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April 23, 2012

Mr. William H. Stallings
Chief, Transportation, Energy and Agriculture Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 8000
Washington, DC 20530
william.stallings@usdoj.gov

Re: Comments on the proposed final judgment and settlement in *United States v. SG Interests I, Ltd.*, No. 12-cv-00395 (D. Colo. filed Feb. 15, 2012)

Dear Mr. Stallings:

On behalf of the Pitkin County Board of County Commissioners, pursuant to 15 U.S.C. § 16(b), please accept the comments on the proposed final judgment in the above captioned matter, attached to this letter as Exhibit A.

Sincerely,

Asimakis (Maki) D. Iatridis

cc: John Ely, Pitkin County (via email)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-00395-RPM-MEH

UNITED STATES OF AMERICA

Plaintiff,

v.

SG INTERESTS I, LTD.,
SG INTERESTS VII, LTC., and
GUNNISON ENERGY CORPORATION

Defendants.

COMMENTS OF PITKIN COUNTY BOARD OF COUNTY COMMISSIONERS OPPOSING THE PROPOSED FINAL JUDGMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (the "Tunney Act"), the Board of County Commissioners for Pitkin County, Colorado ("Pitkin County"), through its undersigned counsel, hereby submits the following comments opposing the proposed Final Judgment in *United States v. SG Interests I, Ltd.*, No. 12-cv-00395 (D. Colo. filed Feb. 15, 2012) (the "Antitrust Litigation").

INTRODUCTION

Although it purports to deter collusive antitrust conduct, the proposed final judgment is no deterrent. The defendant energy companies came together and agreed to manipulate prices at public auctions for federal oil and gas leases. Not only does the settlement allow these corporations to retain their status as co-lessees on leases that were procured through illegal

collusive bidding, but it allows them to pay only the amount that they would have paid had they not colluded. As a result, nothing deters these companies—or others—from continuing this illegal practice because it leaves them in the same place as if they had abided by the law. This is not a deterrent. In fact, by not holding these companies accountable for 18 of the 22 leases that were part of their collusive agreement—the settlement requires them to only pay what they should have paid on four of the 22 leases—it lets these companies off the hook, putting them in a better position than if they had complied with the law. Given the numerous other leases that these companies bid on, the incentive created by the settlement is to continue the illegal practice, rely on the likelihood that they will not get caught on other leases, and hence realize a net illegal savings when averaged across all leases. For these reasons, the proposed final judgment fails to protect the "public interest," as required by the Tunney Act. It therefore should be revised to reflect an appropriate remedy and to deter others from engaging in this collusive and illegal behavior.

BACKGROUND

The Defendants in this case are two related entities, SG Interests I, Ltd. and SG Interests VII, Ltd. (collectively, "SG") and a third entity, Gunnison Energy Corporation ("GEC"). Beginning in 2001, the corporations independently acquired and developed oil and gas leases in different areas of the Thompson Divide region of Colorado. According to the Antitrust Complaint, by 2003, they started competing for the same federal oil and gas leases.

On October 20, 2009, the former vice president of oil and gas development at GEC, Anthony Gale, filed a *qui tam* complaint pursuant to the False Claims Act ("FCA") against GEC and SG in the matter titled *United States ex rel. Gale v. Gunnison Energy Corp.*, No. 09-cv-

02471 (D. Colo. filed Oct. 20, 2009) (the "FCA Litigation"). Mr. Gale alleged that the companies entered into an illegal agreement to refrain from bidding against each other at public auctions for 22 oil and gas leases in the Ragged Mountain area of Colorado, located in the Thompson Divide. (FCA Litigation *doc. #1* at 1.) Specifically, the FCA Complaint alleges that the companies executed a memorandum of understanding on February 8, 2005 (the "MOU," FCA Litigation *doc. # 1*, Exhibit 2), where GEC agreed not to bid at United States Bureau of Land Management ("BLM") auctions so that SG could win the offered leases at a below-fair-market price. (*Id.* at 4.) In turn, SG agreed to transfer a fifty percent interest to GEC if it won these leases. (*Id.*) The two parties split the payments for the leases 50-50. (*Id.*)

The FCA Complaint goes on to allege that GEC never competed against SG in federal auctions after they entered into the MOU. (*Id.* at 5.) As a result of this collusive behavior, SG won bids on 22 parcels in the Ragged Mountain area, totalling 24,834.17 acres, for a price of $2,348,655.78. (*Id.*) SG then transferred a fifty percent interest to GEC in each parcel, as set forth in the terms of the MOU. (*Id.*) The FCA Complaint also notes that a vice president of SG stated in a deposition that the parties entered into the MOU because it was more "efficient" than "driving prices up" by bidding against each other. (*Id.* at 6.)

