UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA 450 Fifth Street, NW Washington, DC 20530, Plaintiff, v. KOCH FOODS INCORPORATED 1300 W. Higgins Road, Suite 100 Park Ridge, IL 60068, Defendant.	Case No. 1:23-cv-15813 Judge John F. Kness

COMPETITIVE IMPACT STATEMENT

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "Tunney Act"), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment as to Defendant Koch Foods Incorporated ("Koch" or "Defendant").

I. NATURE AND PURPOSE OF THE PROCEEDING

On November 9, 2023, the United States filed a civil complaint against Koch. Koch contracts with independent chicken farmers, generally known as "growers,"[1] to breed and care for Koch's chickens until they are ready for slaughter and processing. The Complaint alleges

[1] Most farmers who contract their services to Koch raise "broilers," the chickens that are slaughtered and processed for people to consume. Some farmers raise Koch's breeder hens or pullets (chicks). This Competitive Impact Statement and the Final Judgment use the term "growers" to refer to all chicken farmers raising broilers, breeders, or pullets for Koch.

that, since 2014, Koch contracts require many of its growers to pay Koch an exit penalty if they terminate their contracts with Koch and switch to another processor.[2] Since at least 2018, Koch has sought to enforce this exit penalty provision through threatened or actual litigation against growers who try to switch. Koch's conduct has deterred growers from leaving Koch and switching to its competitors. The Complaint alleges Koch's exit penalty and efforts to enforce the exit penalties are unlawful practices under Section 202(a) of the Packers and Stockyards Act, 7 U.S.C. § 192(a), and Section 1 of the Sherman Act, 15 U.S.C. § 1.

Count One of the Complaint alleges that, by including the exit penalty provision in its contracts and taking steps to enforce it, Koch has violated Section 202(a) of the Packers and Stockyards Act, 7 U.S.C. § 192(a), which prohibits unfair and deceptive practices by "live poultry dealers" such as Koch. Growers are required to accept the exit penalty provision as part of the standard Koch contract and cannot reasonably avoid it. Koch sometimes fails to disclose the exit penalty provision before a grower takes out a loan to build new broiler houses to grow chickens for Koch. The existence and enforcement of the exit penalty provision are practices that unfairly harm growers, and no countervailing benefit exists for these practices.

Count Two of the Complaint alleges that Koch violates Section 202(a) of the Packers and Stockyards Act, 7 U.S.C. § 192(a), by imposing the exit penalty provision because it unfairly burdens growers' rights under 9 C.F.R. § 201.100(h)(2) to terminate their production contracts on 90 days' prior notice to Koch.

Count Three of the Complaint alleges that, by including the exit penalty provision in its production contracts with growers, Koch unreasonably restrains interstate trade and commerce in

[2] Although the termination provisions by their terms applied to all qualifying growers who terminated their contract with Koch, as a matter of practice, Koch enforced the provision only against growers who intended to switch to another processor.

violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Koch's illegal conduct reduces competition in the market for the purchase of growers' services, imposes unreasonable costs on growers who might otherwise switch poultry processors, and deprives growers of the benefits of competition for their services. The exit penalty provision has prevented growers from accepting better compensation from Koch competitors.

Along with the Complaint, the United States filed a proposed Final Judgment and a Stipulation and Order ("Stipulation and Order") to remedy the unfair and anticompetitive effects resulting from the harmful conduct alleged in the Complaint. The Final Judgment is subject to review under the Tunney Act only to the extent that it resolves the Sherman Act claim because the Packers and Stockyards Act is not an "antitrust law[]," as defined in 15 U.S.C. § 12(a). *See* 15 U.S.C. § 16(b) (mandating the Tunney Act's procedures only for "civil proceeding[s] brought by or on behalf of the United States under the *antitrust laws*" (emphasis added)).

Under the proposed Final Judgment, which is explained more fully below, Koch must cease all efforts to collect exit penalties, return all exit penalties, repay all affected growers their "Recoverable Legal Costs" (as defined in the proposed Final Judgment), notify all former or current Koch growers whose production contract contained an exit penalty that the provision is of no further force or effect, and refrain from including an exit penalty provision in any chicken production contracts for the term of the decree.

While the proposed Final Judgment is pending before the Court, Koch must cease all efforts to collect exit penalties and refrain from including an exit penalty provision in any future chicken production contracts. The terms of the Stipulation and Order require Koch to abide by and comply with the provisions of the proposed Final Judgment until it is entered by the Court or

until the time for all appeals of any Court ruling declining entry of the proposed Final Judgment has expired.

The United States and Koch have stipulated that the proposed Final Judgment may be entered after compliance with the Tunney Act. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and punish violations thereof.

