DEPARTMENT OF JUSTICE
Antitrust Division

United States of America v. ConAgra Foods, Inc, et al.

Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in United States of America v. ConAgra Foods, Inc., et al., Civil Action No. 1:14-cv-823. On May 20, 2014, the United States filed a Complaint alleging that the combination of the wheat flour milling assets of ConAgra Foods, Inc. and Horizon Milling, LLC (a joint venture between Cargill, Inc. and CHS, Inc.) to form a joint venture to be known as Ardent Mills would violate Section 7 of the Clayton Act, 15 U.S.C. §18, and Section 1 of the Sherman Act, 15 U.S.C. §1. The proposed Final Judgment, filed the same time as the Complaint, requires Ardent Mills to divest flour mills located in Los Angeles, California; New Prague, Minnesota; Oakland, California; and Saginaw, Texas, along with certain tangible and intangible assets.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 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 District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments,

including the name of the submitter, and responses thereto, will be posted on the U.S. Department of Justice, Antitrust Division's internet website, filed with the Court and, under certain circumstances, published in the Federal Register. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, Department of Justice, 450 Fifth Street., NW, Suite 8700, Washington, DC 20530.

_____
Patricia A. Brink,
Director of Civil Enforcement.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
United States Department of Justice
Antitrust Division
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 20530

Plaintiff,

v.

CONAGRA FOODS, INC.
One ConAgra Drive
Omaha, Nebraska 68102,

HORIZON MILLING, LLC
15407 McGinty Road West
Wayzata, Minnesota 55391,

CARGILL, INCORPORATED
15407 McGinty Road West
Wayzata, Minnesota 55391,

and

CHS INC.
5500 Cenex Drive
Inver Grove Heights, Minnesota 55077,

Defendants.

Case No.: 1:14-cv-00823

Judge: Hon. Ketanji Brown Jackson

Filed: 05/20/2014

COMPLAINT

The United States of America ("United States"), acting under the direction of the Attorney General of the United States, brings this civil antitrust action against Defendants ConAgra Foods, Inc. ("ConAgra"), Horizon Milling, LLC ("Horizon"), Cargill, Incorporated ("Cargill"), and CHS Inc. ("CHS") to enjoin the formation of a flour milling joint venture to be known as Ardent Mills ("Ardent Mills" or "the joint venture").

Ardent Mills would be formed by combining the flour milling assets of Horizon (a joint venture between Cargill and CHS) and ConAgra Mills (a subsidiary of ConAgra). Horizon and ConAgra Mills are two of the three largest flour millers in the United States, as measured by capacity. Horizon and ConAgra Mills are significant competitors in the sale of hard and soft wheat flour in Southern California and Northern Texas; they also are significant competitors in the sale of hard wheat flour in Northern California and the Upper Midwest. The formation of Ardent Mills likely would lessen competition in each of these markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1.

I. JURISDICTION, VENUE, AND COMMERCE

1. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, and Section 4 of the Sherman Act, 15 U.S.C. § 4, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Defendants produce and sell flour in the flow of interstate commerce. Defendants' activities in the production and sale of flour substantially affect interstate commerce. This Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25; Section 4 of the Sherman Act, 15 U.S.C. § 4; and 28 U.S.C. §§ 1331, 1337(a), and 1345.

3. Defendants have consented to venue and personal jurisdiction in this judicial district.

II. THE DEFENDANTS AND THE TRANSACTION

4. ConAgra is incorporated in Delaware and has its headquarters in Omaha, Nebraska. ConAgra is one of the largest food companies in the United States. Its ConAgra Mills subsidiary makes several types of flour, including hard wheat flour and soft wheat flour. ConAgra Mills operates twenty-one wheat flour mills in the United States. It is one of the three largest wheat flour millers in the country, with a total daily wheat flour capacity of approximately 225,000 hundred weight ("cwt"). In 2012, ConAgra reported revenues of $13.3 billion; ConAgra Mills reported revenues of $1.8 billion.

5. Horizon is a joint venture formed in 2002 by Cargill and CHS that is headquartered in Wayzata, Minnesota. Cargill owns 76 percent of Horizon and CHS owns 24 percent of Horizon. Horizon makes several types of flour, including hard wheat flour and soft wheat flour. It is one of the three largest wheat flour millers in the United States, controlling twenty wheat flour mills with a total daily wheat flour capacity of approximately 270,000 cwt. In 2012, Horizon reported revenues of approximately $2.5 billion.

6. Cargill is a privately held company that is incorporated in Delaware and has its headquarters in Wayzata, Minnesota. Cargill produces agricultural products and food ingredients; it also markets wheat to flour mills. All of Cargill's flour mills were contributed to the Horizon joint venture, which presently includes fifteen of Cargill's former wheat flour mills. In 2012, Cargill reported revenues of $133.8 billion.

7. CHS is incorporated in Minnesota and has its headquarters in Inver Grove Heights, Minnesota. It sells, among other things, grains and grain marketing services, animal feed, foods, and food ingredients; it also markets wheat to flour mills. CHS owns five wheat flour mills in the United States, all of which are leased to the Horizon joint venture. In 2012, CHS reported revenues of $40.1 billion.

8. Pursuant to a March 4, 2013 Master Agreement, Ardent Mills would combine the flour milling operations of ConAgra Mills and Horizon. The joint venture would be 44 percent owned by ConAgra, 44 percent owned by Cargill, and 12 percent owned by CHS. Ardent Mills would own forty-one wheat flour mills in the United States. It would have annual sales of more than $3 billion, and assets worth more than $2.5 billion.