Gale asserted claims under the False Claims Act, 31 U.S.C. § 3730(b). (*Id.* at 1.) At the auctions, SG was required to sign a bid form stating that it arrived at its bids independently, without collusion, and without violating a criminal statute banning bid rigging, 18 U.S.C. § 1860. (*Id.* at 4.) These false certifications to the government allegedly violated Section G of the FCA, 31 U.S.C. § 3729(a)(1)(G). (*Id.* at 7.)

On February 15, 2012, the Antitrust Division of the United States Department of Justice filed the complaint in this current litigation, naming GEC and SG as defendants (collectively, the "Defendants"). The Antitrust Complaint addresses much of the same conduct as the FCA Complaint; its allegations focus on the collusive bidding procedures and the MOU. (Antitrust Litigation *doc. #1* at 4.) However, instead of alleging improper bidding on 22 federal leases, the Antitrust Complaint limits the violation to bids on just four leases sold at February and May 2005 BLM auctions. (*Id.* at 5–6.) The Antitrust Complaint notes that the Defendants set a ceiling price for each parcel before the auction. (*Id.*) Further, while the FCA Complaint makes claims under the False Claims Act, the Antitrust Complaint alleges antitrust violations of the Sherman Act. (*Id.* at 7.)

As an example of the collusive agreement, the Antitrust Complaint notes that, before bidding on the fourth lease, the Defendants agreed to a ceiling price of $300 per acre for the parcel. (*Id.* at 6.) At the auction, SG won this same parcel for the Defendants by bidding a mere $2 per acre. (*Id.*)

In its prayer for relief, the Antitrust Complaint asks that the court "award [the United States] treble damages for the losses it incurred as a result of Defendants' conduct" pursuant to the Sherman Act. (*Id.*)

On the same day that the United States filed the Antitrust Complaint, it also filed a Competitive Impact Statement (Antitrust Litigation *doc. #5*) and a Stipulation (Antitrust Litigation *doc. #4*). Attached to the Stipulation was the proposed Final Judgment, which would require GEC and SG to pay $275,000 each to the United States "to satisfy claims that the United States has…under both the False Claims Act and the Sherman Act." (Antitrust Litigation *doc.*

#4, Exhibit A at 2.) According to the DOJ's Competitive Impact Statement, these payments "reflect[ ] the likely additional bid revenue that the BLM would have received had [the Defendants] acted as independent competitors at the…auctions. Requiring [the Defendants] to pay damages in these circumstances will protect the public interest by deterring them and other parties from entering into similar anticompetitive agreements in the future." (Antitrust Litigation *doc. #5* at 7.) Thus, the goal of protecting the public interest is achieved by deterrence. Despite the complaint's claim for treble damages, the Competitive Impact Statement states that these $275,000 payments "would achieve all or substantially all of the relief the United States would have obtained through litigation." (*Id.* at 9.)

Also attached to the Stipulation were two proposed settlement agreements: the first among SG, the United States, and Mr. Gale, and the second among GEC, the United States, and Mr. Gale. The agreements mirror each other, and release the Defendants from various liability on not only the four bids mentioned in the Antitrust Complaint, but for all activities surrounding the 22 federal oil and gas bids that they won between February 10, 2005 and November 9, 2006. (Antitrust Litigation *doc. #5*, Attachments 1, 2.) According to BLM records, the Defendants are still co-lessees on all 22 parcels, along with 11 other parcels not mentioned in either the FCA or Antitrust Litigations.

In exchange for the two $275,000 payments, the settlement agreements state that the United States agrees to release SG and GEC

> from any civil monetary claim the United States has for the Covered Conduct under the False Claims Act…and the Program Fraud Civil Remedies Act…from any claim the United States Department of the Interior may have for debarment of SG from participating in leasing under the Mineral Leasing Act and Minerals Leasing Act for Acquired Lands…from any civil

> monetary claim the United States has under common law theories of breach of contract, payment by mistake, unjust enrichment, disgorgement, negligent misrepresentation, and fraud. SG's full payment of this Settlement Amount will also satisfy claims that the United States has against SG under Section 1 of the Sherman Antitrust Act.

(Antitrust Litigation *doc. #5*, Attachments 1, 2 at 3–4.) The proposed judgment and settlement agreements are currently pending before the District Court.

