Comments of the Attorneys General of California, Iowa, Massachusetts, Mississippi, and Oregon on the Proposed Final Judgment in *United States v. Bayer AG, Monsanto Company, and BASF SE*, Case 1:18-cv-01241 (D.C. Cir. May 29, 2018).

The Attorneys General of California, Iowa, Massachusetts, Mississippi, and Oregon ("the Attorneys General") submit these comments on the Proposed Final Judgment ("PFJ" or "consent decree") in *United States v. Bayer AG, Monsanto Company, and BASF SE* under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (Tunney Act). The Attorneys General are the chief law officers for their States and are charged with enforcing state and federal antitrust laws. Agriculture is tremendously important to the economies of these states.[1]

---

[1] **California.** California is the largest agricultural producer and exporter in the United States. See California Department of Food & Agriculture, *California Agricultural Statistics Review 2016-2017* at 7 (2018), https://www.cdfa.ca.gov/Statistics/PDFs/2016-17AgReport.pdf. The State's 76,700 farms and ranches generated just over $46 billion in revenue in 2016 and its farm receipts represent 13 percent of the United States' total. *Id.* at 2. The United States Department of Justice ("USDOJ") Complaint alleged that the proposed acquisition would substantially lessen competition in, among other products, seeds for carrots, cucumbers, onions, tomatoes, and watermelons. Complaint at ¶ 14, *United States v. Bayer AG & Monsanto Co.*, Case 1:18-cv-01241 (D.C. Cir. May 29, 2018). California is the nation's leading producer of carrots, onions, tomatoes, and the second largest producer of fresh market cucumbers and watermelons. *Id.* at 10. As a crucial part of the nation's food supply, and the home to innovative related industries designed to support farmers involving seed, chemical, digital, and environmental research affected by the proposed merger between Bayer and Monsanto, California has substantial concerns that any failure of the divestiture assets would harm competition in agricultural markets.

Iowa. The State of Iowa is a national leader in agricultural production. Iowa has over 30 million acres of farmland with 85% of available land in Iowa dedicated to agriculture. See USDA, National Agricultural Statistics Service, Upper Midwest Regional Office, *2017 Iowa Agriculture Statistics* at 82 (Oct. 2017) (30.6 million of Iowa's 35.7 million acres are dedicated to farming) https://www.nass.usda.gov/Statistics_by_State/Iowa/Publications/Annual_Statistical_Bulletin/2017_Iowa_Annual_Bulletin.pdf. Iowa's 88,637 farms generate over $30.8 billion in revenue, with $17 billion coming from crop production. *Id.* The Complaint alleged that the proposed acquisition would substantially lessen competition for genetically modified soybean, canola, corn, and cotton seeds. Complaint at ¶ 14, *United States v. Bayer AG & Monsanto Co.*, Case 1:18-cv-01241 (D.C. Cir. May 29, 2018). Iowa ranks first in the country for harvested acreage of principal crops, which includes corn, soybeans, wheat, etc., and is first in the nation in corn production and second in soybean production. *2017 Iowa Agricultural Statistics* at 12. The State of Iowa joins this comment to raise concerns that the proposed consent decree fails to adequately protect agricultural markets, which play a central role in the state's economy.

Massachusetts. With 7,755 farms producing on over 520,000 acres, agricultural production in Massachusetts has an annual market value of over $492 million. These farms supply nearly 28,000 jobs and Massachusetts is one of a few states in the country to show an increase in both farms and farmland, despite a national decline in both. Agricultural processing provides an additional $13 billion to the total agricultural value and an additional 60,000 jobs in Massachusetts. See Massachusetts Department of Agricultural Resources, *2015/2016 Annual Report* at 2 (2018),

Under the Tunney Act, the Court shall consider the impact of the proposed final judgment and the impact of entry of the proposed final judgment on "competition in the relevant market or markets, upon the public generally . . . ." 15 U.S.C. Section 16(e)(1)(B). The Attorneys General respectfully request that when making its public interest determination, the Court consider: (1) the recent rapid and dramatic collapse in the number of participants in the relevant crucial markets; (2) the outcome of the merger between Monsanto and Delta Pine and Land ("Delta Pine") in 2008, in which Bayer purchased most of the divestiture assets; (3) the adequacy of BASF as the buyer of the divestiture assets; (4) and the potential harm to innovation.

