few remaining grain trading companies that purchase corn, soybeans, and wheat in these markets will engage in anticompetitive coordination to depress grain prices. Moreover, it is not likely that Cargill's exercise of market power in any of these relevant geographic markets would be thwarted by significantly increased purchases of corn, soybeans, or wheat by processors, feedlots, or other buyers, by new entry, by farmers and other suppliers transporting their products to more distant markets, or by any other countervailing force.

In addition, the Complaint alleges that by consolidating the Cargill and Continental river elevators on the Illinois River, this transaction would give two firms approximately 80% of the authorized delivery capacity for settlement of CBOT corn and soybeans futures contracts. This concentration would increase the likelihood of price manipulation of futures contracts by those firms, resulting in higher risks for buyers and sellers of futures contracts.

Finally, the Complaint alleges that the defendants' Purchase Agreement includes a Covenant Not to Compete that is longer than is reasonably necessary for Cargill to have a fair opportunity to gain the loyalty of Continental's suppliers and customers, and has the effect of unlawfully dividing markets between the two companies in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The provisions of the proposed Final Judgment are designed to preserve existing competition for grain purchasing services to farmers and other suppliers in numerous areas in the United States, and to prevent anticompetitive manipulation of CBOT corn and soybean futures markets. To preserve existing competition for grain purchasing services, it requires divestitures of Cargill or Continental river elevators at Morris, Illinois, Lockport, Illinois, East Dubuque, Illinois, and Caruthersville, Missouri; rail terminals at Troy, Ohio and Salina, Kansas; and port elevators at Beaumont, Texas, Stockton, California, and Seattle, Washington. This relief is intended to maintain the level of competition that existed preacquisition, and ensures that farmers and other suppliers in the affected markets will continue to have effective alternatives to Cargill when selling their crops. To prevent manipulations of CBOT corn and soybean futures markets, the proposed Final Judgement requires divestitures of Cargill or Continental elevators along the Illinois River at Morris, Lockport and Chicago, Illinois, as well as providing one-third of Cargill's capacity at Havana, Illinois to a new entrant pursuant to a throughput agreement.[2/]

[2] The divestitures of the Morris and Lockport river elevators provide relief for both the grain purchasing markets and the CBOT futures markets.

A. East Dubuque and Morris River Elevators, and Seattle Port Elevator Provisions

Section IV.A of the proposed Final Judgment provides that, within five (5) months from the filing of the proposed Final Judgment with the Court, or five (5) calendar days after notice of the entry of the Final Judgment by the Court, whichever is later, defendant Cargill must divest all of its property rights in the East Dubuque, Illinois river elevator and the Morris, Illinois river elevator to an acquirer acceptable to the United States. Section IV.A of the proposed Final Judgment also provides that, within six (6) months from the filing of the proposed Final Judgment with the Court, or five (5) calendar days after notice of the entry of the Final Judgment by the Court, whichever is later, defendant Cargill must divest all of its property rights in the Seattle port elevator to an acquirer acceptable to the United States.

Section IV.B of the proposed Final Judgment imposes conditions on Cargill and the acquirer of the Seattle port elevator, should the acquirer decide to enter into a throughput agreement with Cargill or any joint venture involving the Tacoma elevator to which Cargill is a party ("Cargill Joint Venture"). Throughput agreements, which are common in the grain industry, allow one firm to move its grain through another firm's elevator for a fee. Under the terms of the Final Judgment: (a) Cargill may not obtain continuing rights to move more than 8.5 million bushels of grain per month through the Seattle port elevator (which ensures that the acquirer of that facility will have continuing rights to a substantial majority of the facility's throughput capacity); (b) the throughput agreement gives Cargill no more rights concerning the operations of the Seattle facility than are commonly granted to sublessees in standard throughput agreements (which insures that the acquirer will retain overall operational control of the facility);

and (c) that, in any event, the throughput agreement will not interfere with the ability or incentive of the acquirer to compete for the purchase of corn and soybeans.

Section IV.C of the proposed Final Judgment provides that Cargill need not divest the Seattle port elevator if it does not buy, lease, or otherwise acquire an interest in Continental's port elevator at or near Tacoma, Washington.