Under the Tunney Act, once the United States files a proposed judgment in an antitrust case, the public has 60 days to submit comments on the proposal. 15 U.S.C. § 16(b). The United States must file these comments with the District Court and publish them in the Federal Register. *Id.* Then, the United States is required to file a response to the concerns raised in the comments. 15 U.S.C. § 16(d).

PITKIN COUNTY'S INTEREST IN THE ANTITRUST LITIGATION

The Defendants' antitrust violations affected leases located in the Ragged Mountain area of western Colorado. As noted in the Competitive Impact Statement, this Ragged Mountain area includes lands located in Pitkin County. (Antitrust Litigation *doc. #5* at 2 n.1.) According to BLM land records, SG has an interest in a total of 69 oil and gas leases in the Thompson Divide area, many of which are located in Pitkin County. The BLM is currently considering a proposal from SG to unitize several leases in the Lake Ridge area of the Thompson Divide. The plan would extend the lease term for 16 parcels owned by SG that are currently set to expire in 2013. If it is approved, the proposal would affect 32,000 acres of public lands, and would have a severe environmental impact on lands located in Pitkin County. The Lake Ridge leases are located near the Ragged Mountain leases; both are in the Thompson Divide. *See* map attached hereto as

Exhibit A (approximate area of the Lake Ridge leases is highlighted in yellow; approximate area of the Ragged Mountain leases is highlighted in red).

As companies like SG and GEC continue to pursue federal oil and gas leases in the Thompson Divide, Pitkin County has an interest in ensuring that this land is being acquired fairly and by entities that obey the law. The Board of County Commissioners for Pitkin County is an elected body that directly represents the public interest. It has a stake in seeing that oil and gas companies are not undermining and manipulating the market for federal leases by acquiring parcels at illegal cut-rate prices.

SG purchased 12 of the 16 leases in the proposed Lake Ridge unitization for the federal minimum of $2 per acre. The highest price that SG paid for the remaining four parcels was $6 per acre. The complaints in both the FCA Litigation and the Antitrust Litigation suggest that the Defendants were willing to engage in illegal activity in order to win federal leases at below-market prices. The lowest illegal prices cited in the FCA Litigation and the Antitrust Litigation are similar to the low prices paid for the leases in the Lake Ridge area. Further illegal activity was suggested in yet another federal litigation involving both Defendants, *Riviera Drilling & Exploration Co. v. Gunnison Energy Corp.*, No. 08-cv-02486 (D. Colo. filed Nov. 14, 2008). Similar to the FCA and Antitrust Litigations, this lawsuit alleged that the Defendants committed antitrust and monopoly violations. This case was dismissed only after plaintiff's counsel withdrew because the plaintiff filed for bankruptcy and could not pay its fees.

Given these three lawsuits, Pitkin County is concerned that SG—and other companies—will be allowed to explore and drill on land in Pitkin County in violation of federal law and despite violations of federal law for the Ragged Mountain leases. SG's winning bids on parcels

located in Pitkin County may have been the product of similar illegal activity as that alleged in these federal lawsuits. This is cause for serious concern. As an elected body, the Board of County Commissioners directly represents the public interest in this region. Pitkin County wants to ensure that this illegal conduct is punished appropriately so that potential offenders are deterred by being warned that the government will not tolerate this collusive activity. The government has an obligation to deter oil and gas companies from illegally acquiring and operating leases in Pitkin County.

STANDARD OF REVIEW

Before accepting any consent judgment proposed by the United States in a civil antitrust action under the Sherman Act, "the court shall determine that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e)(1). As part of this inquiry, the court must 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).

"Extrapolating from these factors, courts have developed a two-prong public interest inquiry. First, courts inquire as to whether the proposed relief effectively will foreclose the possibility that antitrust violations will occur or recur.…Second, courts consider whether the

relief impinges upon other public policies." *United States v. Airline Traffic Pub. Co.*, 836 F. Supp. 9, 11–12 (D. D.C. 1993). To be effective, antitrust remedies must "prevent[ ] the recurrence of anticompetitive activity." *Id.* at 12.

"The legislators [behind the Tunney Act] found that consent decrees often failed to provide appropriate relief, either because of miscalculations by the Justice Department or because of the 'great influence and economic power' wielded by antitrust violators." *United States v. AT&T*, 552 F. Supp. 131, 148 (D. D.C. 1982).

"[I]n light of the history and purpose of the Tunney Act, it is abundantly clear that the courts were not to be mere rubber stamps, accepting whatever [proposed judgment] the parties might present." *United States v. GTE Corp.*, 603 F. Supp. 730, 740 n.42 (D. D.C. 1984). Courts have "refused to accept or approve those provisions [that they do] not find to meet the public interest standard." *Id.* (citing *AT&T*, 552 F. Supp. at 147–53).