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

A. The Defendant and the Growers

Koch is the fifth largest poultry processor in the United States. Like other processors, Koch contracts with growers to raise its broiler chickens for delivery to Koch's processing plants. To operate at a scale sufficient to grow broilers for a major processor like Koch, a poultry farmer typically needs two to four modern broiler houses, with a construction cost of approximately $500,000 per house. The growers thus bear the risks of their investment, including risks of weather damage, such as tornadoes. By outsourcing chicken growing, Koch shifts the substantial cost, capital requirements, and risk to small poultry farmers. Outsourcing chicken growing also allows Koch to avoid the burden and costs associated with employing the growers who care for the chickens.

Koch operates eight poultry processing complexes. Each of Koch's eight complexes has contracts with approximately 100 growers to provide growing services. In total, Koch has more than 800 growers under contract. Most of these growers operate as small, highly leveraged family farms, and bank debt repayment is their largest expense.

The only realistic way for most growers to repay their loans for newly constructed broiler houses is by growing broiler chickens. Once built, broiler houses cannot be relocated, and

farmers can raise chickens only for processors that are both nearby and willing to accept new farmers. Growers know that their farm is just one among many, and none is an irreplaceable supplier of growing services for Koch or any other processor.

In deciding whether to approve the grower's loan, a lender will generally evaluate a grower's projected cash flow based on the standard-form Koch contract. The lender expects that Koch will require the farmer to sign the contract without amendment after the chicken houses are built. The lender generally conditions a loan for new-house construction on a farmer's willingness to execute the Koch standard contract "as is" once the new broiler houses are ready to receive their first flocks. Most loans for broiler houses span 10 or 15 years, while some are longer. As a practical matter, Koch offers contracts to growers on a "take-it-or-leave-it" basis, and a prospective grower typically has no opportunity to negotiate the compensation terms of a Koch contract.

Koch wields enormous leverage over the farmers who grow its broiler chickens. . These indebted growers generally need at least six flocks each year to stay current on their broiler-house loans, yet Koch decides the number of flocks to allot to each farmer. If Koch elected not to renew a grower's contract, or merely reduced the number of flocks placed per year, many growers would be unable to make their loan repayments. Koch also controls other factors that can significantly affect the compensation of growers, such as the number and quality of chicks provided, the type of feed, the timing of when flocks are collected, the use of antibiotics, and various payment adjustments.

B. The Anticompetitive Effects of the Koch Exit Penalty Provision

Count Three of the Complaint, which charges the Sherman Act violation, alleges that the Koch exit penalty and Koch's efforts to enforce it through threatened or filed litigation against

growers result in anticompetitive effects in the market for the purchase of farmers' growing services.

Processors typically own the chicks they place with growers under production contracts, and pay for the chickens' transportation, feed, veterinary care, and collection. The cost and risk of transporting feed and chickens limit the area in which processors can contract with growers. The geographic radius within which a processor can economically contract with farmers for chicken growing services constitutes its "draw area."

Although there may be some processor-specific requirements, top-quality chicken housing that satisfies one processor's requirements can be acceptable to other processors in the area. Growers with top-quality housing may be able to improve their compensation by switching from Koch to another processor, depending on the competitive conditions in the relevant market. Another processor competes with a Koch complex for chicken growing services if the draw area of one or more of its complexes overlaps significantly with the draw area of that Koch complex.

For each Koch complex that competes with one or more rival processors, the relevant geographic market is an area around the Koch complex and its set of competing processors. Koch contracts with a significant share of the growers working for processors within the geographic market of each Koch complex.

Nearly all growers contracting with Koch are also within the draw area of at least one competitor's complex and therefore can benefit from competition for their services. Over 80 percent of growers working for Koch are located within the draw areas of the complexes of at least two of Koch's competitors. More than half of the growers who provide their services to Koch are located within the draw areas of the complexes of three or more of Koch's competitors.

Each Koch complex competes with one or more rival processors to sign up growers within their overlapping draw areas. But the Koch exit penalty provision artificially restrains growers from switching from Koch to a competitor. Because Koch contracts with a significant share of the growers under contract with processors in each complex's geographic market, these switching restraints significantly lessen competition in those markets.

Koch's highly visible efforts to collect its exit penalties have deterred growers who might otherwise avail themselves of competition between Koch and other processors to obtain better compensation for themselves and their families. Koch's exit penalty unreasonably harms competition for growers' services.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in Count Three. Under the proposed judgment, Koch must eliminate the exit penalty provision from Koch's current contracts and omit it from future contracts. Further, Koch must repay all exit penalties that it has collected and to reimburse all Recoverable Legal Costs that growers have incurred as a result of Koch's threatened or filed litigation. The proposed judgment requires Koch to refrain from collecting any exit penalty, taking any steps to collect any exit penalty, or including an exit penalty in its chicken production contracts. It also prohibits Koch from engaging in any retaliation, intimidation, or harassment of any grower who was involved in any exit penalty dispute or who cooperated with the United States Department of Justice or the United States Department of Agriculture in their investigations of Koch's exit penalties.

