UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA, *Plaintiff*, v. CARGILL MEAT SOLUTIONS CORPORATION, *et al.*, *Defendants*.	Civil Action No.: 22-cv-1821

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 Defendants George's, Inc. and George's Foods, LLC (collectively, "Settling Defendants").

I. NATURE AND PURPOSE OF THE PROCEEDING

On July 25, 2022, the United States filed a civil Complaint against Cargill Meat Solutions Corp. and Cargill, Inc. ("Cargill"), Wayne Farms, LLC ("Wayne"), Sanderson Farms, Inc. ("Sanderson"), Webber, Meng, Sahl and Company, Inc., d/b/a WMS & Company, Inc. ("WMS") and G. Jonathan Meng ("Meng"). The Complaint alleged that those defendants, together with another data consultant and other poultry processors that combined controlled over 90% of poultry processing jobs nationwide, conspired from 2000 or before to the present to assist their competitors in making compensation decisions, to exchange current and future, disaggregated, and identifiable compensation information, and to facilitate this anticompetitive agreement. These conspirators collaborated on decisions about poultry plant worker compensation, including

through the direct exchange of compensation information. This conspiracy suppressed competition in the nationwide and local labor markets for poultry processing. Their agreement distorted the competitive process, disrupted the competitive mechanism for setting wages and benefits, and harmed a generation of poultry processing plant workers by unfairly suppressing their compensation.

With the Complaint, the United States also filed two proposed Final Judgments, one with respect to Cargill, Wayne, and Sanderson and one with respect to WMS and Meng (Dkt. Nos. 2 & 3), to settle this lawsuit as to those five defendants. The Tunney Act review process for those settlements is ongoing.

On May 17, 2023, the United States filed an Amended Complaint alleging that beginning in 2005 or before, Settling Defendants also participated in the conspiracy to exchange information about wages and benefits for poultry processing plant workers and collaborate with their competitors on compensation decisions. The Amended Complaint does not contain additional causes of action or requests for relief.

The Amended Complaint alleges that, from 2005 or before to the present, the Settling Defendants and their poultry processing and consultant co-conspirators exchanged compensation information through the dissemination of survey reports in which they shared current and future, detailed, and identifiable plant-level and job-level compensation information for poultry processing plant workers. The shared information allowed poultry processors to determine the wages and benefits their competitors were paying—and planning to pay—for specific job categories at specific plants.

The Amended Complaint further alleges that the Settling Defendants and their co-conspirators met in person at annual meetings. From at least 2005 to 2018, Settling Defendants

attended meetings with other poultry processors during which they and the consultant co-conspirators facilitated, supervised, and participated in the exchange of confidential, competitively sensitive information about poultry plant workers.

The Settling Defendants' and their co-conspirators' collaboration on compensation decisions and exchange of competitively sensitive compensation information extended beyond the shared survey reports and in-person annual meetings. As alleged in the Amended Complaint, from 2005 or before to the present, the Settling Defendants and their co-conspirators repeatedly contacted each other to seek and provide advice and assistance on compensation decisions, including by sharing further non-public information regarding each other's wages and benefits. This demonstrates a clear agreement between competitors to ask for help with compensation decisions and to provide such help to others upon request.

In sum, this conspiracy, from at least 2005 to the present, permitted the Settling Defendants and their co-conspirators to collaborate with and assist their competitors in making decisions about worker compensation, including wages and benefits, and to exchange information about current and future compensation plans. Through this conspiracy, the Settling Defendants artificially suppressed compensation for poultry processing workers.

The Complaint and the Amended Complaint also include a claim alleging that Defendants Sanderson and Wayne acted deceptively in the manner in which they compensated poultry growers in violation of Section 202(a) of the Packers and Stockyards Act, 1921, as amended and supplemented, 7 U.S.C. § 192(a). The Settling Defendants are not defendants as to this claim.

At the time the Amended Complaint was filed, the United States also filed a proposed Final Judgment and Stipulation and Order with respect to the Settling Defendants, which is

designed to remedy the anticompetitive effects resulting from the harm alleged in the Amended Complaint.