"The legislative history reveals that the sponsors of the Act were concerned that the Department of Justice had settled some civil antitrust cases on what they believed to have been unfavorable terms. Senator Tunney spoke of several 'blatantly inequitable and improper antitrust settlements.'…The Act appears to have been intended to prevent the Department of Justice from settling civil antitrust cases on terms less favorable than Congress thought it should obtain." *Maryland v. United States*, 460 U.S. 1001, 1003 (1983) (Rehnquist, J., dissenting from summary affirmance).

In 2004, Congress amended the Tunney Act to strengthen the review process and ensure that district courts were not engaging in judicial rubber-stamping. In the Congressional findings and declarations of purposes preamble, the legislators stated that "it would misconstrue the

meaning and Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgments would make a 'mockery of the judicial function.'" Pub. L. 108-237, Title II, § 221(a)(1)(B), June 22, 2004, 118 Stat. 668. This amendment responded to an improper standard set forth in *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995) (setting forth the "mockery" standard), a case relied upon by the United States in its Competitive Impact Statement for its standard of review. (*See* Antitrust Litigation *doc. #5* at 10–12); *see also* Lloyd C. Anderson, *Mocking the Public Interest: Congress Restores Meaningful Judicial Review of Government Antitrust Consent Decrees*, 31 Vt. L. Rev. 593 (2007).

COMMENT

While Pitkin County commends Mr. Gale and the Department of Justice for their efforts to enforce the antitrust law in the federal oil and gas leasing context, it believes that the proposed judgment and settlements ultimately do not protect the public interest. The United States must set a strong precedent so that companies will be deterred from committing similar violations in the future. Additionally, the proposed judgment and settlement cannot go forward because the Defendants have not fulfilled their disclosure requirements under the Tunney Act.

I. The proposed judgment and settlement are lenient and do nothing to deter future antitrust violations; in fact, the settlements encourage future antitrust violations.

The proposed judgment and settlement fail to impose any penalty. The Defendants are allowed to only pay the amount that they would have paid had they competed against each other (i.e., had they abided by the law) when they bid on four leases. In other words, the Defendants' "punishment" is that they must give the same amount of money to the government that they would have given if they had not participated in illegal bid rigging.

This is no punishment at all. The Defendants are able to continue operating these ill-gotten leases; they are able to continue to submit bids for new leases; and they are able to walk away from their bid-rigging scheme without paying the treble damages that would necessarily be part of any antitrust judgment. Further, the proposal absolves them of collusive conduct for the other 18 leases that were allegedly part of the same scheme. One of the main considerations for a court in determining whether a proposed judgment is in the public interest is “the impact of entry of such judgment upon competition in the relevant market.” 15 U.S.C. § 16(e)(1)(B). The proposed settlement all but encourages potential bidders to enter into illegal agreements to manipulate bid prices because it imposes no punishment on the offenders. It also fails to account for any other violations under the United States Code.

And while the punishment is narrow and lenient, the release is broad and comprehensive. It absolves the Defendants of liability for all 22 leases, not just the four that provide the basis for damages. It releases the Defendants from liability not only under the antitrust laws, but also under the False Claims Act, the Program Fraud Civil Remedies Act, the Mineral Leasing Act, the Mineral Leasing Act for Acquired Lands, and any common law claims that the government might have. The settlement also fails to include any prospective sanctions for the Defendants. And the Defendants received this broad release in exchange for only paying what they should have paid in the first place on only four of the 22 leases. The proposal does nothing to deter the Defendants or other potential offenders from violating the law in the future, and therefore does not serve the public interest.

A. Bid rigging is a per se violation that must be punished.

Collusive bidding is a particularly egregious violation of the antitrust statutes. Courts have recognized that some business practices are "so destructive of competition that [they are] considered per se violations of the Sherman Act." *Richard Hoffman Corp. v. Integrated Bldg. Sys., Inc.*, 581 F. Supp. 367, 372 (N.D. Ill. 1984). As Justice Black once wrote,

> there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable-an inquiry so often wholly fruitless when undertaken.

N. Pac. Ry. Co. v. United States 356 U.S. 1, 5 (1958).

Collusive bidding falls into this category: "Any agreement between competitors pursuant to which contract offers are to be submitted or withheld from a third party constitutes bid rigging per se violative of [the Sherman Act]." *United States v. Mobil Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989). In the criminal context, the Federal Sentencing Guidelines recognize that bid rigging is the one specific antitrust violation that merits an increase in the offense level given the nature of the crime alone. *See* U.S. Sentencing Guidelines Manual § 2R1.1(b)(1). Neither good motives nor belief that one's activities are legal are available defenses to a bid-rigging claim. *United States v. Guthrie*, 814 F. Supp. 942, 951 (E.D. Wash. 1993).