III. BACKGROUND

9. Wheat flour is an important ingredient in many baked goods. The two primary types of wheat flour – hard wheat flour and soft wheat flour – are distinguished by their gluten content. "Hard" wheat flour has a high gluten content, which makes it well suited for baking bread, rolls, bagels, pizza dough, and similar baked goods. Gluten is a protein that helps trap gasses during the leavening process, permitting baked goods to rise, and giving them a tougher, chewier texture. "Soft" wheat flour has a low gluten content, which makes it well suited for baked goods that are lighter and flakier than bread and rolls, such as cakes, cookies, and crackers, which have a tender, crumbly texture.

10. Wheat flour is produced by grinding wheat into a fine powder. The process starts by feeding wheat kernels into a flour mill's "breaker rollers," which crack open the wheat kernels, separating the exterior hull from the interior endosperm of each kernel. The separated exterior hulls are known as wheat middlings, or "midds," and typically are sold for use in the manufacture of animal feed. The interior endosperm is further ground between rollers to produce flour. Although some flour mills, known as "swing" mills, are set up to produce hard and soft wheat flour, most flour mills are designed to produce only one or the other. Hard and soft wheat flour generally cannot be produced on the same equipment without a substantial loss of efficiency, which increases the cost of producing flour.

11. Finished wheat flour is sold to industrial bakers, food service companies, distributors, and retail sellers. Larger flour customers typically purchase flour pursuant to a formal request for proposal or a less formal bidding-type solicitation. For such purchases, large flour customers often specify the characteristics of the flour they desire to buy (including protein level, an indicator of gluten content), and they seek to negotiate the lowest price possible for the type of flour they desire. Smaller customers typically purchase standard types of flour at a price based on a miller's daily or weekly price sheet. Smaller customers often compare the delivered price offered by rival millers to determine the best available flour price, and they often can negotiate a discount off of list prices by playing millers against one another.

12. The price of delivered wheat flour has five key components: (i) the price of wheat, which is usually determined by the price on an organized wheat market; (ii) the "basis," which accounts for the difference between the organized wheat market price and the local price for a miller; (iii) the "millfeed credit," which is based on the price at which a miller can sell wheat middlings; (iv) transportation costs, *i.e.*, the cost of delivering flour from the mill to the customer; and (v) the "block," which covers the cost of converting wheat into flour.

13. The first four components largely are determined by a mill's location or market forces that are beyond a miller's control, and account for the overwhelming majority of the price of delivered flour. Although competing millers seek to minimize each of these components to keep the delivered price of flour low, the block – which is a relatively small portion of the total delivered price of flour – is the primary component on which millers compete.

14. Although transportation costs also are a relatively small portion of the cost of delivered flour, they often determine whether a flour miller can supply a customer cost effectively. Customers frequently find that the most cost competitive flour millers are those with

nearby mills, whose flour transportation costs are low relative to those of more distant flour mills. Although flour can travel long distances by rail, the added cost of doing so may prevent distant mills from making substantial sales to local customers. Thus, competition for flour sales to a customer takes place largely among millers located within approximately 150 to 200 miles of a customer. Within that area, competition among millers largely takes place over the size of the block offered to the customer, all else equal.

IV. RELEVANT MARKETS

A. Relevant Product Markets

15. Hard wheat flour is a relevant product market and a line of commerce under Section 7 of the Clayton Act, and Section 1 of the Sherman Act. Hard wheat flour has specific applications for which other types of flour cannot be used. A baker of crusty, chewy baked goods, such as bread, bagels, or pizza dough, cannot use soft wheat flour because the finished product will not "rise" or have the texture that consumers expect. As a result, a flour customer who requires hard wheat flour would not substitute other products in response to a small but significant and nontransitory increase in the price of hard wheat flour.

16. Soft wheat flour is a relevant product market and line of commerce under Section 7 of the Clayton Act, and Section 1 of the Sherman Act. Soft wheat flour has specific applications for which other types of flour cannot be used. A baker of lighter, flakier baked goods, such as cakes, cookies, crackers, or pastries, cannot use hard wheat flour in place of soft wheat flour because the finished product will not remain flat – as is desirable for crackers or pastries – or have the texture that consumers expect. As a result, a flour customer who requires soft wheat flour would not substitute other products in response to a small but significant and nontransitory increase in the price of soft wheat flour.

B. Relevant Geographic Markets

17. Flour millers can price differently to customers in different locations. Hard and soft wheat flour sales typically are negotiated by a miller and an individual customer. Flour millers take into account rivals' mills that can economically supply a customer when determining the price at which to sell to that customer. Thus, a miller will charge a higher price to a customer in an area with few supply options relative to a customer in an area with many supply options.

18. Flour customers are unlikely to arbitrage in response to such differential pricing. The ability of customers to arbitrage by securing flour from customers in other areas is limited by transportation costs, which limit the distance that flour can economically be shipped. Moreover, arbitrage by securing flour from customers in other areas entails increased food safety and quality risks. As a result, most customers would not find it desirable or cost effective to buy flour from customers in other areas.

19. Because flour millers can price differentially and customers are unlikely to arbitrage, flour millers can price discriminate. In the presence of price discrimination, relevant geographic markets may be defined by reference to the location of customers. In particular, the relevant geographic markets for hard and soft wheat flour are those areas of the country encompassing the locations of customers who could be similarly targeted for a price increase.