The proposed consent decree acknowledges uncertainties inherent in these divestitures. For example, where BASF must acquire licenses, permits, or registrations, the PFJ requires Bayer "make best efforts to assist BASF" in acquiring them. PFJ at 30, *United States v. Bayer AG, Monsanto Co., & BASF SE* Case 1:18-cv-01241 (D.C. Cir. May 29, 2018). With such uncertainty in a deal with the potential to cause so much harm, monitoring takes on greater importance. We urge USDOJ and the Court to (1) require the appointment of a monitoring trustee (instead of only at the "discretion" of USDOJ (PFJ at 33)); (2) affirmatively retain jurisdiction throughout the ten-year term of the Final Judgment; (3) order a retrospective study of

---

https://www.mass.gov/files/documents/2018/02/12/2015%202016%20Annual%20Report%20JW%20JL%20edits%201%2024.pdf. Massachusetts is also home to innovative industries that will be affected by the merger.

Mississippi. Agriculture is Mississippi's chief industry, employing approximately 29% of the state's workforce, generating 7.6 billion dollars a year, and involving every county in the state. There are approximately 36,200 farms in Mississippi, covering 10.7 million acres. MS Dept. of Agric. & Com., www.mdac.ms.gov/agency-info/mississippi-agriculture-snapshot (last updated Dec. 2017). The Complaint alleged that the proposed acquisition would substantially lessen competition for soybean, corn, and cotton seeds, which are among Mississippi's top five crops. Complaint at ¶ 14, *United States v. Bayer AG & Monsanto Co.*, Case 1:18-cv-01241 (D.C. Cir. May 29, 2018); *id.* Horticulture crops are also a significant portion of Mississippi agriculture, including vegetables and melons, and the Complaint alleged that the proposed acquisition would substantially lessen competition in these as well. *Id.* The State of Mississippi shares concerns that the proposed consent decree, as currently filed, fails to adequately protect the agricultural markets, which play a central role in the state's economy, or to adequately protect Mississippi consumers.

Oregon. Oregon's 35,400 farms and ranches grow 225 different crops on 16.3 million acres, resulting in over 300,000 jobs. See Oregon State University Extension Service, *Oregon Agriculture, Food and Fiber: An Economic Analysis* at 6 (Dec. 2015), https://www.oregon.gov/ODA/shared/Documents/Publications/Administration/OregonEconomicReport.pdf. In 2014, Oregon's agricultural commodities had sales in excess of $5 billion. *Id.* Food processing generated an additional $15.7 billion in sales. *Id.* at 19.

the effects of the merger on competition two years after transfer of the divestiture assets has begun; and (4) remove the clause (PFJ at 42) allowing USDOJ and Bayer to discontinue the Final Judgment after only six years, instead of the standard ten years. Discontinuation would allow Bayer and Monsanto to reacquire divestiture assets and resume their aggressive acquisition strategies without notifications to federal enforcers four years early (PFJ at 39-41). These extra measures are warranted because the consequences of even partial failure of any of the divesture assets would be so grave.

I. Separately, Bayer and Monsanto each have overwhelming power in highly concentrated markets.

"Most of the relevant markets are already highly concentrated, and in each market, the merger would significantly increase concentration." Complaint at ¶ 19, *United States v. Bayer AG & Monsanto Co.*, Case 1:18-cv-01241 (D.C. Cir. May 29, 2018). Last year, two colossal mergers in the concentrated agricultural chemical space were completed: (1) ChemChina's $43 billion purchase of Syngenta (the largest Chinese overseas acquisition ever) in June 2017; and (2) Dow and DuPont's $130 billion merger of equals in August, 2017. This third mega-deal, Bayer's $66 billion purchase of Monsanto, now under consideration by the Court, follows close behind. The "Big Six" have become the "Big Four" in a flash. *See id.* at ¶ 21 (genetically modified seeds and traits controlled by "Big Four": Monsanto, Bayer, DowDuPont, and Syngenta); *Consolidation and Competition in the U.S. Seed and Agrochemical Industry: Hearing Before the S. Comm. on Judiciary*, 114th Cong. 2 (2016) (statement of Sen. Chuck Grassley, Chairman, S. Comm. on Judiciary) ("To me, it looks like this consolidation wave has become a tsunami.").

