UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. ZEN-NOH GRAIN CORP., and BUNGE NORTH AMERICA, INC., *Defendants*.	Civil Action No.:1:21-cv-01482 (RJL)

RESPONSE OF PLAINTIFF UNITED STATES TO
PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), 15 U.S.C. § 16, the United States hereby responds to the two public comments received regarding the proposed Final Judgment in this case. After careful consideration of the submitted comments, the United States continues to believe that the divestiture required by the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is therefore in the public interest. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this response have been published as required by 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On April 21, 2020, Zen-Noh Grain Corp. ("ZGC") agreed to acquire 35 operating and 13 idled U.S. grain elevators from Bunge North America, Inc. ("Bunge") ("collectively,

"Defendants") for approximately $300 million ("the Transaction"). The United States filed a civil antitrust Complaint on June 1, 2021, seeking to enjoin the proposed Transaction. The Complaint alleges that the likely effect of the Transaction would be to substantially lessen competition for purchases of corn and soybeans in nine geographic areas of the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. *See* Dkt. No.1.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and an Asset Preservation and Hold Separate Stipulation and Order ("Stipulation and Order") in which the United States and Defendants consent to entry of the proposed Final Judgment after compliance with the requirements of the APPA. *See* Dkt. Nos. 2–2, 2–1. The proposed Final Judgment requires the Defendants to divest certain grain elevators and related assets of Bunge or ZGC affiliate CGB Enterprises, Inc. ("the Divestiture Assets") to Viserion Grain LLC and Viserion International Holdco LLC ("Viserion"), or to another acquirer or acquirers acceptable to the United States, within 30 calendar days after entry of the Stipulation and Order.

Pursuant to the APPA's requirements, on June 1, 2021, the United States also filed a Competitive Impact Statement describing the transaction and the proposed Final Judgment. *See* Dkt. No. 3. On June 8, 2021, the United States published the Complaint, proposed Final Judgment, and Competitive Impact Statement in the *Federal Register*, *see* 86 Fed. Reg. 30479 (June 8, 2021), and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in *The Washington Post* and *St. Louis Post-Dispatch*, from June 4, 2021, through June 10, 2021. On July 1, 2021, the Court entered the Stipulation and Order. *See* Dkt. No. 14. On July 7, 2021, Defendant ZGC effectuated the divestiture contemplated by the proposed Final Judgment by selling the

prescribed assets to Viserion. The 60-day period for public comment ended on August, 9, 2021. The United States received two comments, attached as Exhibits A and B.

II. THE COMPLAINT AND THE AMENDED PROPOSED FINAL JUDGMENT

The Complaint alleges that ZGC's proposed acquisition of certain grain elevator assets from Bunge would likely eliminate competition between the Defendants to purchase grain from farmers in numerous markets along the Mississippi River and its tributaries. In particular, the Complaint alleges that in nine geographic areas, a Bunge river elevator and a nearby ZGC (or ZGC affiliate CGB) elevator represent two of only a handful of grain purchasing alternatives for area farmers. In those nine geographic areas, ZGC and Bunge currently compete aggressively to win farmers' business by offering better prices and more attractive amenities such as faster grain drop-off services and better grain grading. Unless remedied, the Transaction will eliminate competition between ZGC and Bunge in those locations in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The proposed Final Judgment is designed to remedy the likely harm to competition alleged in the Complaint by requiring a divestiture that will establish an independent, economically viable competitor for the purchase of corn and soybeans in the nine affected geographic markets. The proposed Final Judgment requires the Defendants to divest nine elevators within 30 days after the entry of the Stipulation by the Court to Viserion or another acquirer or acquirers approved by the United States. In each of those nine geographic markets, a Bunge elevator competes head to head with one or more ZGC or CGB elevators.

The Divestiture Assets include the real property, buildings, facilities, and other structures associated with the nine grain elevators. The Divestiture Assets also encompass all existing

grain inventories at the elevators, and all contracts and other agreements that relate exclusively to the elevators that will be divested.

