



1201 F Street NW, Suite 200
Washington, DC 20004

June 15, 2018

The Honorable James E. Boasberg
United States District Judge
United States District Court
for the District of Columbia
c/o Kathleen S. O'Neill, Chief
Transportation, Energy & Agriculture Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 8000
Washington, DC 20530

Dear Judge Boasberg:

RE: Comments on *United States of America v. Bayer AG and Monsanto Co.*,
[Civil Action No. 1:18-cv-1241, D.D.C.]; Proposed Final Judgment and
Competitive Impact Statement, 83 *Fed. Reg.* 27652 (June 13, 2018)

1. **Statutory Authority for This Filing.** Pursuant to subsections 5(b), (d), and (f) of the Clayton Act (15 U.S.C. 16(b), (d), and (f)), this letter files comments of the National Federation of Independent Business, Inc. (NFIB) on the Proposed Final Judgment (PFJ) in *United States of America v. Bayer AG and Monsanto Co.*, published in the *Federal Register* of June 13, 2018. Section 5(e) of the Act (15 U.S.C. 16(e)) requires the Court, in determining whether entry of the PFJ is in the public interest, to consider, among other things, "the impact of entry of such judgment . . . upon the public generally." The public generally has a compelling interest in a federal judiciary that functions as an independent branch of government, as the U.S. Constitution contemplates, rather than as a mere adjunct to the executive branch. Entry of the PFJ in its current form would be strongly contrary to that compelling interest and would therefore have a strong adverse impact on the public generally. Accordingly, the Court should determine that entry of the PFJ, in its current form, is not in the public interest. With the four adjustments discussed and highlighted in bold typeface for your convenience in paragraphs 3, 4, 5, and 6 below, the PFJ would properly respect the constitutional function of the judiciary and be in the public interest.

2. **Interest of NFIB Filer.** NFIB is an incorporated nonprofit association representing small and independent businesses, with about 300,000 members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and

the fifty States hear the voice of small business as they formulate public policies. NFIB and its members benefit from the free market competition that the antitrust laws help protect; they also benefit, as does the public generally, from a federal judiciary that functions as an independent branch of government in accordance with the Constitution.

3. Need to Determine Existence of Case or Controversy. Section I of the PFJ begins: "This Court has jurisdiction over the subject matter of and each of the parties hereto with respect to this action." Under section 2 of Article III of the Constitution, "[t]he judicial Power" extends to "Cases" and "Controversies" enumerated in that section. Given that the United States, Bayer AG, Monsanto, and cooperating company BASF have settled their dispute concerning the applicability of the antitrust laws, the Court should address specifically the question whether a case or controversy exists. **If the Court determines that no case or controversy exists within the meaning of section 2 of Article III, it should decline to enter any judgment. If the Court determines that a case or controversy exists, the Court should revise the first sentence of Section I of the PFJ to read: "The Court has determined that this matter constitutes a case or controversy for purposes of section 2 of Article III of the Constitution, that the Court has jurisdiction of the subject matter of the case, and that the Court has personal jurisdiction of each of the parties."**

4. Need to Cabin Justice Department "Sole Discretion." The PFJ purports more than thirty times to have the Court vest in the Department of Justice (using the name in which it litigates of "the United States") authority to act at "sole discretion," a formulation that encourages, if not authorizes, arbitrary action. For example, the PFJ provides (emphasis added):

-- "The divestitures shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between BASF and Bayer and Monsanto give Bayer and Monsanto the ability unreasonably to raise BASF's costs, to lower BASF's efficiency, or otherwise to interfere in the ability of BASF to compete effectively." (para. IV.D)

-- "The United States, in its sole discretion, taking into account BASF's assets and business, shall determine whether any of the assets identified should be divested to BASF." (para. IV.F.(2)).