"The growth of the large seed companies over the past decade has been a result of agrochemical companies buying up dozens of independent biotechnology and seed companies and merging them with one another, resulting in an industry comprised of only six large multinational firms . . . ." Blair Fannin, *Mergers Could Result in Cotton Seed Price Surge, Southeast Farm Press* (Sept. 26, 2016) (citing Agricultural and Food Policy Center, Texas A&M University, *Effects of Proposed Mergers and Acquisitions Among Biotechnology Firms on Seed Prices*, at 10 (Sept. 2016)). These six multinational firms all have cross-licensing agreements with one another, with all having licenses for transgenic traits with at least Monsanto and two of their fellow members of the Big Six, which is just one example of how closely these companies are intertwined. Agricultural and Food Policy Center, Texas A&M University, *Effects of Proposed Mergers and Acquisitions Among Biotechnology Firms on Seed Prices* at 10 (Sept. 2016). The consolidation of two more giants, Bayer and Monsanto, would make it easier for the companies to reach agreements or understandings that may violate United States antitrust law. But their relationships are not enough — the firms have been aggressive in their acquisition strategies.

> At the same time Monsanto was applying for approval of *Bacillus thuringiensis* (*Bt*) corn and Roundup Ready soybeans, it was also purchasing nearly forty seed and biotech companies, including industry giants Asgrow Agronomics, DeKalb Genetics, and Delta and Pine Lands (DPL). Dow Chemical began purchasing

> seed companies, including the seed biotech company Mycogen, before reforming itself as Dow Agrosciences. DuPont responded by acquiring Pioneer Hi-Bred International, the world's largest seed company at the time. Hoechst [former cartel partner of Bayer and BASF] and Rhone Poulenc merged to form Aventis. After the StarLink corn fiasco, Aventis merged with Sanofi-Synthelabo, selling off its agricultural unit, Aventis CropScience, to Bayer. Chemical conglomerates AstraZeneca and Novartis merged and spun off their agricultural division as Syngenta. Cumulatively, this wave of mergers transformed what had been a sector composed primarily of small, family-owned firms into a $100 billion global industry that integrated seeds, fertilizers and pesticides. Thus, the current crop of mergers must be evaluated against the backdrop of an already concentrated industry.

Rebecca Bratspies, *Owning All the Seeds: Consolidation and Control in Agbiotech*, 47 ENVTL. L. 583, 589–90 (Summer 2017) (parenthetical added) (internal references omitted).

The breakneck speed of consolidation in the agricultural chemicals sector has prevented regulators from understanding the effects of one mega-merger on agriculture before the next mega-merger is completed. The effects of Dow/DuPont and ChemChina/Syngenta on competition are unknown. It is too soon to determine whether the markets for agricultural chemicals are still competitive following the prior mergers and, whether the mitigation required for approval of those deals was effective. The agricultural chemical market is so concentrated that any harm to competition caused by this next merger will help hasten the end of the family farm and affect every consumer's food choices and budget. This would have a profound impact on every state in the nation. A retrospective study would enable enforcement agencies and the public to understand the effect of remedies in the PFJ.

II. The strategy behind these divestitures is identical to the strategy employed to remedy Monsanto's purchase of the largest U.S. producer of cottonseed, when most of the duplicated assets were sold to Bayer.

In November, 2008, Monsanto completed its purchase of Delta Pine for $1.5 billion. Final Judgment, *United States v. Monsanto Co. & Delta & Pine Land Co.*, No. 1:07-cv-00992 (Nov. 6, 2008). At the time of the Complaint, Monsanto and Delta Pine controlled over 90 percent of the cottonseed enhanced with biotechnology traits ("traited cottonseed") in the mid-south and southeast United States. Complaint at ¶ 39, *U.S. v. Monsanto Co. & Delta & Pine Land Co.* (D.C. Cir. May 31, 2007).

