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DEPARTMENT OF JUSTICE

Antitrust Division

UNITED STATES V. GEORGE'S FOODS, LLC, ET AL.

Public Comment and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h), the United States hereby publishes below the comment received on the proposed Final Judgment in United States v. George's Foods, LLC, et al., Civil Action No. 5:11-cv-00043, which was filed in the United States District Court for the Western District of Virginia, Harrisonburg Division, on May 10, 2011, together with the response of the United States to the comment.

Copies of the comment and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street, NW, Suite 1010, Washington, DC 20530 (telephone: 202-514-2481), on the Department of Justice's website at http://www.usdoj.gov/atr, and at the Office of the Clerk of the United States District Court for the Western District of Virginia, Harrisonburg Division, 116 N. Main Street, Harrisonburg, Virginia 22802. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink
Director of Civil Enforcement

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil Action No. 5:11-cv-00043
	)	
v.	)	
	)	
GEORGE'S FOODS, LLC,	)	
	)	By: Glen E. Conrad
GEORGE'S FAMILY FARMS, LLC,	)	Chief United States District Judge
	)	
and	)	
	)	
GEORGE'S, INC.,	)	
	)	
Defendants.	)	

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

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby files the public comment concerning the proposed Final Judgment in this case and the United States' response to that comment. After careful consideration of the comment submitted, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published in the Federal Register, pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On May 10, 2011, the United States filed a civil antitrust Complaint against George's Foods, LLC; George's Family Farms, LLC; and George's, Inc. (collectively, "Defendants" or "George's") alleging that George's acquisition of a Harrisonburg, Virginia chicken processing complex ("the Transaction") from Tyson Foods, Inc. ("Tyson") likely would substantially lessen competition for the services of broiler growers operating in and around the Shenandoah Valley area of Virginia and West Virginia, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

On June 23, 2011, the United States filed a proposed Final Judgment, which is designed to remedy the expected anticompetitive effects of the Transaction, and a Stipulation signed by the United States and the Defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. § 16. Pursuant to those requirements, the United States also filed its Competitive Impact Statement ("CIS") with the Court on

June 23, 2011 (Docket #45); the proposed Final Judgment and CIS were published in the Federal Register on June 30, 2011, see United States v. George's Foods, Inc., et. al., 76 Fed. Reg. 38419; and summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, were published in the Washington Post for seven days, beginning on June 29, 2011 and ending on July 7, 2011, and for seven days in the Harrisonburg Daily News-Record, beginning on June 29, 2011 and ending on July 8, 2011. The sixty-day period for public comment ended on September 3, 2011; one comment was received as described in Section IV below and is attached hereto.

II. THE COMPLAINT AND PROPOSED RESOLUTION

A. Background

On May 7, 2011, George's purchased Tyson's Harrisonburg broiler processing complex and related assets. George's and Tyson are competing chicken processors, each involved in the production, processing, and distribution of "broilers," which are chickens raised for meat products. Chicken processors, such as George's and Tyson, rely on the services of farmers, called "growers," to care for and raise chickens from hatch to slaughter. Growers work under production contracts with a nearby processor, which maintains ownership of the birds throughout the process.

George's and Tyson operated processing facilities about 30 miles away from each other in the Shenandoah Valley region of Virginia and West Virginia. George's operates a processing facility in Edinburg, Virginia, while Tyson operated a facility in Harrisonburg, Virginia. In addition, a third processor, Pilgrim's Pride, operates plants in Timberville, Virginia (mid-way between Edinburg and Harrisonburg) and in nearby Moorefield, West Virginia.

B. The Complaint

The United States' Complaint alleges that the Transaction would likely lessen competition for purchases of grower services in the Shenandoah Valley area. Prior to the Transaction, George's, Tyson, and Pilgrims' Pride competed against each other for grower services in the region. The transaction reduced the number of competitors in the relevant market from three to two and left George's with approximately 40% of the processing capacity in the market. The Complaint alleges that the Transaction would likely have the effect of enhancing George's incentive and ability to force growers to accept lower prices and less favorable contractual terms for grower services.

C. Proposed Final Judgment

The proposed Final Judgment requires George's within 60 days following entry of the Judgment (subject to two 30-day extensions at the discretion of the United States) to enter into contracts to implement certain capital improvements to its Shenandoah Valley area processing facilities. Under the proposed Final Judgment, George's must install at the Harrisonburg plant an individually frozen ("IF") freezer; install a whole leg or thigh deboning line at either the Harrisonburg or Edinburg plants; and make substantial repairs to the roof of the Harrisonburg plant. The proposed Final Judgment requires that the contracts for these

improvements provide for completion within 12 months. The proposed Final Judgment terminates upon motion by either the United States or the Defendants that the Defendants have satisfied the Judgment's requirements.

The proposed Final Judgment ensures that George's has the ability and incentive to increase production at its Shenandoah Valley poultry processing facilities. Utilization of the freezer and the deboning equipment will reduce the variable costs George's incurs in its Shenandoah Valley operations. For George's to fully realize the cost savings it anticipates from the Transaction and to maximize its return on the investments required by the proposed Final Judgment,\1\ George's will need to operate the Harrisonburg plant at or near capacity -- something Tyson had only rarely done in the past few years. The increases in output resulting from the improvements will in turn lead to a significant increase in the total number of chickens George's must procure from area growers. This increased demand for chickens will increase demand for grower services in the Shenandoah Valley region beyond the level demanded when Tyson owned the Harrisonburg plant, which will benefit growers.

\1\ The installation of the IF freezer will allow George's to produce higher margin items at both of its Shenandoah Valley facilities, and the deboning equipment will allow George's to alter the mix of products produced at these facilities. Together, these improvements will allow George's to produce products more highly valued in the marketplace and thereby earn higher margins.

III. STANDARD OF REVIEW UNDER THE TUNNEY ACT

As discussed in detail in the CIS (at pp. 13-16), the Tunney Act calls for the Court, in making its public interest determination, to consider certain factors relating to the competitive impact of the proposed Final Judgment and whether it adequately remedies the harm alleged in the complaint. See 15 U.S.C. § 16(e)(1)(A) & (B) (listing factors to be considered).