-- "The terms of any such divestiture agreement shall be commercially reasonable and must be acceptable to the United States, in its sole discretion." (para IV.F.2)

-- "Upon receipt of the document, the United States shall notify Bayer and BASF within twenty (20) business days whether, in its sole discretion, it approves of or rejects each party's compliance plan." (para IX.B)

-- "The decision whether or not to consent to a Collaboration shall be within the sole discretion of the United States." (para. XI)

The public generally has a strong interest in discouraging the arbitrary exercise of power by any government agency. The Department of Justice should not attempt to arrogate to itself, through a court judgment achieved by a sue-and-settle strategy, power to act at its "sole discretion." The Court should not lend its coercive power to a Department of Justice acting at its "sole discretion." **To correct the misuse of the phrase "sole discretion" in the PFJ, the Court should redesignate paragraph XVI as paragraph XVII and insert after paragraph XV the following new paragraph XVI:**

XVI. REASONABLENESS ON THE PART OF THE UNITED STATES

The United States when acting under this Final Judgment in its "sole discretion" in any matter, shall have a duty to act reasonably in the circumstances.

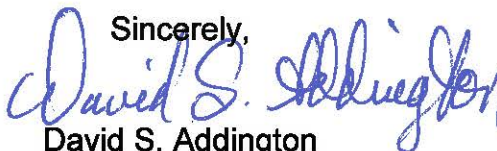
5. Need to Prevent Justice Department from Coercing Corporations to Give Up The Assistance of Counsel. In dealing with their government, and especially in dealing with the Department of Justice, businesses have need of legal counsel. It is not in the interest of the public generally to allow the Department of Justice to use its powers, even (or perhaps especially) in the context of enforcing the antitrust laws, to deny corporations the ability to have counsel assist them in protecting the legal interests of the corporation. Paragraph X of the PFJ provides that "For the purposes of determining or securing compliance with this Final Judgment . . . authorized representatives of the United States Department of Justice . . . shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division . . . be permitted . . . to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters" (emphasis added). Paragraph X lends itself to the misconstruction (or worse, may actually be intended to mean) that Defendants' may not have their respective corporate counsel present when the Department of Justice interviews their corporate officers, employees, or agents. The Court should not permit the Justice Department to use the economic leverage it gained over the defendants by filing an antitrust lawsuit to pressure the Defendants to give up the assistance of corporate counsel. Even if corporate defendants are willing to give up the assistance of counsel to get clear of a lawsuit, the assistance of counsel is of such great importance as a matter of principle to the public generally that the courts should not lend themselves to the Justice Department effort to deprive corporations of the assistance of counsel. **The Court should amend Paragraph X by striking "may have their individual counsel present" and inserting "may have their individual counsel, or relevant Defendant's counsel, or both, present".**

6. Need to Prevent Justice Department from Making Up Its Own Legal Standards of Proof. Paragraph XIV provides in part: "Defendants agree that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of any remedy therefor by a preponderance of the evidence, and they waive any argument that a different standard

of proof should apply.” The Court should not allow the Department of Justice to use the economic leverage it gained over the defendants by filing an antitrust lawsuit to pressure the Defendants to give up the right to make a legal argument to a court; indeed, the effort by the Department of Justice to do so is inappropriate interference in the proper functioning of the court. Who has the burden of proof on an issue, and by what standard, should be determined by the law and not by the Department of Justice through coercing defendants into purported agreements as to the standard of proof and coercing them to waive the right to raise legal arguments in court. **The Court should amend Paragraph XIV by striking “by a preponderance of the evidence, and they waive any argument that a different standard of proof should apply” and inserting “in accordance with applicable law, including the applicable standards regarding the burdens of pleading, going forward with evidence, and persuasion.”**

7. Public Generally Has an Interest Even if Defendants Submit to Pressure. NFIB reiterates that the Court, in making its determination of public interest, must consider not only the interests of the parties to the case and the interest of market competition, but also the interests of the public generally. The public generally has an interest in preserving the rights of the people against a government that would intrude upon those rights, even in cases in which particular defendants may be willing to give up those rights for economic gain. NFIB appreciates this opportunity to present comments to the Court on the Proposed Final Judgment in accordance with the Clayton Act.

Sincerely,



David S. Addington

Senior Vice President and General Counsel

cc: The Honorable Jeff Sessions
Attorney General of the United States
c/o Kathleen S. O'Neill, Chief
Transportation, Energy & Agriculture Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 8000
Washington, DC 20530