20. A hypothetical monopolist flour miller could impose on customers a small but significant nontransitory price increase in each of the following areas (which encompass certain metropolitan statistical areas): Northern California (encompassing Santa Rosa-Petaluma, Napa, Sacramento-Arden-Arcade-Roseville, Stockton, Vallejo-Fairfield, San Francisco-Oakland-Fremont, Santa Cruz-Watsonville, San Jose-Sunnyvale-Santa Clara, Merced, and Modesto), Southern California (encompassing Los Angeles-Long Beach-Santa Ana, Riverside-San

Bernardino-Ontario, and San Diego-Carlsbad-San Marcos), Northern Texas (encompassing Dallas-Fort Worth-Arlington), and the Upper Midwest (encompassing Minneapolis-St. Paul-Bloomington, Eau Claire, Madison, La Crosse, and Rochester). Therefore, each area is a relevant geographic market under Section 7 of the Clayton Act, and Section 1 of the Sherman Act.

V. MARKET SHARES AND CONCENTRATION

21. Ardent Mills would own a substantial share of flour milling capacity serving each relevant market. Because transportation costs limit the ability of distant millers to compete with local millers for customers, competition for flour sales largely takes place among millers with milling capacity located within 150 to 200 miles of a customer. Thus, milling capacity within 200 miles of key cities within each geographic area is a useful basis on which to estimate market shares and concentration, and it approximates sales shares in each geographic market. Each 200-mile area around a city encompasses those flour millers most likely to compete for sales in each geographic market, and shares based on capacity within 200 miles of each city are indicative of the likely competitive effects for customers in the broader relevant markets.

22. In Northern California, Ardent Mills would own approximately 70 percent of hard wheat flour milling capacity within 200 miles of San Francisco. In Southern California, it would own more than 40 percent of hard wheat flour milling capacity, and approximately 70 percent of soft wheat flour milling capacity, within 200 miles of Los Angeles. In Northern Texas, it would own more than 75 percent of hard wheat flour milling capacity, and 100 percent of the soft wheat flour milling capacity, within 200 miles of Dallas/Ft. Worth. In the Upper Midwest, it would own more than 60 percent of hard wheat flour milling capacity within 200 miles of Minneapolis. Given that transportation costs limit the ability of more distant mills to compete in these areas,

Ardent Mills's large capacity shares would result in Ardent Mills having a large share of sales in these areas.

23. Based on capacity within 200 miles of key cities in each market, formation of Ardent Mills would increase the Herfindahl-Hirschman Index ("HHI"),[1] a standard measure of market concentration, by more than 200 points to more than 2,500 points in the relevant markets. For San Francisco, formation of the joint venture would increase the HHI for hard wheat flour to more than 5,000. For Los Angeles, the joint venture would increase the HHI for hard wheat flour to more than 2,500; and the HHI for soft wheat flour to more than 5,500. For Dallas/Ft. Worth, the HHI for the hard wheat flour would increase to more than 6,000; and the HHI for soft wheat flour would increase to 10,000. For Minneapolis, the HHI for hard wheat flour would increase to more than 4,500. As a result, the joint venture should be presumed likely to enhance market power in each of the relevant markets.

VI. ANTICOMPETITIVE EFFECTS OF THE JOINT VENTURE

A. Formation of Ardent Mills Would Eliminate Head-to-Head Competition between Horizon and ConAgra

[1] *See* U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 5.3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html. The HHI is calculated by squaring the market share of each firm competing in the market, then summing the resulting numbers. The HHI takes into account the relative size distribution of the firms in a market; it increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. The HHI approaches zero in markets with a large number of participants of relatively equal size and reaches a maximum of 10,000 points in markets controlled by a single firm.

24. The formation of Ardent Mills would eliminate head-to-head competition between ConAgra Mills and Horizon in the relevant markets. ConAgra Mills and Horizon routinely compete by offering lower prices to their customers, and customers have secured lower prices by playing ConAgra Mills and Horizon against one another. The formation of Ardent Mills would eliminate that competition, resulting in higher hard wheat flour prices for customers in Northern California, Southern California, Northern Texas, and the Upper Midwest, and higher soft wheat flour prices for customers in Southern California and Northern Texas.

25. Horizon and ConAgra Mills operate mills that are close to one another in the relevant geographic markets, and that are among those closest to many customers in those markets. Because their mills are the closest mills to many customers, Horizon's and ConAgra's delivered flour costs tend to be lower than those of their rivals' more distant mills. Moreover, because their mills are located close to one another, Horizon's and ConAgra's flour transportation costs tend to be similar. As a result of the proximity of their mills to one another – and to one another's customers – Horizon and ConAgra frequently are among the lowest-cost flour suppliers for customers in the relevant areas, and they compete aggressively against one another to make sales in those areas. That competition would be lost with the formation of Ardent Mills.

B. Formation of Ardent Mills Would Increase the Likelihood of Anticompetitive Capacity Closures

26. Relative to stand-alone Horizon and ConAgra Mills, the joint venture would increase the incentive and ability of Ardent Mills to close hard and soft wheat flour milling capacity serving the relevant markets. With a larger base of mills to benefit from increased flour prices, the joint venture would have an increased incentive to shut down capacity. The joint venture also would have mills with a wider array of operating costs from which to choose

capacity to shut down, increasing the ability of the joint venture to profitably shut down capacity or entire mills. By creating a larger portfolio of flour mills with differing costs, formation of the joint venture would make it more likely that Ardent Mills would find it profitable to close a higher-cost mill to raise hard or soft wheat flour prices. Thus, the joint venture would increase the likelihood of capacity closure, which would tighten supply relative to demand, inducing Ardent Mills and rival millers to compete less aggressively for flour sales, ultimately increasing flour prices to customers in the relevant geographic markets.