This public interest inquiry is necessarily a limited one as the United States is entitled to deference in crafting its antitrust settlements.\2\ See generally United States v. Microsoft Corp., 56 F.3d 1448, 1458-62 (D.C. Cir. 1995); Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1236 (D.C. Cir. 2004) (A "district court's 'public interest' inquiry into the merits of the consent decree is a narrow one."); United States v. SBC Commc'ns, 489 F. Supp. 2d 1, 12-17 (D.D.C. 2007).

\2\ The purpose of Tunney Act review is not for the court to engage in commenters' desire for an "unrestricted evaluation of what relief would best serve the public," United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) (citing United States v. Bechtel Corp., 648 F.2d 660, 666 (91 Cir. 1981)), or to determine the relief "that will best serve society," Bechtel, 648 F.2d at 666; rather, it is to determine whether the proposed decree is within the reaches of the public interest -- "even if it falls short of the remedy the court would impose on its own." United States v. AT&T Co., 552 F. Supp. 131, 151 (D.D.C. 1982).

In making a Tunney Act determination, the relevant inquiry is "whether there is a factual foundation for the government's decisions such that its conclusions

regarding the proposed settlement are reasonable." United States v. KeySpan Corp., 763 F. Supp. 2d 633, 637-38 (S.D.N.Y. 2011) (quoting United States v. Abitibi--Consol. Inc., 584 F. Supp. 2d 162, 165 (D.D.C. 2008)) (internal alterations omitted). Under this standard, the United States need not show that a settlement will perfectly remedy the alleged antitrust harm; rather, it need only provide a factual basis for concluding that the settlement is a reasonably adequate remedy for the alleged harm. SBC, 489 F. Supp. 2d at 17. The proposed Final Judgment should remedy only the anticompetitive behavior alleged in the Complaint and is not required to go beyond that. Microsoft, 56 F.3d at 1459.

With respect to the sufficiency of the proposed remedy, the United States is entitled to deference as to its views of the nature of the case, its perception of the market structure, and its predictions as to the effect of proposed remedies. See, e.g., SBC, 489 F. Supp. 2d at 17. A court should not reject the United States' proposed remedies merely because commenters believe that other remedies may be preferable. See KeySpan, 763 F. Supp. 2d at 637-38.

IV. SUMMARY OF PUBLIC COMMENT AND THE UNITED STATES' RESPONSE

During the sixty-day public comment period, the United States received only one comment, co-authored by attorney David A. Balto and law professor Peter C. Carstensen (the "Balto/Carstensen Comment" or "the Comment"). The Comment, which objected to both the scope and duration of the remedy in the proposed Final Judgment, is attached hereto. As explained in detail below, after careful review, the United States continues to believe that the proposed Final Judgment is in the public interest.

A. Summary of the Public Comment

The Balto/Carstensen Comment asserts that the proposed Final Judgment is not sufficient to remedy the harms alleged in the Complaint in that it fails to address the potential for the Defendants to degrade the terms of their contracts with growers.\3\ The Comment maintains that to address adequately any harm to growers that might result from George's acquisition of the Tyson's Harrisonburg plant, the proposed Final Judgment must incorporate the following: (1) Defendants' agreement "to refrain from degrading the contractual provisions solely by virtue of its buyer power;" (2) an extension of the termination date of the proposed Final Judgment to "some reasonable time period, e.g. five or seven years;" (3) a provision requiring Defendants to collect complaints from growers and forward them to the Department of Justice along with a requirement that Defendants notify growers of their right to complain directly to the Department of Justice or the Department of Agriculture; and (4) a requirement that the Department of Justice reassess the competitive effects of the Transaction in three to five years and, if necessary, revise the remedy.\4\

\3\ Comment at 2.

\4\ Comment at 2-3.

B. Response to Comment

The remedy called for in the proposed Final Judgment is an effective one given the particular facts and circumstances of this matter. The increased demand for

grower services likely to result from George's adherence to the terms of the proposed Final Judgment is likely to be sufficient to counteract any potential adverse effects (both price and nonprice) arising from the Transaction. As such, the concerns raised by the comment are misplaced. Moreover, the United States is confident that the Comment's suggestions for additional remedial measures are unnecessary to serve the public interest.

1. The Proposed Final Judgment Addresses Both Price and Nonprice Competition for Grower Services

The United States respectfully submits that the proposed Final Judgment is sufficient to remedy the harm alleged in the Complaint. Here, the principal competitive concern alleged in the Complaint is that the Transaction enhances George's ability to exercise monopsony power; i.e., power over growers selling their services to George's. The economic concern regarding monoposony is that a buyer (such as George's buying services from growers) with market power will reduce purchases in order to gain a pricing advantage over sellers (i.e., growers). As Professors Areeda and Hovenkamp explain, "Unlike the competitive buyer, the monopsony buyer can reduce the purchase price by scaling back its purchases." IIB PHILIP E. AREEDA, HERBERT HOVENKAMP, & JOHN L. SOLOW, ANTITRUST LAW

575 at 442 (3d ed. 2007).

In analyzing competitive effects resulting from a horizontal acquisition like this one, there is no substantive difference in approach applied between price and nonprice considerations,\5\ and competition on nonprice contract terms is considered as important as competition on price.\6\

\5\ "When the Agencies investigate whether [an acquisition] may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition." U.S. Dep't of Justice and Federal Trade Comm'n, Horizontal Merger Guidelines, at 2 (2010).

\6\ ``A. refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them.'' Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447,459 (1986). See also Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (an agreement to eliminate a term of trade extinguishes a form of competition among sellers).

The remedy in the proposed Final Judgment, accordingly, is designed to ensure that output is enhanced, which will promote prices and contractual terms that are favorable for growers. As discussed above, the remedy creates a significant incentive for George's to increase production at its Shenandoah Valley plants. To accomplish this, George's will need additional chickens. This in turn will increase the overall demand for grower services in the Shenandoah Valley beyond the level demanded pre-Transaction when Tyson was operating the Harrisonburg plant at less-than-capacity levels.\7\

\7\ The Comment agrees that the requirements imposed by the proposed Final Judgment will expand overall demand for grower services in the Shenandoah Valley. Comment at 10.