The proposed Final Judgment for the Settling Defendants, explained more fully below, requires the Settling Defendants to:

a. end their agreement to collaborate with and assist in making compensation decisions for poultry processing workers and their anticompetitive exchange of compensation information with other poultry processors;

b. submit to a monitor (determined by the United States in its sole discretion) for a term of seven years, who will examine the Settling Defendants' compliance with both the terms of the proposed Final Judgment and U.S. federal antitrust law generally, across their entire poultry businesses; and

c. provide significant and meaningful restitution to the poultry processing workers harmed by their anticompetitive conduct, who should have received competitive compensation for their valuable, difficult, and dangerous labor.

The proposed Final Judgment for the Settling Defendants also prohibits them from retaliating against any employee or third party for disclosing information to the monitor, an antitrust enforcement agency, or a legislature, and includes other terms discussed below.

The term of the proposed Final Judgment reflects the significant and voluntary cooperation that Settling Defendants provided in the United States' investigation into the conduct described in the Complaint, for which the United States is grateful.

The Stipulation and Order for the Settling Defendants requires them 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 has stipulated with the Settling Defendants that the proposed Final Judgment may be entered after compliance with the Tunney Act. Entry of the proposed Final Judgment will terminate this action as to the Settling Defendants, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Settling Defendants' Anticompetitive Agreement to Collaborate on Compensation, Including Through their Anticompetitive Exchange of Compensation Information

The Amended Complaint alleges that the Settling Defendants agreed to collaborate with and assist each other and their co-conspirators in making decisions about wages and benefits for their poultry processing plant workers, exchanged competitively sensitive information, and facilitated the exchange of each other's competitively sensitive information. This agreement includes over a decade of discussions about current and future compensation plans and exchanges of compensation information between and among the Settling Defendants and their co-conspirators, who collectively held market power over local and the nationwide markets for poultry plant workers. This conspiracy, while including detailed exchanges of information about current and future wage and benefit policies and amounts, went well beyond the sharing of information and included individual processor-to-processor consultation and advice-giving on decisions that were competitively sensitive and should have been made independently.

From 2005 or earlier to the present, the Settling Defendants and their co-conspirators collaborated on compensation decisions, including by discussing, giving advice, and sharing with

each other their competitively sensitive compensation information—rather than each individual firm making its own decisions regarding poultry processing plant worker compensation. This collaboration related to compensation topics such as current wages and benefits, planned and contemplated future wage raises, and changes to benefits, at a nationwide level, at a regional level, and at the individual plant or individual job category level. The Settling Defendants and their co-conspirators engaged in such collaborations via correspondence and at annual in-person meetings, at which they explicitly discussed poultry processing plant worker compensation, and to which they brought competitively sensitive compensation information.

As part of their collaboration, the Settling Defendants and their co-conspirators exchanged confidential, current and future, disaggregated, and identifiable compensation information related to poultry processing workers with each other, both directly and through facilitation by data consultant co-conspirators, from at least 2005 to the present. Their exchange of information through these consultants included an annual survey designed and controlled by the Settling Defendants and their co-conspirators. The survey compiled and disseminated information to competitors about current compensation and planned or contemplated changes in plant worker wages and salaries. The survey reported compensation and benefits data for standardized job categories at the Settling Defendants' and their co-conspirators' individual processing plants.

From their information exchanges, the Settling Defendants knew how, and how much, their competitors were compensating their poultry processing plant workers at both a nationwide and a local level.

B. The Competitive Effects of the Conduct

The Amended Complaint alleges that the Settling Defendants' and their co-conspirators' agreement to collaborate on compensation decisions, including through the anticompetitive exchange of compensation information, distorted the competitive mechanism of local and nationwide markets for poultry processing plant labor. By doing so, this conspiracy harmed a generation of poultry processing plant workers by artificially suppressing their wages and benefits for decades.