The Defendants' MOU is a straight-forward per se violation. The agreement explicitly establishes that SG "act[ed] as the nominee for" the Defendants at federal auctions after they "mutually establish[ed] a ceiling price." (FCA Litigation *doc. #1*, Exhibit 2 at 1.) SG would then "in turn promptly assign a fifty percent (50%) interest" to GEC. (*Id.*) Not only that, but SG's 30(b)(6) representative stated in a deposition that the Defendants entered into the agreement because it "would have been more efficient and less costly to acquire these entity leases jointly with [GEC] rather than drive up the prices at a lease sale." (FCA Litigation *doc. #1*, Exhibit 3.)

Pitkin County is not arguing that the proposed settlement is faulty because the government has a strong case. The strength of the case is not a factor in determining whether a consent decree is in the public interest. *United States v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235, 239 (S.D.N.Y. 1997) (citing Tunney Act legislative history). Rather, it believes that the settlement must recognize—as federal courts and the legislative branch have—that bid rigging is an antitrust violation that is particularly harmful to the public interest. The Defendants got together for the purpose of manipulating bid prices for valuable federal land in an area with very high environmental value, the Thompson Divide. And the plan worked well: the companies were both willing to pay $300 per acre for a certain parcel and ended up getting that same land for $2 per acre—the lowest price that the government allows. As the DOJ stated in its own press release on this matter, "[a]t a time of budgetary constraint, it is crucial that the federal government receive the most competitive prices for these important leases, which ultimately benefits American taxpayers." Press Release, Department of Justice, *Justice Department*

Settlement Requires Gunnison Energy and SG Interests to pay the United States a Total of $550,000 for Antitrust and False Claims Act Violations (Feb. 15, 2012).

With this in mind, the settlement must reflect these principles by sending a real message that the government will not tolerate this type of behavior. As the settlement stands, the monetary amount to be paid by the Defendants fails to set this important precedent. Without additional amounts and harsher sanctions, there is no deterrent, and the public interest is compromised. The proposed judgment in effect incentivizes bidders to push the limits of antitrust law. It fails to explain why the settlement absolves the Defendants of liability for the 18 other leases without having to pay damages for that collusive activity. According to the FCA Complaint and BLM land records, these leases were won using the same strategy as the other four leases: one entity submitted the bid without competition from the other, and then the winning bidder transferred a partial interest in that lease to the other entity after it won. Before the collusive agreement, the companies were competitors who bid against each other. After the collusive agreement, they eliminated competition for these 18 leases. Yet the proposed judgment and the competitive impact statement lack any explanation of why the Defendants are being released from liability for these 18 leases. The evidence suggests that, similar to the first four leases, these 18 leases were the product of a bid-rigging agreement between SG and GEC. If so, the Defendants should also have to face damages for this collusive behavior for the 18 leases. Instead, the proposed settlement relieves the Defendants of all liability for the 18 leases. The impact on "competition in the relevant market" is to encourage further manipulations of oil and gas lease prices. This undermines both the purpose of antitrust law and the public interest.

Allowing the companies to pay only that which they should have paid had they followed the law is not a deterrent. It requires them to pay like all other law abiding companies. It puts them on the same footing as law abiding companies. Pitkin County does not understand how equalizing an illegal company with legal companies constitutes a deterrent for a per se antitrust violation. This is particularly true because the Competitive Impact Statement does not discuss any alternative remedies considered and the anticipated effects of alternative remedies actually considered, as it should have. 15 U.S.C. § 16(e)(1)(A). Instead, it merely contains a cursory, boilerplate statement that the United States considered a "full trial on the merits," but that the proposed Final Judgment "achieve[s] all or substantially all of the relief the United States would have obtained through litigation." (Antitrust Litigation *doc. #5* at 9.) As discussed below, the United States would have obtained more through litigation.