As set forth in the Horizontal Merger Guidelines, lowered variable cost efficiencies, such as those likely resulting from the proposed Final Judgment, will serve to "reduce or reverse any increases in the merged firm's incentive" to exercise market power.\8\ The efficiencies in this case are specific to George's acquiring the Harrisonburg plant in that an alternative purchaser of the plant would not likely have been able to justify the equipment's high cost without the ability to spread the overhead cost across the output of two plants in the area, as George's can.

\8\ Horizontal Merger Guidelines § 10 (instructing that the United States can consider whether verifiable, transaction-specific efficiencies would be sufficient to reverse the transaction's potential harm to growers in the relevant market, e.g., by preventing price decreases to growers in that market).

In addition, the significant cost of the improvements -- which altogether could exceed George's purchase price for the Harrisonburg facility -- provides George's with a substantial economic incentive to increase production that is

consistent with George's public commitment to keeping the Harrisonburg plant open and fully operational.

The Comment states that to sufficiently protect growers from being harmed by the Transaction, the United States should amend the proposed Final Judgment to incorporate terms prohibiting the Defendants from degrading grower contract provisions.\9\ As explained above, the proposed Final Judgment is designed to protect competition with respect to nonprice terms so there is no need for added protections. Thus, amending the proposed Final Judgment in this case as the Comment suggests would only serve to unnecessarily interject the United States or the Court into contract negotiations and disputes.\10\

\9\ Comment at 12.

\10\ The Comment also asserts that the proposed Final Judgment is inadequate because the Comment believes George's extension of the grower contracts it inherited from Tyson was an "implied remedy" that should have been included "as an express condition of the settlement." Comment at 8-9. Contrary to the Comment's assertion, George's extension of the contracts, which George's offered on its own without the knowledge or consent of the United States, was not a term -- either express or implied — of the settlement between the United States and George's. The only terms of the settlement are those contained in the proposed Final Judgment.

2. The Comment's Proposals for Further Modifications to the Proposed Final Judgment Should be Rejected.

The Comment states that the proposed Final Judgment should be modified to include certain additional terms. (See supra pp. 6-7.) As a whole, the United States does not believe that additional provisions are warranted given that the proposed Final Judgment suffices to remedy the harm alleged in the Complaint. While the additional provisions set forth in the Comment may be beneficial, the purpose of Tunney Act review is not to determine what other remedies are preferable but instead to determine whether there is a factual basis for concluding that the settlement agreed upon by both the United States and the Defendants is in the public interest.\11\ As discussed above, that test is satisfied.

\11\ See supra Section III; see also United States v. KeySpan, 763 F.Supp.2d 633, 642 (S.D.N.Y. 2011) (holding in Tunney Act proceeding that Government is entitled to deference in choosing to pursue settlement).

Moreover, the specific provisions requested in the Comment are not necessary to protect the public interest. For example, the Comment states that the United States and Defendants should take certain steps in relation to the enforcement of the Packers and Stockyards Act ("PSA"), including a process for collecting grower concerns relating to their rights under the PSA.\12\ There is no need, however, to include PSA-related requirements in this particular proposed Final Judgment. The Complaint in this matter was brought under Section 7 of the Clayton Act The PSA is a separate statute dealing with marketplace practices that specifically relate to livestock, meats and poultry and is enforced primarily by the United States Department of Agriculture. The USDA has established processes to collect and handle grower complaints arising under the PSA and the Department of Justice has a similar process for individuals to raise

concerns arising under the antitrust laws.\13\ The Department of Justice and the USDA already work together to ensure that all concerns raised by growers brought to the attention of either agency are properly investigated and handled, regardless of whether they arise under the antitrust laws or the PSA.

\12\ Comment at 13.

\13\ To contact the Department of Agriculture regarding concerns under the PSA, growers can use the following email address: "PSPComplaints@usda.gov". To report an antitrust concern to the Department of Justice, growers can contact the DOJ at http://www.justice.gov/atr/contact/newcase.html.

The Comment also recommends that the term of the proposed Final Judgment last for "five to seven years" \14\ and that the United States conduct a review of the effects of the Transaction and have the power to require additional remedies at the end of that period.\15\ The United States does not see the need to extend the duration of the proposed Final Judgment as, once the Defendants comply with its terms, likely harm from the merger will be addressed and there will be no further need for the judgment to remain in force. Similarly, the United States is confident that the effectiveness of the proposed Final Judgment obviates the need for requiring undefined "additional remedies."\16\

\14\ The proposed Final Judgment currently provides for termination, at the request of either party, upon the Defendants completing all of the specified capital improvements; the Judgment specifies that the Defendants must have entered into contracts for the mandated improvements within 60 days of entry of the proposed Final Judgment and that all such contracts be fulfilled within six to twelve months of the contract execution date. Assuming the Defendants have contracts executed for the required investments at the time Court enters the Judgment, the Judgment could be terminable within twelve months.

\15\ Comment at 3, 12 & 13.

\16\ A large part of what drives litigating parties to enter into settlements as a means of resolving their disputes is the certainty afforded by knowing the cost of what ultimately will be required by each side going forward. Parties would rarely, if ever, resolve a dispute short of engaging in a full trial on the merits if the proffered settlement stated that one of the parties could unilaterally decide to change the terms of the Judgment post-entry.

Underlying the additional provisions requested in the Comment is concern as to the rights of growers. The United States shares that concern, as evidenced by its bringing this action in the first place. The Defendants will remain fully subject to the antitrust laws during the pendency of the Final Judgment and after its termination. The United States will remain able to investigate any potential anticompetitive conduct in the poultry industry and will not hesitate to take appropriate action. In sum, the Comment's proposed additional provisions to the proposed Final Judgment are not needed.

V. CONCLUSION

The United States has determined that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. The United

States will move this Court to enter the proposed Final Judgment after the comment and this response are published in the Federal Register. The United States does not believe that any further public hearing is required and the Tunney Act does not require a hearing as to whether a final judgment is in the public interest. United States v. Lucasfilm, Inc., 2011 WL 2636850 at *2 (D.D.C. 2011).

Dated: October 25, 2011

Respectfully submitted,
/s/
JILL A. PTACEK Attorney
Transportation, Energy and Agriculture Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, N.W., Suite 8000
Washington, DC 20530
Telephone: (202) 307-6607
Facsimile: (202) 307-2784
E-mail: jill.ptacek@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on October 25, 2011, I caused the Response of Plaintiff United States to Public Comment on the Proposed Final Judgment and attached exhibit to be electronically filed with the Clerk of the Court using the CM/ECF system, which will provide electronic notice to the following counsel.