B. Lockport River Elevator, Caruthersville River Elevator, Salina Rail Elevator, Troy Rail Elevator, Beaumont Port Elevator, Stockton Port Elevator, and Chicago Port Elevator Provisions

Section IV.D of the proposed Final Judgment provides that, within five (5) months from the filing of the proposed Final Judgment with the Court, or five (5) calendar days after notice of the entry of the Final Judgment by the Court, whichever is later, defendant Continental must divest all of its property rights in the river elevators located at Lockport, Illinois and Caruthersville, Missouri; the rail terminals located at Salina, Kansas and Troy, Ohio; and the port elevators located at Beaumont, Texas, Chicago, Illinois, and Stockton, California, to an acquirer acceptable to the United States. These facilities were originally part of the defendants' Purchase Agreement. This divestiture requirement will ensure that these facilities are sold to purchasers who will operate these assets as grain elevators; and it is intended to preserve the market structure that existed in those geographic areas prior to the acquisition.

C. General Divestiture Provisions

Sections IV.E through IV.H of the proposed Final Judgment apply to all the divestitures ordered in Sections IV.A and IV.D (as qualified by Sections IV.B and IV.C). Section IV.E provides that unless the United States consents in writing, the divestitures shall include the entire assets defined in Sections IV.A and IV.D. The divestitures must be accomplished in such a way

to satisfy the United States, in its sole discretion, that the assets can and will be operated by the acquirer as a viable, ongoing entity capable of competing in the grain business. In addition, any Standard Throughput Agreement that may be negotiated between Cargill or the Cargill Joint Venture and the purchaser of the Seattle port elevator must be acceptable to the United States, in its sole discretion.

Under Section IV.F of the proposed Final Judgment, defendants shall make known, by usual and customary means, the availability of the assets and provide any prospective purchasers with a copy of the Final Judgment. The pertinent defendant is required to offer to furnish any prospective purchaser, subject to customary confidentiality assurances, all information regarding the assets customarily provided in a due diligence process, except such information subject to attorney-client privilege or attorney work-product privilege. The pertinent defendant must also permit prospective purchasers to have reasonable access to personnel and to make inspection of physical facilities and financial, operational, or other documents and information customarily provided as part of a due diligence process.

Section IV.G prohibits defendants from interfering with any negotiations by the purchaser to hire any employee whose primary responsibility involves the use of the assets. Under Section IV.H, defendants must take all reasonable steps necessary to accomplish the prompt divestitures contemplated by the proposed Final Judgment, and may not impede the operation of the assets.

Section IV.I of the proposed Final Judgment prohibits Cargill from purchasing, leasing, or acquiring any interest in any of the assests required to be divested by defendant Continental pursuant to Section IV.D, or any interest in the river elevator at or near Bird's Point, Missouri (in

which Continental formerly owned a minority interest and had a right of first refusal to purchase grain). Section IV.I also prohibits Cargill from subsequently purchasing or leasing the Tacoma port elevator should another firm acquire that facility, or from acquiring any other interest in that facility (including a joint venture interest) without the written consent of the United States. Section IV.I does not explicitly prohibit Cargill from reacquiring the assets that it will divest, because that prohibition is inherent in the requirement that Cargill divest these assets for the ten-year term of the Final Judgment.

Pursuant to Section IV.J of the proposed Final Judgment, defendant Cargill must enter into a throughput agreement that makes one-third (1/3) of the daily loading capacity at its river elevator located at or near Havana, Illinois, or one barge-load per day, whichever is greater, to an independant grain company acceptable to the United States in its sole discretion (the "Havana Throughput Agreement").[3/] Unless the United States agrees to an extension, Cargill must enter into the Havana Throughput Agreement within five (5) months from the date the Final Judgment is filed with the Court, or five (5) calendar days after notice of the entry of the Final Judgment by the Court, whichever is later.

D. Trustee Provisions

If the defendants fail to complete any of the divestitures or to enter into the Havana Throughput Agreement within the required time periods, the Court will appoint a trustee,

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[3] The divestitures of the facilities at Morris, Lockport, and Chicago were sufficient to resolve concerns about consolidation of authorized delivery points for CBOT corn futures markets, which extend from Chicago to Pekin. To resolve concerns about concentration of authorized delivery points for CBOT soybean futures markets, which extend the entire length of the Illinois River, it was necessary to provide delivery capacity for a new entrant on the southern portion of the Illinois River.

pursuant to Section V of the proposed Final Judgment, to accomplish the divestitures. Once appointed, only the trustee will have the right to sell the divestiture assets or enter into the Havana Throughput Agreement, and the pertinent defendant will pay all costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any such professionals or agents shall be reasonable and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished. The proposed Final Judgment also requires the pertinent defendant to use its best efforts to assist the trustee in accomplishing the required divestitures.