Monsanto had purchased the Stoneville Pedigreed Seed Company in 2005 (the second-largest traited cottonseed company in the mid-south and southeast regions of the United States), and, in order to complete its purchase of Delta Pine, sold those assets to Bayer. Competitive Impact Statement at 9, *United States v. Monsanto Co. & Delta & Pine Land Co.* (D.C. Cir. May 31, 2007). Now, with this merger, Bayer will move those Stoneville assets to BASF. The Monsanto/Delta Pine merger remedy created a new, viable cotton competitor in Bayer through the Stoneville acquisition. However, Bayer's presence here, ready to acquire Monsanto to

upgrade its cotton offerings, suggests that the market is even more consolidated than it was in 2008. Because the agrochemical industry of 2018 is so much more concentrated than the industry in 2008, the promise that BASF can take over Bayer's role in the market should be subject to even greater scrutiny.

Even in 2008, Bayer was a stronger candidate as takeover buyer in Monsanto/Delta Pine than BASF is in the present merger between Bayer and Monsanto. Bayer was considered a good buyer for the Stoneville assets because it had already successfully entered the southwest cottonseed market and established itself as a solid competitor. Plaintiff United States' Response to Public Comments at 11, *United States v. Monsanto Co. & Delta & Pine Land Co.* (Mar. 5, 2008). Here, BASF has no experience manufacturing seeds, but is expected to replace Bayer in the market very quickly.

In *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 21 (2007), the court determined that the "government presented a reasonable basis for concluding that the proposed settlements will replace much of the competition lost to the mergers, if perhaps not all of it." Here, it is much less clear that BASF will replace much of the competition lost in this highly concentrated market. Monsanto/Delta Pine provides a recent experiment – and one whose results suggest caution. That Monsanto and Bayer, companies that already dominate the cotton market, are coming back for even more consolidation is troubling. That the merger here covers many more markets and is taking place when the agricultural chemical sector is much more consolidated provides reason to carefully examine whether BASF really can be the new Bayer.

III. The divestiture to BASF fails to restore competition.

BASF does not currently make seeds and has never run a seeds business. Bayer and Monsanto dominate certain seed markets, like soybeans in Iowa and carrots in California. A BASF failure to successfully operate a leading, dominant seed business would result in a Bayer/Monsanto monopoly, instead of the hoped-for Bayer/Monsanto and BASF duopoly.

The proposed final judgment trusts that BASF can immediately step into the shoes of Bayer in the market. To facilitate the merger, BASF will take over several highly sophisticated product lines, including the manufacture of vegetable, cotton, and soybean seeds, businesses the company has never participated in, and, for vegetable seeds, had no interest in acquiring until late in the process of negotiations. The seed markets are already so concentrated that there is only *one* possible buyer of the divestiture assets. According to USDOJ, ". . . if BASF is unable to acquire the assets, simply divesting the package to another purchaser would not preserve competition." Competitive Impact Statement at 31-32, *United States v. Bayer AG, Monsanto Co., & BASF SE* (D.C. Cir. May 29, 2018). If this remedy does not work, if BASF cannot become the new Bayer very quickly, we are left with a world in which three giants control the food supply.[2] Even if BASF is successful, control over agriculture will be split between only

[2] Control of agricultural chemicals is control of the food supply because American farms rely on genetically modified seed. The former Big Six create and manufacture genetically modified seed that is herbicide and/or insect tolerant. They also create and manufacture the herbicides and seed coatings that

four colossal multinationals based in the United States (DowDuPont), China (ChemChina), and Germany (Bayer/Monsanto, BASF).[3]

In order to accept this deal, USDOJ required the largest divestiture ever, comprising businesses worth $9 billion. Indeed, the other two very recent megadeals involving direct competitors of Bayer and Monsanto required much more narrow divestitures to remedy expected harm to competition. For instance, in order to complete the ChemChina/Syngenta merger, the FTC required Syngenta to spin off the herbicide paraquat, the insecticide abamectin, and the fungicide chlorothalonil. Final Order, *In the Matter of China Nat'l Chem. Corp., ADAMA, & Makhteshim Agan*, FTC Matter 1610093 (June 16, 2017). These spin-off product lines were initially acquired by Syngenta in its 2014 takeover of ADAMA. Moreover, Dow/Dupont, similarly required less extensive divestitures: Finesse herbicide and Rynaxypyr insecticide products. Final Judgment, *United States v. Dow Chem. Co. & E.I. Du Pont de Nemours & Co.*, Case 1:17-cv-01176 (Oct. 19, 2017). It is far too soon to make reasonable determinations about the success of the comparatively narrow divestitures in ChemChina/Syngenta and Dow/DuPont. Given this context, permitting a merger involving a massive divestiture to the third competitor in an already highly concentrated market for critical agricultural products without applying the utmost caution would be reckless.