William B. Poff
Woods Rogers PLC
P.O. Box 14125
Roanoke, VA 24038-4125

Michael L. Keeley
John D. Harkrider
Rachel J. Adcox
Russell M. Steinthal
Axinn, Veltrop & Harkrider LLP
114 West 47th Street
New York, NY 10036

Gary V. Weeks
Bassett Law Firm
221 North College Avenue
P.O. Box 3618
Fayetteville, AK 72702

Respectfully Submitted,
/s/
Jill A. Ptacek
Attorney
United States Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil Action No. 5:11-cv-00043
v.	)	
	)	
GEORGE'S FOODS, LLC,	)	By: Glen E. Conrad
	)	Chief United States District Judge
	)	
GEORGE'S FAMILY FARMS, LLC,	)	
	)	
and	)	
	)	
GEORGE'S, INC.,	)	
	)	
Defendants.	)	

COMMENTS OF DAVID A. BALTO\1\ AND PETER C. CARSTENSEN\2\
ON THE PROPOSED FINAL JUDGMENT

\1\ David A. Balto is nationally known for his expertise in competition policy and is a prolific author on antitrust and consumer protection issues in high-tech industries, health care, pharmaceuticals, and financial services. Mr. Balto has over 25 years of antitrust experience spanning across the private sector, the Antitrust Division at the Department of Justice, and the Federal Trade Commission. From 1995 to 2001, Mr. Balto was Policy Director for the Bureau of Competition at the Federal Trade Commission and attorney advisor to Chairman Robert Pitofslcy. Mr. Balto is also a Senior Fellow at the Center for American Progress where he focuses on competition policy.

\2\ Peter C. Carstensen is the George H. Young-Bascom Professor of Law at the University of Wisconsin Law School. One of his areas of expertise is the application of competition law and policy to agricultural market issues. In addition to his scholarship, he has testified before the various congressional committees on these topics, and was a panelist at the Workshop on Agricultural Competition Issues in the Dairy Industry jointly sponsored by the Department of Justice and the Department of Agriculture.

I. Introduction

In a case commonly studied in a first year law course on contracts, Judge Friendly began his opinion with a simple statement: "[t]he issue is, what is a chicken?\3\" In this case the issue is not "what is a chicken?" but instead "what is an appropriate remedy?" For the reasons set forth below, the remedy secured by Department of Justice ("DoJ") is inadequate and we respectfully request that this Court find the Proposed Final Judgment ("PFJ") not to be in the public interest and correspondingly reject the PFJ as drafted.

The DoJ should be applauded for bringing this civil antitrust action against George's Foods, LLC; George's Family Farms, LLC; and George's, Inc. (collectively "George's" or "Defendants") challenging their acquisition of a chicken processing complex from Tyson Foods, Inc. ("Tyson"). Following on the

heels of an earlier DoJ enforcement action against Dean Foods Company, the instant action demonstrates the DoJ's firm commitment to restoring antitrust enforcement in critical agricultural sectors. A period of non-enforcement has led to a situation today that is analogous to the deplorable state of the U.S. agriculture industry during the late 19th century--which was one of the motivating factors behind enacting the Sherman Act in the first place.\4\ Consumers are paying more, farmers are receiving less, and dominant agricultural processers, such as the Defendants, are reaping outsized profits.

\3\ Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960).

\4\ Philip J. Weiser, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Toward a Competition Policy Agenda for Agriculture (August 7, 2010) available at http://www.justice.gov/atr/public/speeches/248858.htm.

The DoJ's decision to bring this enforcement action also reflects an important antitrust policy point: greater scrutiny of transactions that affect buyer power. The challenged transaction's adverse effect on consumers of poultry products was uncertain; however, the DoJ determined that the potential adverse effect on those who raise chickens ("growers") was sufficient to prompt litigation. Although regarded as a contentious claim by some observers, this enforcement action is consistent with long-standing and well-accepted antitrust doctrine. Hence, bringing this law suit reconfirms the DoJ's commitment to challenging mergers that--primarily or exclusively-adversely affect competition on the buyer's side of the market.

The DoJ also deserves credit for bringing this enforcement action despite the small size of the transaction in terms of dollars, falling well below the current transaction size reporting threshold under the Hart-Scott-Rodino Act. The DoJ examined the specific facts and circumstances of this particular transaction and correctly concluded that the potential for adverse competitive effects on growers is substantial. The challenged transaction reduces the number of buyers for grower services in the Shenandoah Valley from three to two and represents a serious loss of opportunity for growers.

Despite these positive aspects, the remedies contained in the PFJ are ultimately incomplete because they do not adequately address all the theories of competitive harm alleged in the Complaint. Specifically, the PFJ and corresponding Competitive Impact Statement ("CIS") fail to address the potential for the Defendants to substantially lessen competition in the market for grower services in the Shenandoah Valley vis-à-vis degrading the terms of their contracts with growers, a concern specifically raised in the Complaint.

Given the unique nature of this case and its potential long-lasting implications on antitrust enforcement in agricultural markets, it is imperative that the DoJ obtain an appropriate remedy.

For these reasons, we respectfully request that this Court find the PFJ not to be in the public interest and correspondingly reject the PFJ as drafted. We also, however, encourage the DoJ to file an amended PFJ, which incorporates the following:

• Defendants' promise to refrain from degrading the contractual provisions solely by virtue of its buyer power;

• A new termination date for the PFJ based on some reasonable time period, e.g. five or seven years;

• A provision requiring the Defendants to collect grower complaints on contract issues, report those complaints to the DoJ on a quarterly basis, and send annual notice to growers informing them that they can take complaints about contract issues to the U.S. Department of Agriculture's Grain Inspection and Packers and Stockyards Act Administration ("GIPSA"), which enforces the Packers and Stockyards Act ("PSA") that provides protection for growers from buyer abuses, and/or contact the DoJ directly with their concerns; and

• A provision allowing for a review at some reasonable time in the future, e.g. three or five years, at which point the DoJ can reassess the competitive effect of the challenged transaction and, if warranted, revise the remedy.
With the addition of these recommendations, the amended PFJ will address all the theories of competitive harm alleged in the Complaint and will fully eliminate the competitive harm arising from this transaction.