B. The Sherman Act requires courts to impose treble damages on civil defendants who violate antitrust laws.

Antitrust treble damages are mandated by statute for the particular purpose of deterring anticompetitive conduct. The antitrust statutes provide that the United States "shall recover threefold the damages" whenever it is "injured in its business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15A (emphasis added). The "principal purpose of the antitrust private cause of action…is, of course, to deter anticompetitive practices." *Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 (1982). Further, the Sherman Act carries the "plainly stated congressional objective…that the private treble-damages action play a paramount role in the enforcement of the fundamental economic policy of the Nation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 755 (1977). The Supreme Court "has concluded that 'the purposes of the antitrust laws are best served by insuring that the private action will be an ever-

present threat to deter anyone contemplating business behavior in violation of the antitrust laws.'" *Id.* (quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968)). "[A]ntitrust treble damages were designed in part to punish past violations of the antitrust laws…[b]ut treble damages were also designed to deter future antitrust violations." *Hydrolevel*, 456 U.S. at 572. Therefore, treble damages are a true deterrent.

In the Antitrust Complaint's prayer for relief, the government claims the treble damages that are mandated by the Sherman Act. However, the proposed settlement and judgment disregards this mandate, ignoring the deterrent goals of antitrust law. Such a lenient settlement is not in the public interest. A deterrent component is necessary.

The Competitive Impact Statement presents the $550,000 payment as "the likely additional bid revenue that the BLM would have received" had the Defendants not colluded on four leases. The payment supposedly "protect[s] the public interest by deterring them and other parties from entering into similar anticompetitive agreements in the future." As explained above, however, treble damages are the true deterrent designed to protect the public interest. This business-as-usual payment, on the other hand, tells the offenders that, if they break the antitrust laws, they will only be liable for the amount that a law-abiding company would have paid. The settlement incentivizes potential offenders to take a risk when considering whether to enter into a bid-rigging scheme—at the worst, they'll only have to pay what other legal companies are paying. But when their illegal conduct is averaged out between leases they obtained illegally and leases where they got caught, the illegal companies pay below-market rates for leases on average. Here, paying the market rate for four leases as a "penalty" and below-market rate for 18 leases resulted in a below-market average for all 22 leases. In effect, the DOJ is releasing the

Defendants from liability without even making them pay what lawful companies would have paid. This is not even a slap on the wrist. It has no deterrent effect.

The Antitrust Complaint also states that the $550,000 payment "would achieve all or substantially all of the relief the United States would have obtained through litigation." (Antitrust Litigation *doc. #5* at 9.) If the payment represents the amount that the Defendants would have paid absent a collusive agreement, this statement cannot be correct. The Sherman Act's treble damage provision is *mandatory*, not discretionary. The statute employs the word "shall." The $550,000 would be transformed into $1.65 million if the United States pursued the antitrust claims in court. Again, instead of deterring the Defendants and others, the proposed judgment chooses a route that undermines the goals of the antitrust laws and compromises the public interest.

C. The proposed settlement ignores other violations of the United States Code.

Aside from the fact that the government has not pursued treble damages and has only made the Defendants pay what law-abiding bidders would have paid, the settlement is not in the public interest because it disregards other sanctions and penalties that are directly related to the Defendants' antitrust violations.

First, the proposed judgment and settlement do not address the other 18 leases that were allegedly a part of the same collusive behavior. The FCA Complaint includes a chart outlining each of these parcels that are currently co-leased by the Defendants. The settlement addresses the 3,567.54 acres worth of leases that were auctioned off in February and May 2005, but does not address the remaining 21,266.63 acres sold to SG at August 2005, November 2005, August 2006, and November 2006 auctions. According to BLM records, these parcels are all now co-

leased between SG and GEC. If SG bid on the leases after the Defendants reached an agreed-upon ceiling price, and then SG transferred an interest to GEC once it won the bids, it would follow that the Defendants should pay damages for these leases as well. As discussed above, collusive bid-rigging is a per se violation of the Sherman Act, and neither good motives nor belief that one's activities are legal absolve a defendant of liability.

The proposed settlement releases the Defendants from liability for these additional 18 leases, yet it does not use these leases as a basis for calculating damages. By failing to both punish the Defendants for these collusive activities and deter others from similar illegal conduct, the proposed judgment and settlement fail to serve the public interest. The District Court must consider the settlement's effect on "competition in the relevant market." In this instance, the effect is to encourage bid-rigging, thus setting a dangerous precedent that suggests that the federal government will allow companies to come together to manipulate the market for oil and gas leases without punishing this illegal behavior. If the government allows this conduct, it will receive less than market value at auctions, thus hurting everyone except the companies that have chosen to engage in antitrust violations. This is certainly not in the public interest.