Poultry processors are distinguishable from other kinds of employers from the perspective of poultry processing plant workers. Many poultry processing plant jobs are dangerous and require physical stamina and tolerance of unpleasant conditions. Poultry processing workers also develop common skills or industry-specific knowledge in poultry processing work, making such workers most valuable to other poultry processing plants. Additionally, many poultry processing plant workers face constraints that reduce the number of jobs and employers available to them, limiting the number of competitors for their labor. For example, workers who cannot speak, read, or write English or Spanish can still perform poultry processing plant line work. Similarly, workers with criminal records, probation status, or lack of high school or college education are often able to work at poultry processing plants even when other jobs are not available to them. Finally, many poultry processing plants are located in rural areas, in which workers often have fewer job alternatives—especially for full-time, year-round work—as compared to workers in other areas. Thus, other jobs are not reasonable substitutes for poultry processing plant jobs.

In local poultry processing labor markets, defined by the commuting distance between workers' homes and poultry processing plants, the Settling Defendants and their co-conspirators

control more than 80% of poultry processing jobs—and in some areas, likely 100%—and thus collectively have market power in those local markets. The Settling Defendants and their co-conspirators also together control over 90% of poultry processing jobs nationwide, giving them market power in the nationwide labor market for poultry processing plant work.

The Settling Defendants' agreement to collaborate on compensation decisions and accompanying exchange of information related to compensation, which was anticompetitive even standing alone, distorted the normal wage-setting and benefits-setting mechanisms in the processor plant worker labor market, thereby harming the competitive process. Because the collaboration and the shared compensation information facilitated by the consultant co-conspirators allowed the Settling Defendants and their co-conspirators to understand more precisely what their competitors were paying, or were planning to pay, for processing plant worker compensation, they were able to pay less compensation than they otherwise would have in a competitive labor market. In contrast, the Settling Defendants' workers lacked any comparable information, a clear asymmetry in the market.

In sum, the Settling Defendants' anticompetitive agreement to collaborate on compensation decisions, exchange of compensation information, and facilitation of such (alongside the facilitation of this conduct by the consultant co-conspirators) suppressed compensation in the local submarkets and the nationwide market for poultry processing plant workers to the detriment of hundreds of thousands of processing plant workers, who were financially harmed by such conduct.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief required by the proposed Final Judgments will remedy the harm to competition alleged in the Amended Complaint.

A. Prohibited Conduct

Section IV of the Final Judgment prevents the Settling Defendants from continuing their collaboration and information-sharing with competing poultry processors about poultry processing worker compensation. Paragraphs IV.A and B prohibit Settling Defendants' employees in management positions or any positions related to compensation from directly or indirectly participating in meetings or gatherings related to compensation for poultry processing workers, communicating with any poultry processor about competitively sensitive information related to poultry processing compensation, or facilitating or encouraging such communications; entering into, attempting to enter into, maintaining, or enforcing any agreement with any poultry processor about compensation for poultry processing workers; or using any such information about another poultry processor's compensation for poultry processing workers. Accordingly, under the proposed Final Judgment, the Settling Defendants may not collaborate on wages and benefits for their workers or share confidential wage and benefit information with any poultry processor not owned or operated by Settling Defendants, and may not provide confidential wage and benefit information to any consultants that produce reports regarding compensation for poultry processing workers, among other prohibited activities.

To ensure that poultry plant workers and third parties are not punished by the Settling Defendants for raising antitrust or other concerns, Paragraph IV.D. of the proposed Final Judgment prohibits the Settling Defendants from retaliating against any employee or third party for disclosing information to the monitor, a government antitrust agency, or a government legislature.

B. Monitor

Section VI of the proposed Final Judgment provides that the Court will appoint a

monitor, selected by the United States in its sole discretion, who will have the power and authority to investigate and report on the Settling Defendants' compliance with the terms of the Final Judgment and the Stipulation and Order. In addition, the monitor will have the power and authority to investigate and report on the Settling Defendants' compliance with the U.S. federal antitrust laws. When investigating and reporting on the Settling Defendants' compliance with the U.S. federal antitrust laws, the monitor may examine all aspects of the Settling Defendants' poultry businesses, including poultry processing, poultry processing workers, growers, integrated poultry feed, hatcheries, transportation of poultry and poultry products, and the sale of poultry and poultry processing products.