The lingering agreements for research projects in the pipeline also indicate that Bayer was competing hard with Monsanto. And there are products for which, in order to maintain competition, Bayer has to promise to use "best efforts" to help BASF get the necessary regulatory approvals for licenses, registrations, and permits required to use the divested assets – complicated approvals in multiple jurisdictions with no guarantees. PFJ at 30. Because BASF will have to rely on Bayer to make these assets work, the company will have a disincentive to anger Bayer.

---

those seeds are genetically modified to tolerate. And they are working to control the digital systems that will recommend their products to farmers using soil, climate, and historical data.

These products are widely used: In 2014, 94 percent of soybean acres, 91 percent of cotton acres, and 89 percent of corn acres were planted with herbicide tolerant seed.

In 2018, insect-resistant traits were present in 85 percent of cotton acreage and 82 percent of corn acreage. Percentage of acres planted with "stacked" seed (seeds containing both herbicide resistance and insect resistance), was 82% of cotton and 80% of corn. USDA Economic Research Service, *Recent Trends in GE Adoption* (updated July 12, 2017) https://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us/recent-trends-in-ge-adoption.aspx.

[3] Last year, the Food Security is National Security Act of 2017 was introduced in the Senate. It would include the Secretary of Agriculture and the Secretary of Health and Human Services on the Committee on Foreign Investment in the United States, and would require the Committee to examine the effects of the transaction on "the security of the food and agriculture systems of the United States, including any effects on the availability of, access to, or safety and quality of food . . . ." S. 616, 115th Cong. (2017). Bayer's $66 billion purchase of Monsanto would have undergone this analysis if the law was passed.

For example, the PFJ allows for five supply and tolling agreements, and an additional catch-all supply and tolling agreement so that BASF can make the divested assets work.[4] BASF will still need Bayer so much that five categories of supply and tolling agreements may be insufficient: the PFJ leaves open the possibility that Bayer and BASF "shall enter into any other supply, reverse-supply, tolling, or reverse-tolling agreements reasonably necessary to allow BASF to operate any Divestiture Assets or to facilitate the transfer of Bayer assets to BASF." PFJ at 25-26. The relationship will not be one sided – Bayer will need BASF to formulate, fill, and package its products manufactured at the Regina Canada formulation facility, which are part of the Glufosinate Ammonium Divestiture assets. PFJ at 25. While the commitment to making these assets work is apparent in this extensive agreement, the extensive nature of the ongoing, necessary cooperation indicate that the industry already too consolidated. The necessity of an ongoing, close relationship in order to preserve competition is troubling.

The combination of Bayer and Monsanto could damage competition so much that the PFJ requires even more cooperation between Bayer and BASF. For two years, Bayer agrees not to solicit or hire any individual hired by BASF (which may raise other concerns about employee poaching). PFJ at 20. Bayer could enter into transition services agreements for information technology support. PFJ at 26. Bayer might be distributing BASF's products containing glufosinate ammonium, and divested seed treatments. PFJ at 17. Like the supply and tolling agreements, the PFJ is flexible enough to anticipate that BASF might need Bayer to "enter into other transition services or reverse transition services agreements to provide any other transition services reasonably necessary." PFJ at 27.

The ability of BASF to step into the market as a successful competitor is a critically important consideration in evaluating the proposed consent decree. And the decree contains many future events, over which the companies do not have full control, such as the transfer of licenses, that must happen for a full transfer of assets. If BASF fails in its attempt to assume Bayer's role in the market, certain government approvals are not granted, or key employees do not move with the assets, farmers will be irreparably harmed.