Further, the United States could have pursued additional claims under the False Claims Act, the Program Fraud Civil Remedies Act, the Mineral Leasing Act, and the Mineral Leasing Act for Acquired Lands, as well as common law claims for damages. However, while the settlement releases the Defendants from liability for all of these potential claims, the $550,000 payment does not account for any of these violations. The settlement even states that the payment "satisf[ies] claims that the United States has…under *both the False Claims Act* and the Sherman Act." (Antitrust Litigation *doc. #4*, Exhibit A at 2 (emphasis added).) As discussed

above, if the payment is supposed to represent only Sherman Act damages, it is severely inadequate. But given that the DOJ has stated that it is also supposed to account for False Claims Act damages, it is even more ineffective. The False Claims Act provides for a penalty for each misrepresentation that a defendant makes to the federal government (in this case, up to 22 instances), plus treble damages. *See* 31 U.S.C. § 3729(a)(1). As alleged in the FCA Complaint, the Defendants had to certify with each bid that they were not engaged in collusive bidding. Despite these false claims, the proposed settlement releases the Defendants for FCA liability, but imposes no penalty under the FCA. Having them pay what they should have paid cannot be considered a "penalty."

The proposed settlement also neglects to impose any injunctive relief on the Defendants. The Mineral Leasing Act provides that, in a civil action, an appropriate remedy includes a "prohibition from participation in exploration, leasing, or development of any Federal mineral." 30 U.S.C. § 195(c). This prohibition is also known as "debarment." It would be a proper sanction here because it would create a real deterrent by letting all bidders know that the government will not tolerate collusive bid rigging in federal oil and gas auctions. Instead of protecting the public interest, however, the proposed settlement allows both Defendants to continue operating their existing leases as co-lessees, and to continue bidding for federal parcels. This is an inadequate remedy for both the government and the public. Debarment should be a sanction here.

D. <u>This case is the first of its kind, and thus the government must set an important precedent</u>.

The Department of Justice has acknowledged that the Antitrust Complaint "marks the first time the [DOJ] has challenged an anticompetitive bidding agreement for mineral rights

leases." Press Release, Department of Justice, *Justice Department Settlement Requires Gunnison Energy and SG Interests to pay the United States a Total of $550,000 for Antitrust and False Claims Act Violations* (Feb. 15, 2012). The Attorney General's office proclaimed that the proposed settlement is supposed to "demonstrate[ ] the U.S. government's resolve to ensure there is vigorous competition for federal oil and gas rights." *Id.*

After reviewing the reasons discussed above alone, the proposed judgment and settlement do nothing to protect the public interest and ensure vigorous competition. Unfortunately, those inadequacies are magnified by the fact that this settlement will set the tone for this industry. Currently, there is an oil and gas boom, with companies seeking numerous properties to develop. Without a real deterrent to prospective bidders, companies will follow the illegal collusive conduct instead of avoiding it. As drafted, the government tells offenders that, at the worst, they will only have to pay the amount that they would have paid if they obeyed the law—and only on some of their illegal bids. As the flagship case for bid-rigging on federal lease auctions, the government must send a stronger message to protect the public interest.

Changing an inadequate decree is not without precedent. In one case, a district court went through three versions of an antitrust consent decree before it was satisfied that the final version met Tunney Act standards. *See United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432, 434 (C.D. Cal. 1967). In another, the court felt it necessary to modify a proposed decree to preclude a company from entering a particular market until the risk of that company's monopoly power was abated. *AT&T*, 552 F. Supp. at 224. As a third example, a court refused to accept part of a consent decree where it "[did] not effectively remedy the anticompetitive

effects...alleged in the complaint." *United States v. Thompson*, 949 F. Supp. 907, 929 (D. D.C. 1996).

Similarly, the proposed final judgment in this case does not effectively address the allegations in the complaint, nor does it match up with the competitive impact statement, and therefore it must be modified. The $550,000 payment does nothing to deter future illegal conduct throughout the industry. The competitive impact statement calls the two settlement agreements the "determinative documents" that led the United States to reach its proposed final judgment. These settlements release the Defendants from liability for both a broad range of statutory violations—not merely the antitrust laws—and a broad number of leases—not merely the four leases that were used to calculate damages. Yet there is no explanation in the competitive impact statement regarding why such a broad release is warranted. "The primary focus of the Department's enforcement policy should be to obtain a judgment—either litigated or consensual—which protects the public by insuring healthy competition in the future." *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29, 45 (W.D. Mo. 1975). In this case, that standard has not been met. By undermining these public auctions, the Defendants tried to cheat the government—and the taxpayers—out of revenue. The proposed final judgment is not in the public interest, and must be modified to present a real deterrent to companies considering this type of per se antitrust violation.

II. <u>The Defendants have failed to comply with the disclosure provisions of the Tunney Act</u>.

There is another reason that the District Court cannot accept the proposed settlement and judgment: the Defendants have not complied with disclosure requirements that must be met before any consent decree is approved.