The Divestiture Assets must be divested in such a way as to satisfy the United States in its sole discretion that the assets can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the market for the purchase of corn and the market for the purchase of soybeans. The Defendants proposed Viserion as the acquirer, and, after rigorous evaluation, the United States approved Viserion as the divestiture buyer.

The proposed Final Judgment allows the acquirer, at its option, to enter into a transition services agreement with Defendants for a period of up to six months. As explained in the Competitive Impact Statement, the transition services covered by the proposed Final Judgment are those that might reasonably be necessary to ensure that an acquirer or acquirers can readily and promptly use the assets to compete in the relevant markets. *See* Dkt. No. 3 at 10 at 12.

III. STANDARD OF JUDICIAL REVIEW

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

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

> violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *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 APPA 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 consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the 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 the 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 consent 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 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 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 APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 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 APPA, Congress made clear its intent to preserve the practical benefits of using consent 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 APPA). This language explicitly wrote into the statute what Congress intended when it first enacted the APPA 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).

IV. SUMMARY OF THE COMMENTS AND THE UNITED STATES' RESPONSE

The United States received two public comments in response to the proposed Final Judgment: one from Missouri Attorney General Eric Schmitt and another from Mr. Mark Calmer, an Iowa farmer and small agricultural business owner. Consistent with the allegations in the United States' Complaint, both comments express concern that ZGC's proposed acquisition of certain Bunge elevators will reduce competition for the purchase of soybeans and corn along the Mississippi River. Missouri Attorney General Schmitt's comment expresses support for the divestiture outlined in the proposed Final Judgment. Mr. Calmer's comment does not express concerns about the adequacy of the divestiture outlined in the proposed Final Judgment nor concerns with Viserion as the proposed acquirer.

In his comment, Missouri Attorney General Schmitt emphasizes that, as highlighted in the Complaint, the Transaction would "eliminat[e] crucial competition" for the purchase of grain from farmers in Southeast Missouri. Attorney General Schmitt further states his support for the proposed Final Judgement, noting that "[i]f entered, the proposed judgment would replace the competition between Zen-Noh and Bunge by establishing an independent player in the market that will compete for the purchase of grain. This competition will help ensure that Missouri's farmers receive a fair price for the crops that they sell." *See* Exhibit A.

Mr. Calmer, a farmer located in Manson, Iowa, expresses concern about increasing concentration in a number of agricultural markets, including the grain export, beef packing, fertilizer and chemical, and seed industries. With respect to grain elevator operations along the Mississippi River, Mr. Calmer states that if the Transaction goes through, it will greatly reduce competition for grain purchases. Mr. Calmer does not discuss the terms of the proposed Final Judgment. *See* Exhibit B. The proposed Final Judgment will preserve competition for the purchase of grain: where ZGC and Bunge elevators have overlapping draw areas with few competitors, one of their facilities will be divested. In Iowa, for example, the parties are selling Bunge's elevator in McGregor to an independent competitor to maintain competition for farmers in that area.

Nothing in either comment warrants a change to the proposed Final Judgment or supports a conclusion that the proposed Final Judgment is not in the public interest. As required by the APPA, the comments, with the authors' contact information removed, and this response will be published in the *Federal Register*.

V. CONCLUSION

After careful consideration of the public comments, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is therefore in the public interest. The United States will move this Court to enter the Final Judgment after the comments and this response are published as required by 15 U.S.C. § 16(d).

Dated: August 30, 2021

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

/s/
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CERTIFICATE OF SERVICE

I, Jill Ptacek, hereby certify that on August 30, 2021, I caused a copy of the Response of Plaintiff United States to Public Comments on the Proposed Final Judgment to be served on Defendants Zen-Noh Grain Corp. and Bunge North America, Inc., via the CM/ECF system.

/s/
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