The monitor will not have any responsibility or obligation for the operation of the Settling Defendants' businesses. The monitor will serve at the Settling Defendants' expense, on such terms and conditions as the United States approves in its sole discretion. The monitor will have the authority to take reasonable steps as, in the United States' view, may be necessary to accomplish the monitor's duties and the Settling Defendants must assist the monitor. The monitor will provide periodic reports to the United States and will serve for a term of up to seven years.

C. Restitution

The Settling Defendants have inflicted financial harm on the hundreds of thousands of poultry plant workers who have labored for them and their co-conspirators during the term of the conspiracy alleged in the Amended Complaint. These workers perform jobs that are physically demanding, involve high risk of injury, and require tolerance of unpleasant working conditions, in exchange for wages and benefits from the Settling Defendants and their co-conspirators. Because of the conspiracy, those wages and benefits were likely less than they would have been

in a free and competitive labor market. For this reason, Section X of the proposed Final Judgment includes a requirement that the Settling Defendants pay restitution to workers harmed by the Settling Defendants' conduct.

The Settling Defendants may satisfy the restitution requirement in the proposed Final Judgment in one of two ways. In an ongoing private antitrust suit brought by a class of nationwide poultry processing workers in this Court, *Jien v. Perdue Farms, Inc.*, No. 1:19-cv-2521 (D. Md.), which involves allegations and claims similar to those in the United States' Amended Complaint, the Settling Defendants negotiated a settlement with the plaintiff class for $5.8 million. If the *Jien* Court grants final approval to the Settling Defendants' *Jien* settlement, the disbursement process approved by the *Jien* Court of the *Jien* settlements satisfies the Settling Defendants' restitution obligation under Section X of the proposed Final Judgment.

Section X of the proposed Final Judgment also sets forth an alternative method by which the Settling Defendants may satisfy their restitution obligations. Under Paragraph X.A. of the proposed Final Judgment, the Settling Defendants must create an escrow account and contribute to that account 10% of the amount of their *Jien* settlement. Under Paragraphs X.C. and X.D. of the proposed Final Judgment, should the *Jien* Court not grant final approval of the Settling Defendants' *Jien* settlement, the Settling Defendants must transfer to that escrow account the entire amount of their *Jien* settlement, so that the account would contain the full *Jien* settlement amount plus the 10% initially required. The United States would then disburse this fund, minus the cost of administration, to the poultry processing plant workers.

D. Required Conduct, Compliance, and Inspection

The proposed Final Judgment sets forth various provisions to ensure the Settling Defendants' compliance with the proposed Final Judgment.

Paragraph VII.A. of the proposed Final Judgment requires the Settling Defendants to appoint an Antitrust Compliance Officer within 10 days of the Final Judgment's entry. Under Paragraph VII.C. of the proposed Final Judgment, the Antitrust Compliance Officer must furnish copies of this Competitive Impact Statement, the Final Judgment, and a notice approved by the United States explaining the obligations of the Final Judgment to the Settling Defendants' management and all employees responsible for evaluating or setting compensation for poultry processing workers, among others. The Antitrust Compliance Officer must also obtain from each recipient a certification that he or she has read and agreed to abide by the terms of the Final Judgment, and must maintain a record of all certifications received. Recipients must also certify that they are not aware of any violation of the Final Judgment or any violation of federal antitrust law. Additionally, the Antitrust Compliance Officer must annually brief each person required to receive a copy of the Amended Complaint, Final Judgment and this Competitive Impact Statement on the meaning and requirements of the Final Judgment and the antitrust laws. The Antitrust Compliance Officer must also annually communicate to all employees that any employee may disclose, without reprisal, information concerning any potential violation of the Final Judgment or the antitrust laws.

Paragraph VII.D. of the proposed Final Judgment imposes similar notice provisions on the Settling Defendants to ensure that any poultry processor or consulting firm they contract with related to poultry processing compensation also has notice of the Amended Complaint, Final Judgment, and Competitive Impact Statement.