Sections IV and V of the proposed Final Judgment require Koch to:

a. Inform all growers with contracts that contain an exit penalty provision that the provision is unenforceable.

b. Repay exit penalties collected from growers.

c. Notify all growers whose production agreements contain or contained an exit penalty provision that they may make a claim for repayment of any exit penalties not already repaid by Koch and for reimbursement of any Recoverable Legal Costs by submitting to Koch a request for payment. The form of notices to current and former growers are attached to the proposed Final Judgment as Appendix 1 and Appendix 2, respectively.

d. Repay all growers' undisputed requests for payment within 120 days of entry of the proposed Final Judgment.

e. Commence a dispute resolution process set forth in the proposed Final Judgment within 14 days of receipt of any request for payment that Koch disputes. Under this process, the Antitrust Division will select a referee, whose decision will be final, binding on Koch and the grower or former grower, and enforceable by the Antitrust Division or the grower through this Court's contempt power under the proposed Final Judgment.

f. Refrain from accepting the payment of any exit penalty, taking any steps to collect any exit penalty, or including an exit penalty provision in any production agreement with a grower.

g. Refrain from engaging in any retaliation, intimidation, or harassment of any grower who was involved in any exit penalty dispute or who cooperated with the United

States Department of Justice or the United States Department of Agriculture in their investigations related to the subject matter of this action.

h. Meet certain reporting obligations to the United States Department of Justice and the United States Department of Agriculture, including an annual certification that Koch is in compliance with the proposed Final Judgment.

For any loans Koch makes to growers, the acceleration of such a loan upon the termination of a grower's production agreement constitutes a prohibited exit penalty under the proposed Final Judgment unless the loan terms conform to specific criteria set forth in the definition of "Loan Agreement" (Paragraph II.G). In particular, a loan agreement permitted under the proposed Final Judgment must:

- Have an original term of five years or less and not have been extended prior to acceleration of the loan by a Termination;
- Provide that the loan will be forgiven or repaid pro rata annually or more frequently during the original term, with only the outstanding balance of the original loan accelerated and payable upon termination;
- Not impose additional charges for prepayment or termination, such as a prepayment penalty;
- Not provide for the payment of interest on the loan;
- Be for the purpose of facilitating the construction or improvement of one or more poultry houses and/or ancillary facilities, including the purchase of related real estate and/or the purchase and installation of related equipment, and where the value of the poultry houses and/or ancillary facilities, including any related real estate and/or related equipment, is projected, at the time of the agreement, to meet or exceed the amount of any payment due as a result of the grower initiating a termination of a production agreement with Koch; and
- Not violate the antitrust laws or the Packers and Stockyards Act.

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the proposed Final Judgment as effective as possible. In order to determine and secure compliance with the proposed Final Judgment and related orders such as the Stipulation and Order, and to determine whether the proposed Final Judgment should be modified or vacated, Paragraph VI.A of the proposed Final Judgment provides that, upon written request and with reasonable notice, from time to time and subject to legally recognized privileges, Koch must permit authorized representatives or agents of the Packers and Stockyards Division of the USDA (the "PSD") or the Antitrust Division of the United States Department of Justice:

1. to have access during Koch's office hours to inspect and copy, or at the option of the requesting agency, to require Koch to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Koch relating to compliance with any requirements of the proposed Final Judgment; and

2. to interview, either informally or on the record, Koch's officers, employees, or agents relating to compliance with any requirements of the proposed Final Judgment. Each interviewee may, at their option and without coercion, have any counsel of their choosing present. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Koch.

Paragraph VI.B of the proposed Final Judgment provides that upon the written request of an authorized representative of the PSD or the Antitrust Division, Koch must submit written reports or respond to written interrogatories, under oath if requested, relating to any matters contained in the proposed Final Judgment.

Paragraph IX.A provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including the right to seek an order of contempt from the Court. Koch agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States relating to an alleged violation of the proposed Final Judgment, the United States may establish a violation of the proposed Final Judgment and the appropriateness of a remedy by a preponderance of the evidence, and Koch waives any argument that a different standard of proof should apply.

As a further reservation of rights, Section XI of the proposed Final Judgment provides that the proposed Final Judgment terminates only the claims expressly stated in the Complaint against Koch and does not in any way affect any other charges or claims that may be filed by the United States. For the avoidance of doubt, Section XI further provides that the Antitrust Division and the PSD retain all rights to investigate and prosecute, including under the antitrust laws or the Packers and Stockyards Act, any conduct, practice or device that: (1) does not arise from an exit penalty or exit penalty provision, or (2) is an aspect of any ranked performance pay compensation (sometimes described as "tournament") system.