II. Background

On March 18, 2011, Tyson and George's publicly announced that George's would purchase Tyson's chicken processing complex located in Harrisonburg, Virginia.\5\ The DoJ opened an investigation and issued Civil Investigative Demands ("CIDs") on April 18, 2011.\6\ Although aware of the DoJ's concerns regarding the competitive effects of the transaction, and before responding to the CIDs, Tyson and George's closed the transaction on May 7, 2011 for approximately $3.1 million for the facilities and an additional amount for equipment and current inventory.\7\ The DoJ filed its complaint against George's on May 10, 2011.\8\

\5\ Complaint at 2, United States v. George's Foods, LLC, No. 5:11-CV-00043 (W.D. Va. May 5, 2010) [hereinafter Complaint].

\6\ 1d. at 2.

\7\ Competitive Impact Statement at 5-6, United States v. George's Foods, LLC, No. 5:11-CV-00043 (W.D. Va. June 23, 2011) [hereinafter CIS].

\8\ Complaint, supra note 5.

Tyson and George's are agricultural processors, specifically, chicken processors.\9\ Contrary to the traditional depictions of farming in classic film and literature such as The Wizard of Oz or Of Mice and Men, modern agriculture operates quite differently. In the poultry and many other agricultural markets, the traditional notion of "farming"—where the farmer owns the land, raises his crop, and sells it to the market—has given way to a market structure where the middlemen, agricultural processors, dominate the market and "farmers" are merely contracted agents of the agricultural processors for so-called "grower services."\10\

\9\ 1d. at 2.

\10\ See generally, Richard J. Sexton, Industrialization and Consolidation in the U.S. Food Sector: Implications for Competition and Welfare, 82(5) AMER. J. AGR. ECON. 1087 (2000) (documenting the increased market concentration in the processing segment of agriculture markets).

Under existing industry dynamics, chicken processors typically furnish the growers with chicks, feed, and any necessary medicines.\11\ Growers typically provide the chicken houses, labor, and other miscellaneous expenses related to raising the chickens.\12\ The processor handles the transportation costs which, when combined with the processors' storage constraints, means that a processor usually contracts with growers in the geographic area surrounding one of its facilities, typically within a fifty to seventy miles radius.\13\ There is no cash market for chickens, so farmers who want to raise chickens on a large scale must work with a chicken processor.\14\

\11\ CIS, supra note 7, at 3.

\12\ Id.

\13\ Id.; Complaint, supra note 5, at 8.

\14\ CIS, supra note 7, at 3..

Given these market parameters, prior to the challenged transaction, three processors competed for grower services in the Shenandoah Valley.\15\ The Defendants have a facility in Edinburg, Virginia that has the capacity to process 1,650,000 birds per week.\16\ Tyson's facility in Harrisonburg, Virginia, which Defendants acquired in the challenged transaction, has a capacity of approximately 625,000 birds per week.\17\ The third and largest player in the Shenandoah Valley market, who was not involved in the transaction, Pilgrim's Pride Corporation ("Pilgrim's Pride") has a facility in Moorefield, West Virginia that can process 2,400,000 birds per week as well as a facility in Timberville, Virginia that can process 660,000 birds per week.\18\

\15\ Complaint, supra note 5, at 9.

\16\ CIS, supra note 7, at 4.

\17\ Id.

\18\ Id.

Tyson is the largest chicken processor in the United States but it was the smallest player in the Shenandoah Valley market. And, even though Defendant's acquisition of the Tyson facility only constitutes a merger between the two smaller processors in the Shenandoah Valley in terms of capacity, the transaction increases the Herfindahl-Hirschman Index ("HHI") by more than 700 points and results in a post-transaction market HHI in excess of 5000.\19\ These HHI figures support the presumption that the transaction likely enhances

Defendants' market power.\20\ Additionally, the barriers to entry in the chicken processing market are significant in terms of both cost and time. Construction of a new facility requires an investment of at least $35 million and it would take at least two years before it would be operational.\21\

\19\ Id. at 9.

\20\ U.S. Dep't of Justice, HORIZONTAL MERGER GUIDELINES § 5.3 (2010).

\21\ Complaint, supra note 5, at 12.

As detailed in the Complaint, growers benefitted from competition between the three processors "in a variety of respects."\22\ Competition among the processors benefitted growers in terms of better prices for their services.\23\ The processers, however, also competed for grower services through their non-price contractual terms, terms that growers consider when choosing which processor to contract with.\24\ The DoJ specifically noted four areas where the three processors' contracts differed: (1) degree in which processors share various costs with growers; (2) number of flocks the processors provide the grower per year; (3) the extent to which processors require certain features in their growers' chicken houses; and (4) the degree in which processors support growers investment in upgrades to their chicken houses.\25\

\22\ Id at 10.

\23\ Id.

\24\ Id.

\25\ Id. at 10-11.

The importance of these non-price contractual terms was central to the DoJ's allegations of competitive harm from the challenged transaction. That importance is reflected in the DoJ statement of the cause of action:

George's acquisition of Tyson's Harrisonburg, Virginia chicken complex will substantially lessen competition for the purchase of broker grower services in the Shenandoah Valley in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Transaction would likely have the following effects, among others:

a. actual and potential competition between George's and Tyson in the procurement of broiler grower services in the Shenandoah Valley will be eliminated

b. competition generally in the procurement of broiler grower services in the Shenandoah Valley will be substantially lessened; and

c. suppliers of broiler growing services will receive less than competitive prices or less competitive contract terms for their services.\26\

\26\ Id. at 13 (emphasis added).

The harm arising from the challenged transaction, therefore, was that the transaction will enhance Defendants' ability to abuse their power relative to growers in terms of both price and non-price contractual provisions. As also noted in the Complaint, in response to unfavorable contract terms or prices, "the grower's only practicable recourse" is switching to another processor.\27\ The reduction of the number of competitors in this market from three to two will reduce the practicability of that option, especially since the other player, Pilgrim's Pride, does not have available capacity to take on a significant number of growers who may want to switch away from the Defendants.\28\

\27\ Complaint, supra note 5, at 11.

\28\ Id. at 4.

