

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAYER AG,
MONSANTO COMPANY, and
BASF SE,

Defendants.

Civil Action No. 1:18-cv-01241 (JEB)

**MOTION AND MEMORANDUM OF THE UNITED STATES
IN SUPPORT OF ENTRY OF FINAL JUDGMENT**

Pursuant to the Antitrust Procedures and Penalties Act (the “APPA” or “Tunney Act”), 15 U.S.C. §§ 16(b)-(h), Plaintiff United States moves for entry of the proposed Final Judgment filed on May 29, 2018 and attached as Exhibit 1.

The proposed Final Judgment may be entered at this time without further proceedings if the Court determines that entry is in the public interest. 15 U.S.C. § 16(e). The Competitive Impact Statement (“CIS”), filed by the United States on May 29, 2018 (Docket No. 3), and the Response of Plaintiff United States to Public Comments on the Proposed Final Judgment (“Response to Public Comments”), filed by the United States on January 29, 2019 (Docket No. 23), explain why entry of the proposed Final Judgment is in the public interest. With this motion, the United States is also filing a Certification of Compliance (attached as Exhibit 2) showing that the parties have complied with all applicable provisions of the APPA and certifying that the APPA’s 60-day public comment period has expired.

I. Background

On May 29, 2018, the United States filed a Complaint in this matter alleging that Defendant Bayer AG's ("Bayer") proposed acquisition of Defendant Monsanto Company ("Monsanto") would likely substantially lessen competition in 17 product markets in the agriculture industry, resulting in higher prices, less innovation, fewer choices, and lower-quality products for American farmers and consumers.

Simultaneously with the filing of the Complaint, the United States filed the proposed Final Judgment, which is designed to eliminate the anticompetitive effects of the proposed transaction; a stipulation signed by the parties that consents to the entry of the proposed Final Judgment after compliance with the requirements of the APPA; and the CIS. As a condition to acquiring Monsanto, Bayer was required to divest to Defendant BASF SE ("BASF") its entire global row crop seeds and traits business (with insignificant exceptions not relevant to the United States), its entire global vegetable seeds business, and all related research and development assets. Bayer also was required to divest to BASF significant crop protection assets, including its global glufosinate ammonium business and other assets to allow BASF to continue Bayer's efforts in developing new foundational herbicide systems. Finally, Bayer was required to divest to BASF certain seed treatments for corn, soy, and cotton, Bayer's digital agriculture assets, and certain other agriculture assets.

Bayer completed its acquisition of Monsanto on June 7, 2018. Bayer divested most of the assets described above to BASF on August 1, 2018 and divested the remainder (Bayer's global vegetable seeds business) on August 16, 2018.

II. The Court Should Enter the Final Judgment

A. The Requirements of the APPA Have Been Satisfied

The APPA requires a 60-day period for the submission of written comments relating to the proposed Final Judgment. 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed the proposed Final Judgment and CIS with the Court on May 29, 2018; published the proposed Final Judgment and CIS in the *Federal Register* on June 13, 2018, *see* 83 Fed. Reg. 27652; and had 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, published in *The Washington Post* on June 5-11, 2018 and in the *St. Louis Post-Dispatch* on June 3, 4, 6, and 8-11, 2018. The 60-day period for public comments ended on August 13, 2018.

The United States received 14 written comments relating to the proposed Final Judgment. On January 29, 2019, the United States filed with the Court its Response to Public Comments and then posted on the Antitrust Division's website the 14 comments and the Response to Public Comments. Pursuant to 15 U.S.C. § 16(d) and the Court's January 2, 2019 Order, on February 4, 2019, the United States published in the *Federal Register* its Response to Public Comments and the location on the Antitrust Division's website where the 14 public comments can be found. *See* 84 Fed. Reg. 1493.

The Certification of Compliance filed with this Motion and Memorandum states that all of the requirements of the APPA have been satisfied. The parties have stipulated that, upon motion of any party or upon the Court's own motion, the proposed Final Judgment may be entered by the Court at any time after compliance with the requirements of the APPA and without further notice to any party or other proceedings. Stipulation and Order § IV.A (Docket No. 2, attachment). It is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the proposed Final Judgment. Entry of the proposed

Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, enforce, or punish violations of the provisions of the Final Judgment.

B. Standard of Judicial Review under the APPA

Before entering the proposed Final Judgment, the APPA requires the Court to determine whether the proposed Final Judgment is “in the public interest.” 15 U.S.C. § 16(e)(1). In making that determination, the Court 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).

The United States described the public interest standard under the APPA in the CIS and in its Response to Public Comments. The United States incorporates those statements herein by reference.

C. Entry of the Proposed Final Judgment Is in the Public Interest

As described above, the United States alleged in its Complaint that the proposed merger of Bayer and Monsanto would likely substantially lessen competition in 17 product markets in the agriculture industry, leading to higher prices, less innovation, fewer choices, and lower-quality products for American farmers and consumers. As explained in the CIS and the Response to Public Comments, the remedy in the proposed Final Judgment is designed to eliminate the likely anticompetitive effects of this merger by requiring Bayer to divest to BASF a

wide range of assets that position BASF to step into Bayer's shoes to replace the competition that otherwise would be lost through the merger.

The Court can make the public interest determination based on the CIS and Response to Public Comments alone. Section 16(e)(2) of the APPA states that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court permit anyone to intervene.” The public, including affected competitors and customers, has had the opportunity to comment on the proposed Final Judgment as required by law. There has been no showing that the proposed settlement constitutes an abuse of the United States’ discretion or that it is not within the zone of settlements consistent with the public interest.

III. Conclusion

For the reasons set forth in this Motion and Memorandum, the CIS, and the Response to Public Comments, the Court should find that the proposed Final Judgment is in the public interest and should enter the proposed Final Judgment without further hearings. Accordingly, the United States respectfully requests that the proposed Final Judgment, attached as Exhibit 1, be entered at this time.

Dated: February 4, 2019

Respectfully submitted,

/s/

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