C. Formation of Ardent Mills Would Increase the Likelihood of Anticompetitive Coordination

27. The formation of Ardent Mills would increase the likelihood of anticompetitive coordination among flour millers. Several features of hard and soft wheat flour markets render them susceptible to anticompetitive coordination. First, the markets are transparent, which gives millers insight into their rivals' costs, prices, output, and capacity utilization levels. Second, hard wheat flour and soft wheat flour are relatively homogeneous products that are purchased frequently. Third, the demand for hard and soft wheat flour is relatively inelastic. Finally, larger flour millers compete against one another to supply hard and soft flour in multiple geographic markets.

28. The relevant markets already are highly concentrated, and the formation of the joint venture would significantly increase that concentration by reducing the number of substantial millers in each of the relevant markets. As a result, the formation of Ardent Mills would allow it and its few remaining rivals to more easily identify and account for the competitive strategies of one another, making it easier for them to coordinate on capacity, price, or other competitive strategies in the relevant markets, which already are susceptible to

coordination. This, in turn, will make coordination more likely and more durable, increasing the likelihood that hard and soft wheat flour prices would increase in the relevant markets.

29. The formation of Ardent Mills also would permit information exchanges between CHS, Cargill, and the joint venture that would facilitate coordination in the relevant markets. CHS and Cargill propose entering into side agreements to supply Ardent Mills with wheat. These agreements include terms that, in principle, would permit CHS, and Cargill to provide Ardent Mills with detailed information about rival millers' wheat purchases, giving the joint venture greater insight into its rivals' costs. As a result, the side agreements would make it easier for Ardent Mills to understand the competitive strategies of its rivals, which would make coordination more likely and durable, increasing the likelihood that hard and soft wheat flour prices would increase in the relevant markets.

VII. ENTRY

30. Entry would not be likely, timely, or sufficient to offset the anticompetitive effects of the formation of Ardent Mills. Flour is a mature industry with stable demand and margins, which means that the incentive to enter the relevant markets with a new mill, or with substantial new capacity at an existing mill, is small. It also is unlikely that entry by more distant mills delivering flour by rail will be timely, likely, or sufficient due to rail delivery's additional cost and inconvenience, which renders it an unacceptable option for many customers.

VIII. VIOLATIONS ALLEGED

A. Violation of Section 7 of the Clayton Act

31. The proposed joint venture likely would substantially lessen competition in the relevant markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

32. Unless enjoined, the joint venture likely would have the following anticompetitive effects, among others:

a. competition between ConAgra and Horizon in the relevant markets would be eliminated;

b. competition in the relevant markets likely would be substantially lessened;

c. reductions in milling capacity would be more likely;

d. coordination in the relevant markets would be easier and more likely; and, as a result,

e. hard wheat flour prices would increase for customers in Northern California, Southern California, Northern Texas, and the Upper Midwest; and soft wheat flour prices would increase for customers in Southern California and Northern Texas.

B. Violation of Section 1 of the Sherman Act

33. ConAgra and Horizon's agreement to combine their flour-milling assets and operations through the Ardent Mills joint venture, to eliminate competition between them, and not to compete against each other unreasonably restrains trade, and likely would continue to unreasonably restrain trade, in the relevant markets in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

IX. REQUESTED RELIEF

34. The United States requests that this Court:

a. adjudge and decree that the Ardent Mills joint venture would be unlawful and violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. adjudge and decree that the Ardent Mills joint venture would be unlawful and violate Section 1 of the Sherman Act, 15 U.S.C. § 1;

c. preliminarily and permanently enjoin and restrain Defendants and all persons acting on their behalf from effectuating the Ardent Mills joint venture, or from entering into or carrying out any other contract, agreement, plan, or understanding, the effect of which would be to create such a joint venture;

d. award the United States its costs for this action; and

e. award the United States such other and further relief as the Court deems just and proper.

Dated: May 20, 2014

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

_____/s/_____
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_____/s/_____
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UNITED STATES OF AMERICA
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff,* v. CONAGRA FOODS, INC., HORIZON MILLING, LLC, CARGILL, INCORPORATED, and CHS INC., *Defendants.*	Case No.: 1:14-cv-00823 Judge: Hon. Ketanji Brown Jackson Dated: May 20, 2014

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the Proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Defendants ConAgra Foods, Inc. ("ConAgra"), Cargill, Incorporated ("Cargill"), and CHS Inc. ("CHS") entered into a Master Agreement, dated March 4, 2013, which would combine the wheat flour milling assets of ConAgra and defendant Horizon Milling, LLC ("Horizon") (a joint venture between Cargill and CHS) to form a joint venture to be known as Ardent Mills ("Ardent Mills" or "the joint venture").

The United States filed a civil antitrust Complaint on May 20, 2014, seeking to enjoin the joint venture. The Complaint alleges that the likely effect of the formation of Ardent Mills

would be to substantially lessen competition for the provision of hard wheat flour to customers in Northern California, Southern California, Northern Texas, and the Upper Midwest, and soft wheat flour to customers in Southern California and the Northern Texas, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1.