The acquisition was already consummated at the time the DoJ initiated the suit; a fact that may have created a serious obstacle in terms of remedy. Moreover, the acquired facility apparently needs significant renovation and its total size is constrained because of its location. We are free to speculate that, before entering into the proposed settlement agreement allowing Defendants to keep the acquired facility, the DoJ made a substantial effort to find an alternate buyer for the acquired facility. Perhaps there was no viable alternative buyer.

In an attempt to mitigate the competitive concerns in light of these unique obstacles, the PFJ is premised on three structural remedies: (1) Defendants must purchase and install a freezer at the Harrisonburg, Virginia facility; (2) Defendants must purchase and install a deboning line at either the Harrisonburg, Virginia facility or Edinburg, Virginia facility; and (3) Defendants must repair the roof at the Harrisonburg, Virginia facility. These provisions hopefully will deter the defendants from exercising their power, to decrease output by committing them to expanding capacity and improving their overall operations. The DoJ contends that these remedies will expand the demand for grower services in the Shenandoah Valley.

What the PFJ fails to address are the anticompetitive concerns given the Defendants' enhanced ability to degrade contract terms it offers to growers in the Shenandoah Valley. For this reason, which is the focus of the remainder of these comments, the PFJ is inadequate and should be rejected as not in the public interest.

III. Applicable Standards

Pursuant to the Antitrust Procedures and Penalties Act ("APPA"), the standard for judicial review of PFJs in antitrust cases is whether or not entry of the PFJ "is in the public interest." 15 U.S.C. § 16(e)(1). When conducting its public interest determination, the court "may not simply rubberstamp the government's proposal, but rather it must engage in an independent determination of whether a proposed settlement is in the public interest." United States v. AT&T, Inc., 541 F. Supp. 2d 2, 6 (D.D.C. 2008) (internal quotations marks and citations omitted).

In making the public interest determination, the APPA requires the court to consider the following:

(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). The court's review of a PJF is therefore limited, as the court may only inquire "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." United States v. InBev N.V./S.A., 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009).

A court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) (citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981)). As explained by the Ninth Circuit in Bechtel, in determining whether a PFJ is in the public interest, "[t]he court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is 'within the reaches of the public interest.'" Bechtel, 648 F.2d at 666 (citations omitted). See also United States v. SBC Commc'ns, Inc., 489 F. Supp 2d 1, 17 (D.D.C. 2007) ("The 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.").

A court may only review the decree itself in relation to the complaint and cannot "effectively redraft the complaint." United States v. Microsoft Corp., 56 F.3d 1448, 1459 (D.C. Cir. 1995). Courts also should not "look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." SBC Commc'ns, 489 F. Supp 2d at 15.

Even under these extremely narrow boundaries of judicial review, as further explained below, the PFJ in this case fails to satisfy the public interest requirement. A court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree." BNS, 858 F.2d at 464. Therefore, this Court, after finding that the PFJ fails to satisfy the public interest requirement, should reject the PFJ as drafted.

IV. The Proposed Remedies Do Not Adequately Redress the Competitive Harms Alleged in the Complaint

The PFJ in this case fails to satisfy the public interest requirement, even under the narrow confines for judicial review of PFJs in antitrust cases, because it omits any remedy of a key competitive harm alleged in the Complaint: the competitiveness of non-price contractual terms in agreements between growers and processors.

In its statement of the cause of action, the DoJ specifically alleges that the transaction enhances the Defendants' ability to impose "less competitive contract terms for [grower] services."\29\ There are repeated references throughout the Complaint to this particular manifestation of the adverse competitive impact of the challenged transaction.\30\

\29\ Complaint, supra note 5, at 13.

\30\ Id. at 4, 9-11.

This concern is well-founded. Extensive past experience shows that, when competition is weak or non-existent in the market for buyers of growers' services, processors have frequently changed the terms of their contracts to exploit the growers and appropriate their investment. The facilities for raising chickens represent a significant, long-term capital investment by a grower and these facilities have only one practical economic use.\31\ A grower who makes a long term commitment to raising chickens, usually finances this with long term debt, hence in a non-competitive environment, buyers have substantial opportunity and ability to impose new, exploitive terms on growers after they have made that initial commitment. These tactics were highlighted at several of the recent Workshops on Agricultural Competition Issues jointly sponsored by the Department of Justice and the Department of Agriculture.\32\

\31\ Id. at 6-7.

\32\ In August 2009, the Attorney General Eric Holder and Agriculture Secretary Tom Vilsack announced a series of joint public workshops to explore competition issues affecting the agriculture industry, and were intended to specifically address buyer power and vertical integration. Press Release, U.S. Dep't of Justice, Justice Department and USDA to Hold Public Workshops to Explore Competition Issues in the Agriculture Industry (Aug. 5, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/248797.htm. The series of five workshops were held in Iowa, Alabama, Wisconsin, Colorado and Washington, DC and there were over 3,500 participants through the first four workshops. Christine Varney, Assistant Attorney General, U.S. Dep't of Justice, Joint DOJ and USDA Agriculture Workshops: Concluding Remarks (Dec. 8, 2010), available at http://www.justice.gov/atr/public//264911.pdf. The workshop held in Alabama was dedicated to competitive issues in the poultry market. Transcript of Record of Poultry Workshop (May 21, 2010), available at http://www.justice.gov/atr//workshops/ag2010/alabama-agworkshop-transcript.pdf.

The PFJ contains no remedy designed to address the impact that the challenged transaction will have on the terms of grower service contracts. And, in stark

contrast to the language in the Complaint, the CIS contains no discussion of the impact that the challenged transaction will have on the non-price terms of grower service contracts. Instead, there is merely a passing reference to this issue in a footnote in the CIS noting only that Defendants have assumed the existing written agreements that Tyson had with growers as of the date of the transaction and has offered to extend those contracts thru 2018.\33\ Somewhat paradoxically, the CIS explicitly reaffirms this particular potential adverse competitive impact of the merger, re-acknowledging that most growers will not abandon their initial investment in response "to small decreases in the prices (or degradations of other contract terms) they receive for their services."\34\

\33\ CIS, supra note 7, at 9 n.5.

\34\ Id. at 5-6 (emphasis added).

The DoJ's recognition of the likely harm that the merger will lead to reduced competition vis-à-vis the non-price contractual terms demonstrates the inadequacy of the PFJ. The inadequacy is three-fold.