The Tunney Act requires every defendant to "file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal." 15 U.S.C. § 16(g). The disclosure must be made "[n]ot later than 10 days following the date of the filing of any proposal for a consent judgment." *Id.* The only communications excepted from this requirement are those "made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone." *Id.* (emphasis added). Section 16(g) was put in place to "insure that no loopholes exist in the obligation to disclose all lobbying contacts made by defendants in antitrust cases culminating in a proposal for a consent decree." H.R. Rep. 93-1463 at 6543 (1974).

The parties filed the proposed Final Judgment on February 15, 2012. Since then, the 10-day deadline has come and gone, and none of the Defendants have met the filing requirements of 15 U.S.C. § 16(g). This raises further questions about an already-inadequate settlement. The failure to disclose also precludes the District Court from accepting the proposed Final Judgment: "Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with…." *Id.*

CONCLUSION

The authors of the Tunney Act and Congress had the "clear intent to insure that the courts have discretion and an active role in the determination of the public interest." John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the*

"Microsoft Fallacies", 34 Loy. U. Chic. L.J. 749, 780 (2003). The court has a responsibility "to compare the complaint filed by the government with the proposed consent decree and determine whether the remedies negotiated between the parties and proposed by the Justice Department clearly and effectively address the anticompetitive harms initially identified." *Thomson Corp.*, 949 F. Supp. at 913. As currently drafted, the proposed judgment and settlement do not protect the public interest, and do not address these serious antitrust violations.

Consider an analogous situation where a government employee steals $550,000 from his employer. Would other government employees be deterred from this type of conduct if the government merely made him return the money without any further repercussions? Would the government release him from all liability in exchange for this minimal payment? And would the government let that employee keep his job? That is essentially what is happening with the Defendants: not only are they merely paying what they would have paid as law-abiding bidders, but they are also allowed to both continue leasing the ill-gotten federal lands and continue bidding on future parcels.

Pitkin County asks the Department of Justice to reconsider the proposed judgment and settlement in this case. The settlement should reflect the fact that the Defendants would be liable for treble damages in any antitrust lawsuit for all 22 leases. It should also account for the other federal claims that the United States has decided to include as part of the Defendants' broad release. Specifically, the DOJ should consider debarring Defendants' activities as lessees on federal lands in Colorado and debarring them from future bidding for several years. Finally, the Defendants must remedy their failure to disclose their communications with the DOJ regarding this litigation.

Respectfully submitted this 23rd day of April, 2012.

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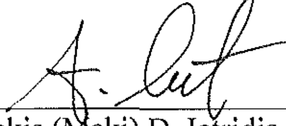

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Thompson Divide Area
With Oil and Gas Leases
Glenwood Springs
Cattle Creek
Kiggin
Red Hill (7,006 feet)
Satank
Carbondale
White Hill
Holgate Mesa (7,541 feet)
Center Mountain (8,535 feet)
Bald Mountain (10,371 feet)
Sunlight Peak (10,571 feet)
Uncle Bob Mountain (9,181 feet)
Twin Peaks (10,775 feet)
Flat Top Mountain (9,492 feet)
Quaker Mesa (8,968 feet)
Hightower Mountain (9,515 feet)
Reno Mountain (9,761 feet)
Ruth Mountain (9,214 feet)
Porter Mountain (9,958 feet)
Elk Knob (9,689 feet)
Spruce Mountain (10,791 feet)
Oil Well Mountain (10,079 feet)
Bronco Knob (10,132 feet)
Chalk Mountain (11,149 feet)
Electric Mountain (10,293 feet)
Redstone
Placita
Patterson Place
Harry Parker Place
Bull Mountain (8,177 feet)
Pilot Knob (9,673 feet)
Buck Mesa (9,807 feet)
Elk Mountain (11,805 feet)
Gallo Hill (10,286 feet)
Marble
Chair Mountain (12,713 feet)
Ragged Peak (12,592 feet)
Ragged Mountain (12,074 feet)
Goose Hill (7,954 feet)
GARFIELD
MESA
PITKIN
DELTA
GUNNISON
Crystal River
North Thompson Creek
Thompson Creek
Legend
Thompson Divide Area
Community
Mountain
Highway
Major Road
Local Road
Stream
Lake
County Line
City
Pending Leases
Leases Held By Production
Other Leases
0 1 2 3 4 5
Miles
Data Sources: Geographic Names from USGS GNIS. Roads and Trails CDOT 2008/9, USFS 2008/9. Lakes and Streams CDOT 2009. Land Ownership from COMaP v8 2008.