E. Other Provisions

For a period of seven years following the date of entry of the Final Judgment, the Settling Defendants must certify annually to the United States that they have complied with the

provisions of the Final Judgment. Additionally, upon learning of any violation or potential violation of the terms and conditions of the Final Judgment, the Settling Defendants, within 30 days, must file with the United States a statement describing the violation or potential violation, and must promptly terminate or modify the activity.

The proposed Final Judgment requires the Settling Defendants to provide full, truthful, and continuing cooperation to the United States in any investigation or litigation relating to the sharing of compensation information among poultry processors in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1. This cooperation provision requires the Settling Defendants to use their best efforts to effectuate interviews, depositions, and sworn testimony with their current and former employees, officers, directors, and agents and to produce documents, data, and information upon request. The Settling Defendants' obligation to cooperate lasts for the full term of the proposed Final Judgment or until the conclusion of all investigations and litigations, including appeals, related to sharing poultry processing worker compensation information. Subject to this full, truthful, and continuing cooperation, the Settling Defendants are discharged from any civil or criminal claim by the United States arising from the sharing of compensation information among poultry processors, provided that the information-sharing occurred before the date of the filing of the Amended Complaint and does not include an agreement to fix prices or wages or to divide or allocate markets.

To ensure compliance with the Final Judgment, the proposed Final Judgment requires the Settling Defendants to grant the United States access, upon reasonable notice, to the Settling Defendants' records and documents relating to matters contained in the Final Judgment. Upon request, the Settling Defendants must also make their employees available for interviews or

depositions, answer interrogatories, and prepare written reports relating to matters contained in the Final Judgment.

The proposed Final Judgment also contains provisions designed to make enforcement of the Final Judgment as effective as possible. The proposed Final Judgment provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of these provisions, the Settling Defendants have agreed 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 the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that the Settling Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

The proposed Final Judgment contains provisions that clarify its interpretation. The proposed Final Judgment is intended to remedy the loss of competition the United States alleges occurred because of the Settling Defendants' conduct. The Settling Defendants agree that they will abide by the proposed Final Judgment and that they may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

The proposed Final Judgment provides that if the Court finds in an enforcement proceeding that a Settling Defendant has violated the Final Judgment, the United States may apply to the Court for an extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with

investigating and enforcing violations of the Final Judgment, in any successful effort by the United States to enforce the Final Judgment against a Settling Defendant, whether litigated or resolved before litigation, the Settling Defendant must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with that effort to enforce this Final Judgment, including the investigation of the potential violation.

The proposed Final Judgment states that the United States may file an action against a Settling Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, the proposed Final Judgment provides that it 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 the Settling Defendants that continuation of the Final Judgment is no longer necessary or in the public interest.

This length of term reflects important cooperation by the Settling Defendants with the United States' investigation and litigation. Settling Defendants provided significant documents and information to the United States over a lengthy period and on a voluntary basis, which advanced the investigation in meaningful ways. The United States is grateful for this cooperation.

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 the Settling Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Settling Defendants 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 upon the Court's determination that the proposed Final Judgment 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 within which 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 the last 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 U.S. 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 U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to:

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 the Settling Defendants. The United States could have commenced contested litigation and brought the case to trial, seeking relief including an injunction against the collaboration on compensation decisions, sharing of compensation information, and facilitation of this conduct, as well as the imposition of a monitor. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Amended Complaint against the Settling Defendants, preserving competition in the poultry processing plant labor markets and in the poultry processing industry at large, given the relief secured, including the poultry-business-wide monitor. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would

have obtained through litigation against the Settling Defendants 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," in antitrust cases 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 "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 violations that the United States has alleged in its Amended 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 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).

Dated: May 17, 2023

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

/s/ Kathleen Simpson Kiernan
Kathleen Simpson Kiernan
U.S. Department of Justice
Antitrust Division
Civil Conduct Task Force
450 Fifth Street NW, Suite 8600
Washington, DC 20530
Tel: 202-353-3100
Fax: 202-616-2441
Email: Kathleen.Kiernan@usdoj.gov