First, as the footnote in the CIS suggests, presumably the DoJ conducted some inquiry to this particular issue. We believe that the Defendants' extension of the contracts inherited from Tyson was an implied condition of the proposed settlement. If this was in fact the case, then the PFJ should have included that as an express condition of the settlement. Implied remedies are simply inadequate and the enforceability of an implied remedy is unclear. Implied remedies should be disfavored because they do not comport with the APPA's requirement that the CIS recite "an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief." 15 U.S.C. § 16(b)(3).

Second, there is no discussion of the nature of the Defendants' extension of the Tyson agreements, nor has this Court reviewed those revised agreements. We may speculate that the DoJ in fact reviewed the revised contract terms in light of what it had learned at the Workshops to ensure that they conformed to the PSA and the corresponding administrative rules promulgated thereunder which protect growers from exploitation.\35\ Nevertheless, the DoJ provides no information on either the price or the non-price contractual provisions of the purported addendum extending the contracts thru 2018. Therefore, the public and this Court has no information upon which to determine whether or not Defendants have already exercised its enhanced market power by imposing unfavorable terms on Tyson's growers.

\35\ 7 U.S.C. §§ 181-229c (2006); 9 C.F.R. § 201.1-.200 (2011).

Third, and perhaps most disconcerting, the PFJ ignores the other side of the coin: the relationships that George's has with its existing growers. This failure even to consider the impact the transaction would have on the contracts Defendants have with their existing growers perhaps best illustrates the

omission of any significant analysis of the non-price contractual terms of grower service contracts.

The contracts that the Defendants inherited from Tyson are only part of the competitive concern raised by the Complaint. Before the transaction, Tyson growers could switch to the Defendants and vice-versa in response to unfavorable contractual provisions. At the time of the transaction, Tyson had contracts with approximately 120 growers in the Shenandoah Valley, whereas George's had contracts with approximately 190 growers.\36\ After the merger, and in light of the Pilgrim Pride's limited available capacity, Tyson's and George's growers lose the "only practicable recourse in the face of unfavorable contract terms."\37\

\36\ Id. at 4.

\37\ Complaint, supra note 5, at 11.

Assuming arguendo that the Defendants assumed and renewed the 120 or so existing Tyson contracts at their existing terms, nothing in the PFJ or the CIS addresses Defendants' potential to abuse their increased buyer power by manipulating the non-price contractual terms governing the relationship between Defendants and its 190 or so other growers. Therefore, even if the Defendants renewed the Tyson contracts as an undisclosed condition of the PFJ, that remedy alone would be inadequate because it wholly ignores the impact that the challenged transaction will have on the 190 growers whose services for the Defendants predate the transaction. Nothing in the PFJ remedies
this concern and there is no meaningful discussion of this potential harm in the CIS, even though it was heavily emphasized in the Complaint.

The DoJ's response to these three criticisms will likely be that, although not explicitly discussed in the PFJ or CIS, the proposed remedies impliedly and adequately redress the potential competitive harm of Defendants abusing their increased buyer power by degrading the non-price terms of their agreements with growers. This claim, however, is a non-sequitur.

The purported goal of the structural remedies in the PFJ is to give Defendants "the incentive and ability to increase local poultry production, thereby increasing the demand for grower services."\38\ As we stated above, we agree with the DoJ's assessment that the investments will increase Defendants' demand for grower services. We do not, however, agree that increased demand will preclude Defendants from simultaneously degrading the non-price contractual terms of its contracts with existing growers or even with new growers added in response to the expanded capacity of Defendants after they have made their initial irrevocable investment.

\38\ Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with George's Inc. (June 23, 2011), available at http://wwwjustice.goviatr/public/press_releases/2011/272510.htm.

A rational economic actor seeks to reduce the total compensation it pays suppliers. The DoJ specifically alleged that the non-price terms in grower

contracts factor into the total compensation processors pay to growers.\39\ The PFJ is inadequate because, to truly remedy the competitive harms alleged in the Complaint, the PFJ should also include a conduct remedy that prohibits Defendants from imposing unfavorable terms on growers.

\39\ Complaint, supra note 5, at 10.

Perhaps the DoJ has in mind that there is a task force that combines the GIPSA staff enforcing the PSA at the Department of Agriculture with lawyers from both the Antitrust and Civil Divisions of the DoJ whose mission is to enhance enforcement of the PSA in order to address problems of contract manipulation and exploitation. Moreover, the DoJ might have concluded that its ability under the PFJ to review contracts of the Defendants provides a means by which it could in fact monitor the Defendants' conduct and ensure that all growers working for Defendants would be protected from any violations of their rights under the PSA.

Explicitly including a requirement in the PFJ that the Defendants adhere to the PSA would have clarified the mechanism by which the DoJ expected to protect growers from abuse in the future. And, doing so would have provided greater assurance that the Defendants would voluntarily comply with those rules because such a violation would constitute contempt under the PFJ.
The DoJ, however, might prefer to see such enforcement done through the PSA process. But, if that is its preference, it should have been stated in both the PFJ and the CIS. Those statements would have made explicit how growers could trigger DoRGIPSA review of any questionable contractual actions by the Defendants.\40\

\40\ A number of federal circuit courts of appeals, contrary to the views of the Secretary of Agriculture and the Civil Division of the DoJ (as an amicus), have held that there can be no violation of the PSA or the regulations promulgated thereunder unless there is an adverse effect on consumers. See, e.g., Terry v. Tyson, 604 F.3d 272 (6th Cir. 2010) cert. denied, 131 S. Ct. 1044 (2011). The Secretary has no authority to directly enforce the PSA and corresponding regulations with respect to poultry markets. Enforcement requires either a private law suit or an action brought by the Civil Division on behalf of the Secretary. To date, we are unaware of any poultry case that the Civil Division has initiated on behalf of the Secretary and any such case would have to overcome some daunting precedents to protect growers for a buyer such as the Defendants. Hence, reliance on the Civil Division acting on behalf of the Secretary to protect growers is a process that would be novel and so would merit explicit acknowledgement so that all interested parties could be aware of this new enforcement strategy.