Finally, the long, sometimes cooperative relationship between Bayer and BASF should be noted; they are the only surviving members of the I.G. Farben cartel. JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 159-63 (1978) (Mr. Borkin was Chief of the Antitrust Division's Patent and Cartel Section at USDOJ from 1938-1946.); *see also* DIARMUID JEFFREYS, HELL'S CARTEL: IG FARBEN AND THE MAKING OF HITLER'S WAR MACHINE (2008).

---

[4] BASF can enter into agreements with Bayer regarding (1) Bayer seed treatments used by Bayer in the Broad Acre Seeds and Traits Business (PFJ at 22); (2) Bayer's formulated isoxaflutole and the isoxaflutole active ingredient (PFJ at 23); (3) Bayer's Glufosinate Ammonium (*Id.*); (4) Bayer's active ingredients used in the seed treatments divested as part of the Clothianidin Seed Treatment Business (PFJ at 24); and (5) Bayer's fluopyram active ingredient (PFJ at 25).

IV. This merger threatens innovation.

Bayer and Monsanto each contribute a significant amount of resources to research and development, currently a combined $2.9 billion (or $2.5 billion Euros). Investor Conference Call Presentation, at 18, https://www.advancingtogether.com/en/home/ (Sept. 14, 2016). Following the merger, the new company could cut competitive research spending because a major rival to create the next advance no longer exists. Indeed, the companies list synergies in research and development, crucial work such as "trait research," as part of the expected savings. *Id.* While a boon for the combined company, the loss of investment in competing research and development will harm innovation in agriculture.

The loss of competition will also affect smaller companies. For example, Bayer was incentivized to license its germplasm to smaller companies because of its competition with Monsanto (Monsanto does not license its germplasm). With this incentive gone, smaller companies working to help farmers increase yield may be forced to shut down, and only the few largest companies will control advancements in agriculture. The consent decree does not address smaller companies' access to Bayer/Monsanto germplasm. This concern was also raised, but not addressed, in the public comments to Monsanto's purchase of cotton company Delta Pine in 2008.

A small number of players pursuing sophisticated research has been found to harm competition in the past. In 1969, USDOJ sued the four largest American automakers (the "Big Four": General Motors, Chrysler, American Motors Corp., and Ford) for violating section 1 of the Sherman Act. Harry Wise, *Use of Antitrust Law as Environment Remedy for Suppression of Pollution Control Technology – In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 15 B.C.L. REV. 813 (1974). In that case, the automakers responded to concerns about auto pollution by creating a committee to facilitate joint research, but the complaint alleged that the committee's actual purpose was to stall innovation. *Id.* The case was resolved by consent decree and followed by other litigation. *Id.* at 814. Ultimately, the small number of companies facilitated the joint effort to lessen competition in the field of pollution control. *Id.* at 820. In the present case, the small number of dominant agricultural companies will have the same ability to coordinate strategy.

V. Conclusion

Arriving so quickly after the Dow/DuPont and ChemChina/Syngenta mergers, the Bayer/Monsanto merger will further contract a highly consolidated market. The proposed final judgment risks creating a monopoly in the markets for certain vegetable seeds, as well as cotton and soybean seeds. In making its public interest determination, the Court should look to the recent rapid and dramatic consolidation of competitors; the experiment provided by Monsanto/Delta Pine; and the sufficiency of BASF as a buyer. USDOJ and the Court should prevent Bayer and Monsanto from reacquiring the divestiture assets for the full ten years. USDOJ and the Court should also require Bayer and Monsanto to notify federal enforcers about new acquisitions for the full ten years. Moreover, a deal with this much complexity and uncertainty should require a monitoring trustee and the Court should affirmatively retain jurisdiction for the full period of the Final Judgment. A retrospective study after completion of

the divestiture of the effects on competition of the largest negotiated merger divestiture ever is needed to protect the public.

Respectfully Submitted,

XAVIER BECERRA
California Attorney General

THOMAS J. MILLER
Iowa Attorney General

MAURA HEALEY
Massachusetts Attorney General

JIM HOOD
Mississippi Attorney General

ELLEN F. ROSENBLUM
Oregon Attorney General