At the same time the Complaint was filed, the United States also filed a Proposed Final Judgment, which is designed to eliminate the anticompetitive effects of the joint venture. Under the Proposed Final Judgment, which is explained more fully below, Defendants are required to divest four flour mills located in Oakland, California; Los Angeles, California; Saginaw, Texas; and New Prague, Minnesota. The Proposed Final Judgment also prohibits Cargill, CHS, and ConAgra from disclosing to Ardent Mills certain non-public information relating to wheat sales to, and wheat use by, Cargill, CHS, and ConAgra wheat customers.

In a Hold Separate Stipulation and Order filed at the same time as the Complaint and Proposed Final Judgment, the United States and Defendants have stipulated that the Proposed Final Judgment may be entered after compliance with the APPA.[2] Entry of the Proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Proposed Final Judgment and to punish violations thereof.

[2] The Hold Separate Stipulation and Order requires Defendants to hold separate their entire wheat flour milling businesses until after the divestitures required by the Proposed Final Judgment have occurred.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendants and the Proposed Joint Venture

ConAgra is a Delaware corporation headquartered in Omaha, Nebraska. It is one of the largest food companies in the United States. Its ConAgra Mills subsidiary makes multiple types of flour, including hard wheat flour and soft wheat flour. ConAgra Mills operates twenty-one wheat flour mills in the United States. In terms of capacity, ConAgra Mills is one of the three largest wheat flour millers in the United States, capable of producing approximately 225,000 hundred weights ("cwt"), or about 23 million pounds, of flour per day. In 2012, ConAgra reported revenues of $13.3 billion; ConAgra Mills reported revenues of $1.8 billion.

Horizon is a joint venture between Cargill and CHS that is headquartered in Wayzata, Minnesota. Cargill owns 76 percent of Horizon, and CHS owns the remaining 24 percent of Horizon. Horizon makes several types of flour, including hard wheat flour and soft wheat flour. In terms of capacity, Horizon is one of the three largest wheat flour millers in the country, with twenty mills in the United States, capable of producing approximately 270,000 cwt, or about 27 million pounds, of flour per day. In 2012, Horizon reported revenues of approximately $2.5 billion.

Cargill is a privately held Delaware corporation headquartered in Wayzata, Minnesota. Cargill produces agricultural products and food ingredients; it also markets wheat to flour mills. The Horizon joint venture includes fifteen mills located in the United States that were contributed by Cargill. In 2012, Cargill reported revenues of $133.8 billion.

CHS is a Minnesota corporation headquartered in Inver Grove Heights, Minnesota. It sells, among other things, grains and grain marketing services (including wheat for flour milling), animal feed, food, and food ingredients; it also markets wheat to flour mills. The Horizon joint venture includes five mills owned by CHS, located in the United States, leased by CHS to Horizon. In 2012, CHS reported revenues of $40.1 billion.

Under the March 4, 2013 Master Agreement, ConAgra, Cargill, and CHS agreed to combine the wheat flour milling assets of ConAgra Mills and Horizon to form Ardent Mills. ConAgra and Cargill each would own a 44 percent share of the joint venture, and CHS would own the remaining 12 percent share. Under the Master Agreement, Cargill and CHS also would share with Ardent Mills certain information regarding wheat markets. The formation of the joint venture likely would substantially lessen competition as a result of Defendants' combination of their wheat flour milling assets. This proposed joint venture is the subject of the Complaint and Proposed Final Judgment filed by the United States on May 20, 2014.

B. Industry Background

1. Flour Milling and Flour Uses

Wheat flour is an important ingredient in many baked food products. It is made by grinding wheat into a fine powder. The process begins with a miller feeding wheat kernels into a flour mill's "breaker rollers," which crack open the hard outer shell of the wheat kernel, separating the exterior hull from the interior endosperm of each kernel. The separated exterior hulls, known as wheat middlings or "midds," often are sold to manufacturers of animal feed, who typically mix the midds with other inputs to manufacture feed. The interior endosperm is further ground and sifted to produce wheat flour.

Hard wheat flour is milled from hard wheat, which has high gluten content and a hard endosperm. Soft wheat flour is milled from soft wheat, which has low gluten content and a soft endosperm. Soft wheat generally does not flow as easily through a mill as hard wheat, which necessitates certain design features in a soft wheat flour mill that are not required in a hard wheat flour mill. As a result, most flour mills are designed to produce hard wheat flour or soft wheat flour. Some mills can produce hard wheat flour and soft wheat flour using two or more milling units, each of which is dedicated to milling one type of flour using the appropriate equipment. Finally, some mills, known as "swing" mills, can produce both types of flour using the same equipment. The production of flour in a swing mill, however, usually entails a loss of efficiency, which increases the costs of producing wheat flour, making a mill less competitive.

The different gluten content of hard and soft wheat flour limits each to certain baked goods applications. Gluten is a type of protein found only in wheat that traps gasses produced during leavening and baking. The greater the gluten content of flour, the more it will rise during baking and the chewier will be the finished product. Hard wheat flour's high gluten content makes it well-suited for use in bread, rolls, bagels, pizza dough, and similar goods. Soft wheat flour, which has lower gluten content, is well-suited for use in lighter, flakier products like cakes, cookies, crackers, and pastries. Substituting hard wheat flour for soft wheat flour (or vice versa) in a specific application would compromise the finished-product characteristics that consumers demand. As a result, there is very little substitutability between hard and soft wheat flour.