The incongruities between the competitive harms alleged in the Complaint and the remedies contained in the PFJ present sufficient grounds for this Court to find the PFJ not to be in the public interest. As this Court is limited to accepting or rejecting the PFJ as drafted, we respectfully request this Court reject the PFJ.

Revising the Remedies

To reiterate our earlier statement, we strongly support the DoJ's decision to bring an enforcement action for this transaction. We also applaud the DoJ for developing innovative structural remedies in response to a unique situation where the traditional structural remedy, divestiture, was apparently not feasible. These innovative structural remedies, however, only redress some of the potential competitive concerns raised in the Complaint and therefore are incomplete. Correspondingly, the Court should reject the PFJ as drafted as not in the public interest.

The DoJ should, however, fashion an amended PFJ that adequately remedies the competitive concerns set forth in the Complaint. In doing so, we offer one general and several specific recommendations. Generally, we would respectfully request that the DoJ look to the standards set forth in its own Guide to Merger Remedies ("GMR"). In that light, we also give several specific provisions that we believe will bring the amended PFJ in line with the GMR as well as the requirements of the APPA.

A. Guide to Merger Remedies

Although concededly not as binding as the standards from the APPA are on courts, the DoJ also has principles by which they craft merger remedies. These principles are set forth in the GMR, which was recently updated in June of this year, and state that "[t]here should be a close, logical nexus between the proposed remedy and the alleged violation—and the remedy should fit the violation and flow from the theory or theories of competitive harm."\41\

\41\ U.S. Dep't of Justice, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES at 4 (June 2011), available at http://www.justice.gov/atr/public/guidelines/272350.pdf.

These principles further explain why the proposed PFJ is inadequate. The competitive harm alleged in the Complaint, specifically Defendants' enhanced ability to impose unfavorable, non-price contractual provisions on growers, is not addressed by the proposed remedies set forth in the PFJ, and therefore fails to demonstrate a "close, logical nexus" with the alleged violation. Additionally, to approve a remedy that fails to comport with this basic requirement would create uncertainty regarding the GMR, which undermines the express purpose of "provid[ing] transparency into the division's approach to merger remedies for the business community, the antitrust bar, and the broader public."\42\

\42\ Press Release, U.S. Dep't of Justice, Antitrust Division Issues Updated Merger Remedies Guide (June 17, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/272365.htm.

In revising the PFJ, we ask that the DoJ follow the principles articulated in the GMR and craft a set of remedies that adequately addresses the alleged competitive harms set forth in the Complaint.

B. Our Recommendations for the Amended PFJ

We propose that the DoJ make the following changes to the PFJ to adequately address the alleged competitive concerns of the challenged transaction. We also emphasize that these changes are supplements to, not replacements of, the structural remedies contained in the initial PFJ.

First, the amended PFJ should include the Defendants' agreement to refrain from degrading the contractual provisions solely by virtue of its buyer power. While Defendants can retain the right to reduce or eliminate provisions that are beneficial to growers, this should only occur if there is mutuality, exhibited by either an increased benefit to growers under some other provision or a reduction in the obligations of the growers.

To enforce this first proposed amendment to the PFJ, the DoJ should be permitted to seek to court enforcement; but, the amended PFJ should also include a provision allowing, at the DoJ's discretion, an aggrieved grower to pursue a commercial arbitration procedure as established under the amended PFJ. The DoJ already has a template for such a condition because a similar remedy was included in the PFJ in the Comcast/NBCU merger.\43\

\43\ Proposed Final Judgment at 24-30, United States v. Comcast Corp., No. 1:11-CV-00106 (D.D.C. June 29, 2011).

Second, to monitor the Defendants' compliance with the first recommended change to the PFJ, the termination date of the amended PFJ should be changed from the time that the Defendants have completed the required investments to some reasonable time period, e.g. five or seven years. We acknowledge that in the longer term, these issues should primarily be the concern of the USDA and the Civil Division given their responsibility of enforcing the PSA and corresponding GIPSA regulations. However, as part of the antitrust remedy to avoid undue risks of harm to growers resulting directly from an acquisition that would otherwise have violated antitrust law, the Antitrust Division ought to retain authority to ensure that anticompetitive conduct does not occur.

Third, the amended PFJ should include a provision requiring the Defendants to collect any complaints from growers regarding the terms of contracts for grower services and report those complaints to the DoJ on a quarterly basis for the duration of the PFJ. The DoJ already has a template for such a provision, as they included such a provision in the Comcast/NBCU deal.\44\ In addition, the PFJ should require the Defendants annually to notify all growers of their rights under the PSA as well as their right to complain directly to the Department of Agriculture or the DoJ if they believe that they are subject to an abusive change in their contractual obligations.

\44\ Proposed Final Judgment at 17, United States v. Comcast Corp., No. 1:11-CV-00106 (D.D.C. June 29, 2011) ("Comcast and NBCU shall furnish to the Department of Justice and the Plaintiff States quarterly electronic copies of any communication . . . containing allegations of Defendants' noncompliance with any provision in this Final Judgment"), available at http://www.justice.gov/atr/cases/f272600/272610.pdf.

Fourth, the amended PFJ should establish a reasonable time in the future, e.g. three or five years from entry of the PFJ, at which point the DoJ will reassess the competitive effects that the challenged transaction has had on competition for grower services in the Shenandoah Valley. This provision should also expressly provide the DoJ with the option to require divestiture or other remedies it deems reasonable based on the results of that reassessment.

VI. Conclusion

In this matter, the DoJ has adequately answered the question: "what is the competitive harm from this transaction?" What the DoJ has failed to do is provide an answer to the question: "what is the adequate remedy?"

Under the standards of judicial review under the APPA, this Court should find that the PFJ is not in the public interest, primarily because the remedies contained in the PFJ do not adequately address the competitive harms detailed in the Complaint. Accordingly, we respectfully request that this Court reject the PFJ as drafted.

We have outlined the ways in which the DoJ can modify the PFJ to adequately address the competitive harms and thereby comport with the public interest standard. In response to the rejection of its initial PJF, the DoJ and the Defendants should submit a revised PFJ that comports with the foregoing recommendations.

Respectfully submitted,

David A. Balto
Law Offices of David Balto
1350 I Street NW, Suite 850
Washington, DC 20005

Peter C. Carstensen
George H. Young-Bascom Professor of Law
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706

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