Paragraph IX.B of the proposed Final Judgment provides that the proposed Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws, to restore the competition the United States alleges was harmed by the challenged conduct, and to end an unfair practice or device in the market for the purchase of growers' services caused by Koch's inclusion of exit penalty provisions in its production agreements. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of the proposed Final Judgment that, as interpreted by the Court in light of these procompetitive and fairness principles and applying ordinary tools of interpretation, is stated specifically and in reasonable

detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of the proposed Final Judgment should not be construed against either party as the drafter.

Paragraph IX.C provides that, in an enforcement proceeding in which the Court finds that Koch has violated the proposed Final Judgment, the United States may apply to the Court for an extension of the proposed Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce the proposed Final Judgment against Koch, whether litigated or resolved before litigation, Koch agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that effort to investigate the potential violation and enforce the proposed Final Judgment.

Paragraph IX.D provides that, for a period of four years following the expiration of the proposed Final Judgment, if the United States has evidence that Koch violated the proposed Final Judgment before it expired, the United States may file an action against Koch in this Court requesting that the Court order: (1) Defendant to comply with the terms of the proposed Final Judgment for an additional term of at least four years following the filing of the enforcement action; (2) all appropriate contempt remedies; (3) additional relief needed to ensure Koch complies with the terms of the proposed Final Judgment; and (4) fees or expenses as called for by Section IX of the proposed Final Judgment.

Finally, Section X of the proposed Final Judgment provides that, unless this Court grants an extension, the proposed Final Judgment will expire seven years from the date of its entry, except that after three years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Koch that continuation of the Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

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 neither impairs nor assists 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 Koch.

Section 308 of the Packers and Stockyards Act, 7 U.S.C. § 209, provides that any person subject to the Act who violates any provisions of the Act (or of any order of the Secretary of Agriculture relating to the Act) related to the purchase or handling of poultry or any poultry growing arrangement (among other violations) may be liable to persons injured as a result of those violations for the full amount of damages sustained as a consequence, and such injured persons may bring suit in federal court or may complain to the Secretary of Agriculture.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Koch have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Tunney Act, provided that the United States has not withdrawn its consent. The Tunney Act conditions entry of the Final Judgment's resolution of the Sherman Act claim upon the Court's determination that the proposed Final Judgment with respect to the Sherman Act claim is in the public interest.

The Tunney Act provides a period of at least 60 days preceding the effective date of a proposed final judgment that resolves a Sherman Act claim during which time any person may submit to the United States written comments regarding the proposed final judgment. Any

person who wishes to comment on the proposed final judgment should do so within 60 days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or within 60 days of the first 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 before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the *Federal Register* unless the Court agrees that the United States instead may publish them on the United States Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to:

Daniel S. Guarnera,
Chief, Civil Conduct Task Force
Antitrust Division
United States Department of Justice
450 Fifth St. NW, Suite 8600
Washington, DC 20530
ATRJudgmentCompliance@usdoj.gov

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

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Koch. The United States could have commenced contested litigation and brought the case to trial, seeking relief including a declaration that the exit penalty provisions in the growers' production agreements with Koch were neither enforceable nor effective, an

injunction requiring Koch to give appropriate notices to current and former growers, and monetary relief to repay growers from whom Koch has collected exit penalties and to reimburse growers for Recoverable Legal Costs as a consequence of Koch's collection efforts. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition in the market for the purchase of poultry growing services. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation against Koch but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR THE PROPOSED FINAL JUDGMENT

Under the Clayton Act and Tunney Act, proposed final judgments, or "consent decrees," that resolve antitrust claims brought by the United States are subject to a 60-day comment period, after which the Court must determine whether entry of a proposed final judgment with respect to those antitrust claims "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); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a proposed Final 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 mechanisms to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the Tunney Act, a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's Complaint, whether a proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by a proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should also bear in mind the flexibility of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement

is within the reaches of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." (internal citations omitted)); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (quoting *W. Elec. Co.*, 900 F.2d at 309).

Moreover, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the antitrust violations that the United States has alleged in its Complaint, and the

Tunney 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; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (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 ("[T]he '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.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added 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*, 38 F. Supp. 3d at 76 (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). This language explicitly wrote into the statute what Congress intended when it first 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). "A court can make its public interest determination based on the competitive impact statement and

response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (*citing Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. DETERMINATIVE DOCUMENTS

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

Dated: November 17, 2023

Respectfully submitted,

FOR PLAINTIFF

UNITED STATES OF AMERICA

/s/ Jack G. Lerner

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