2. Flour Customers and Flour Pricing

Wheat flour is purchased by four main types of customers: industrial bakers, food service companies, flour distributors, and retail flour sellers. Larger flour customers typically buy flour pursuant to a formal request for proposal or a less formal bidding-type process, wherein the

customer seeks bids from multiple flour millers. These customers frequently specify the characteristics of the flour they seek to purchase (including protein content, which is an indicator of gluten content). Smaller flour customers often purchase standard types of flour at prices that are based on millers' daily or weekly price sheets. Whether they buy flour based on a bidding-type process or price sheets, customers frequently play millers against one another during negotiations, using price quotes from one or more millers as leverage to secure lower delivered flour prices from competing millers.

The price of delivered flour has five components: (i) the price of wheat, usually based on an organized wheat market price (*e.g.*, the price of wheat sold on the Minneapolis Grain Exchange, Kansas City Board of Trade, or Chicago Mercantile Exchange); (ii) the "basis," which is the difference between the price of wheat on an organized market and the local market price of wheat for the miller; (iii) the "millfeed credit," which is based on the price at which the miller can sell wheat middlings; (iv) transportation costs, that is, the cost of delivering flour from the mill to the customer; and (v) the "block" (sometimes referred to as the "margin"), which amounts to the miller's fee for converting wheat into flour.

The first four components largely are determined by market forces beyond the control of an individual miller, and they account for the overwhelming majority of the cost of delivered flour. The block, on the other hand, is a relatively small portion of the price of delivered flour. Although millers competing with one another to supply a customer may seek to minimize the cost of the other components to keep the delivered price of flour low, the block is the primary term that millers can control, and it is the primary term on which they compete.

3. Transportation Costs and Customers' Supply Options

Although transportation costs tend to be a relatively small portion of the delivered price of flour, they frequently determine whether a flour miller can supply a customer cost effectively. Transportation costs increase as the distance flour must travel from a mill to a customer increases. Therefore, a miller's ability to economically supply a customer will depend in part on how far away its mills are from the customer's delivery point, which usually is a flour-using facility, such as a bakery, food processing plant, or distribution center. Mills located close enough to customers to which they can cost effectively deliver flour by truck typically are the lowest cost competitors for those customers' business. The maximum distance flour can economically travel via truck typically is 150 to 200 miles.

Although some customers are capable of receiving flour delivery from distant mills by rail or "rail-to-truck transfer" (which entails shipping flour by rail, then transferring it to truck for delivery), neither is a viable option for many customers. Customers not located on a rail spur cannot physically receive direct rail shipments. Even for customers with rail access, rail shipments from distant mills are typically more expensive, slower, and less reliable than direct truck shipments from local mills. Many customers also find that shipments by rail-to-truck transfer have all the disadvantages of rail, plus the risk that using two modes of transportation (and the need to transfer flour from rail to truck) will degrade the quality of the delivered flour. Thus, competition for flour sales to a customer takes place primarily among millers located no more than 150 to 200 miles from a customer.

C. The Relevant Product Markets

The Complaint alleges that hard wheat flour and soft wheat flour are relevant product markets and lines of commerce.

Due to hard wheat flour's unique characteristics, flour consumers use it for specific applications and cannot use other types of flour for those applications. For example, a baker that produces crusty, chewy baked goods, such as bread, rolls, bagels, pizza dough, or similar products, cannot use soft wheat flour in place of hard wheat flour to produce those goods because the finished goods will not "rise" or have the texture that baked-goods consumers expect and demand. Consequently, hard wheat flour customers generally do not regard other types of flour as adequate substitutes for hard wheat flour. Thus, hard wheat flour is a relevant product market.

Due to soft wheat flour's unique characteristics, flour consumers also use soft wheat flour for specific applications and cannot use other types of flour for those applications. For example, a baker that produces lighter, flakier products, such as cakes, cookies, crackers, or pastries, cannot use hard wheat flour in place of soft wheat flour to produce those goods because the finished goods will not remain flat – as is desirable for crackers or pastries – or have the texture that that baked-goods consumers expect and demand. Consequently, soft wheat flour customers generally do not regard other types of flour as adequate substitutes for soft wheat flour. Thus, soft wheat flour is a relevant product market.

D. Relevant Geographic Markets

The Complaint alleges that the relevant geographic markets are Northern California, Southern California, Northern Texas, and the Upper Midwest. These markets are defined based on metropolitan statistical areas ("MSAs") as follows:

- Northern California encompasses the Santa Rosa-Petaluma, Napa, Sacramento-Arden-Arcade-Roseville, Stockton, Vallejo-Fairfield, San Francisco-Oakland-Fremont, Santa Cruz-Watsonville, San Jose-Sunnyvale-Santa Clara, Merced, and Modesto MSAs;

- Southern California encompasses the Los Angeles-Long Beach-Santa Ana, Riverside-San Bernardino-Ontario, and San Diego-Carlsbad-San Marcos MSAs;

- Northern Texas encompasses the Dallas-Fort Worth-Arlington MSA; and the

- Upper Midwest encompasses the Minneapolis-St. Paul-Bloomington, Eau Claire, Madison, La Crosse, and Rochester MSAs.

The relevant geographic markets in this case are best defined by the locations of customers. Flour millers take into account rivals' mills that can economically supply a customer when determining the price at which to sell to that customer. Because transportation costs are an important component of the delivered price of flour, local mills tend to be more cost-effective sources of supply than mills located further away from the customer. When a customer has few local mills capable of supplying it with the flour it needs at a relatively low cost, a miller will charge a higher price to the customer. On the other hand, when a customer has many nearby mills capable of supplying it, a miller will charge a lower price. Thus, flour millers price differently to different customers depending on their location.