Pursuant to Section V.E, the trustee must file monthly reports with the parties and the Court, setting forth the the trustee's efforts to accomplish the divestitures ordered under the proposed Final Judgment. If the trustee does not accomplish the divestitures within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestitures, (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished, and (3) the trustee's recommendations. At the same time, the trustee will furnish such report to the United States and defendants, who will each have the right to be heard and to make additional recommendations. The Court shall thereafter enter such orders as appropriate in order to carry out the purpose of the Final Judgment, including extending the term of the trustee's appointment.

E. Notification Provisions

Section VI of the proposed Final Judgment assures the United States an opportunity to review any proposed sale, whether by the pertinent defendant or the trustee, before it occurs.

Under this provision, the United States is entitled to receive complete information regarding any proposed sale or any prospective purchaser prior to consummation. Upon objection by the United States to a sale of any of the divestiture assets by the pertinent defendant or the trustee, any proposed divestiture may not be completed. Should a defendant object to a divestiture by the trustee pursuant to Section V.B, that sale shall not be consummated unless approved by the Court.

Section VII of the proposed Final Judgment prohibits defendants from financing all or any part of any purchase of the assets made pursuant to Sections IV or V of the Final Judgment. However, the pertinent defendant will not violate this condition with respect to assets leased by a defendant if: (1) the lessor holds the pertinent defendant responsible for lease payments under an assignment or sublease of the defendant's leasehold interests; or (2) the pertinent defendant makes up any shortfall between its lease payment obligations and the lease payments negotiated by the person to whom it assigns or subleases its leasehold interests.

F. Hold Separate Provisions

Under Section VIII of the proposed Final Judgment, defendants must take certain steps to ensure that, until the required divestitures and the execution of the Havana Throughput Agreement have been accomplished, all the previously defined assets and Cargill's Havana river elevator will be maintained as separate, distinct and saleable assets, and maintained as usable grain elevators. Until such divestitures, the defendants shall continue to operate these facilities as grain elevators. The defendants must maintain all these facilities so that they continue to be saleable, including maintaining all records, loans, and personnel necessary for their operation. Defendant Continental must operate the Lockport river elevator, Caruthersville river elevator,

Troy rail elevator, Beaumont port elevator, Stockton port elevator, and Chicago port elevator independently from and in competition with Cargill.

G. Non-Compete Provisions

The Cargill/Continental Purchase Agreement contains a five-year non-compete provision. Under the proposed Final Judgement, defendants are prohibited from implementing any non-compete agreements until all of the assets have been divested. Furthermore, the term of any such non-compete agreement may not be more than three (3) years.

H. Compliance Inspection, Retention of Jurisdiction and Termination Provisions

Section IX requires defendants to make available, upon request, the business records and the personnel of its businesses. This provision allows the United States to inspect defendants' facilities and ensure that they are complying with the requirements of the proposed Final Judgment. Section X provides for jurisdiction to be maintained by the Court. Section XI of the proposed Final Judgment provides that it will expire on the tenth anniversary of its entry by the Court.

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 for 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. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to its entry. 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, N.W., 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 Cargill and Continental. The United States is satisfied, however, that the divestitures and other relief contained in the proposed Final Judgment should preserve competition in grain purchasing services as it was prior to the proposed acquisition, and that the proposed Final Judgment would achieve all of the relief that the government would have obtained through litigation, but merely avoids the time and expense of a trial.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR 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." In making that determination, the Court may consider:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other consideration bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment 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). As the Court of Appeals for the District of Columbia Circuit held, the APPA permits the 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, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the 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."[4/] Rather,

> 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.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 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), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). Precedent requires that

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[4] 119 Cong. Rec. 24598 (1973); see also United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed 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. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S.C.C.A.N. 6535, 6538.

> [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.[5/]

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 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.' ").[6/]

Moreover, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and the Act 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. Since "[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bring a

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[5] United States v. Bechtel, 648 F.2d at 666 (internal citations omitted) (emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983).

[6] United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982) (citations omitted), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette, 406 F. Supp. at 716; United States v. Alcan Aluminium, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

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 might have but did not pursue. Id.

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.

FOR PLAINTIFF UNITED STATES OF AMERICA:

Dated: July 23, 1999

Respectfully submitted,

"/s/"

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