Most flour customers are unable to defeat such pricing by arbitrage. That is, they cannot secure flour at a lower price from customers in other areas. Customers' ability to arbitrage is limited by transportation costs, which limit the distance that flour can be shipped cost effectively. In addition, securing flour from other customers increases the number of times that flour changes hands, and potentially increases the number of transportation modes used, which increases food safety and quality risks, making arbitrage by buying flour from customers in other areas undesirable.

Because of differential pricing and the inability of most wheat flour customers to arbitrage, a hypothetical monopolist controlling the sale of all hard wheat flour to customers in Northern California, Southern California, Northern Texas, or the Upper Midwest, or the sale of

all soft wheat flour to customers in Southern California or Northern Texas, would profitably impose a small but significant and nontransitory increase in the price ("SSNIP") of each relevant product. It is appropriate to aggregate flour customers in each of these areas because each customer in the area faces similar supply options and, hence, would similarly be affected by the formation of Ardent Mills.

E. Relevant SSNIP

The Division applies the hypothetical monopolist test to help define relevant markets. This test asks whether a hypothetical monopolist of a product, or of a product in an area, would profitably impose a SSNIP. When applying the hypothetical monopolist test, the Division typically bases the SSNIP on the price of the final product to a consumer. In this case, however, the Division based the SSNIP primarily on the "block," which is the primary component of the delivered price of flour that is determined by competition among millers.

The use of a smaller SSNIP in this case is consistent with the Horizontal Merger Guidelines, which state that "[w]here explicit or implicit prices for . . . firms' specific contribution to value can be identified with reasonable clarity," those prices (instead of the total price paid by customers) may be the relevant benchmark for analyzing whether a hypothetical monopolist would profitably impose a SSNIP.[3] This method of analysis better directs attention to what "might result from a significant lessening of competition caused by" the joint venture.[4]

Flour millers' specific contribution to value largely involves the conversion of wheat into flour, for which the block is the primary form of compensation. Moreover, competition among wheat flour millers largely is centered on the block, whether explicitly (for customers who seek

[3] *See* U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 4.1.2 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010 html.

[4] *Id.*

to identify each of the five components of delivered price) or implicitly (for customers who pay a flat delivered price). Thus, the lessening of competition resulting from the formation of Ardent Mills largely would result in an increase in the block, which in turn would increase the delivered price of flour to customers. As a result, basing the SSNIP primarily on the block, rather than the delivered price of flour, is appropriate in this case.

F. Competitive Effects of the Proposed Joint Venture

The Complaint alleges that the formation of Ardent Mills would eliminate head-to-head competition between ConAgra Mills and Horizon for sales to individual customers, increase the likelihood of capacity closures, and increase the likelihood of anticompetitive coordination among wheat flour millers.

1. Market Shares and Concentration

The Complaint alleges that the formation of Ardent Mills would increase concentration in each relevant market. Market concentration levels often indicate the likely competitive effects of a transaction – the higher the concentration, and the more the proposed transaction would increase concentration, the greater the likelihood that the transaction would reduce competition. The Complaint alleges that each relevant market is already concentrated, and that the joint venture would significantly increase concentration in each market, indicating that the joint venture likely would substantially lessen competition in the relevant markets.

Due to transportation costs – which increase as shipping distances increase – most competition in the relevant markets occurs among millers with flour mills that are close to customers in the relevant geographic markets. In particular, mills located close enough to customers to allow for economical direct truck shipments of flour (*i.e.*, no more than 150 to 200 miles from customers) typically are the most effective competitors for those customers' business.

Although some millers located more than 200 miles from a customer may sell flour into a geographic market, higher transportation costs typically render distant millers less competitive.

Detailed information on the sales and costs of each miller selling into a geographic market would permit one to compute sales shares for each relevant market. Absent that information, market shares and concentration levels based on milling capacity within 200 miles of key cities within each market serve to illuminate the likely competitive effects of the joint venture. Each such 200-mile area includes the flour millers who typically can serve customers at the lowest cost, and competition will most directly be affected by a loss of competition among those millers.

The market shares and concentration levels identified in the Complaint indicate that the formation of Ardent Mills would give it a large share of capacity – as well as a large share of sales – presumptively enhancing market power in each relevant market. Transactions are presumed likely to enhance market power where they would raise a measure of market concentration called the Herfindahl-Hirschman Index ("HHI")[5] more than 200 points to a total of more than 2500 points. In each relevant market, the formation of Ardent Mills would do so:

- Northern California. Ardent Mills would own two mills in this area comprising approximately 70 percent of the hard wheat flour capacity within 200 miles of San Francisco. The joint venture would increase the HHI for hard wheat flour in this market to more than 5,000.

[5] *See* U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 5.3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010 html. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 (302 + 302 + 202 + 202 = 2,600). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

- Southern California. Ardent Mills would own three mills in this area comprising more than 40 percent of hard wheat flour milling capacity within 200 miles of Los Angeles; the joint venture would increase the HHI for hard wheat flour in this market to more than 2,500. Ardent Mills would also own two mills comprising more than 70 percent of soft wheat flour milling capacity; the joint venture would increase the HHI for soft wheat flour in this market to more than 5,500.

- Northern Texas. Ardent Mills would own three mills in this area comprising more than 75 percent of hard wheat flour milling capacity within 200 miles of Dallas–Ft. Worth. The joint venture would increase the HHI for hard wheat flour to more than 6,000. Ardent Mills would also own two mills comprising all soft wheat flour milling capacity, increasing the HHI for soft wheat flour to 10,000.

- Upper Midwest. Ardent Mills would control six mills in this area comprising more than 60 percent of the hard wheat flour milling capacity within 200 miles of Minneapolis. The joint venture would increase the HHI for hard wheat flour in this market to more than 4,500.

2. Elimination of Head-to-Head Competition

The Complaint alleges that the formation of the joint venture likely would substantially lessen competition in the relevant markets by eliminating head-to-head competition between ConAgra Mills and Horizon. Horizon and ConAgra Mills operate mills that are close to one another in the relevant geographic markets, and that are among those closest to many customers in those markets. Because their mills are the closest mills to many customers, Horizon's and ConAgra's delivered flour costs tend to be lower than those of their rivals' more distant mills. Moreover, because their mills are located close to one another, Horizon's and ConAgra's flour transportation costs tend to be similar.

As a result of the proximity of their mills to one another – and to one another's customers – Horizon and ConAgra frequently are among the lowest-cost flour suppliers in the relevant markets, and they compete aggressively against one another to make sales in those markets by offering a lower delivered price to their customers. Indeed, wheat flour customers in the relevant markets have obtained lower flour prices – largely by securing a smaller block – by playing

ConAgra Mills and Horizon against one another during negotiations. The formation of Ardent Mills would eliminate that competition, resulting in higher hard wheat flour prices for customers in Northern California, Southern California, Northern Texas, and the Upper Midwest, and higher soft wheat flour prices for customers in Southern California and Northern Texas.

3. Increased Likelihood of Capacity Closures

The Complaint alleges that the formation of Ardent Mills likely would substantially lessen competition in the relevant markets by increasing the likelihood of unilateral, anticompetitive capacity closures.

A miller will find it profitable to unilaterally close capacity if any lost profit due to lower sales would be more than offset by a corresponding increase in profit on sales made at a higher price due to the capacity closure. A wheat flour miller with a relatively large base of milling capacity that can benefit from a price increase has a greater incentive to shut capacity, forcing higher cost capacity to step in and increase flour production to meet demand. The joint venture would significantly increase Ardent Mills's base of capacity relative to that of ConAgra Mills or Horizon standing alone, giving Ardent Mills a greater incentive to unilaterally close capacity than either ConAgra Mills or Horizon would have had.

Ardent Mills also would have a greater ability to unilaterally close capacity than either ConAgra Mills or Horizon. Relatively high-cost mills make an attractive target for capacity closures. All else equal, higher-cost capacity yields lower profits. Closing high-cost capacity is more attractive than closing low-cost capacity because profits lost due to closing high-cost capacity are smaller. Because the joint venture would give Ardent Mills a broader array of capacity from which to choose capacity to close – including relatively high-cost capacity – it would increase the ability of the joint venture to profitably shut down capacity. When combined

with the increased incentive to close capacity, this increased ability increases the likelihood that Ardent Mills will close capacity, with the result that Ardent Mills and its remaining rivals will compete less aggressively for the business of flour customers, ultimately increasing prices in the relevant markets.

4. Increased Likelihood of Anticompetitive Coordination

The Complaint alleges that the formation of Ardent Mills likely would substantially lessen competition in the relevant markets by increasing the likelihood of anticompetitive coordination among flour millers. Such coordination occurs where competing firms reach implicit or explicit agreements on output, capacity, price, quality, or other aspects of competition. Such coordination also could occur as a result of parallel accommodating conduct. As described in Section 7 of the Merger Guidelines, "[p]arallel accommodating conduct [involves] situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms."

Several features of hard wheat flour and soft wheat flour markets render them susceptible to coordination. In particular, the Complaint alleges these markets are transparent; that soft and hard wheat flour are homogeneous and purchased frequently; that demand for soft and hard wheat flour is inelastic; and that larger millers compete against one another in multiple geographic markets. By eliminating a significant independent competitor from each of the relevant markets, which already are highly concentrated and are susceptible to anticompetitive coordination, the joint venture would substantially increase the likelihood of coordination among Ardent Mills and its few remaining rivals.

The joint venture would further increase the likelihood of anticompetitive coordination by permitting Cargill and CHS to share certain wheat-related information with Ardent Mills. Under side agreements to the Master Agreement forming Ardent Mills, Cargill and CHS (both of which own grain trading businesses that would operate independently of Ardent) are to be preferred suppliers to the joint venture. These side agreements may permit Cargill and CHS to give Ardent Mills information regarding wheat purchases and wheat uses by the joint venture's rival millers. The exchange of such information would make it easier for Ardent to monitor its rivals' behavior and discipline deviations from coordinated strategies, substantially increasing the likelihood of coordination in the relevant markets.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestiture Requirement

The Proposed Final Judgment requires divestitures of individual wheat flour mills that will eliminate the anticompetitive effects of the formation of Ardent Mills by establishing a substantial, independent and economically viable competitor in each relevant market. The divestitures are to be made to Miller Milling Company, LLC ("Miller Milling"). As explained in the *Antitrust Division Policy Guide to Merger Remedies*, the Antitrust Division may require such upfront buyers when a divested package is less than an existing business entity.[6] In this case, the mills to be divested are not existing business entities; rather, the operation of each mill is intertwined with the operation of Defendants' other wheat flour mills.[7] An upfront buyer is

[6] U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies (June 2011), *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf (identifying an upfront buyer provides greater assurance that the divestiture package contains the assets needed to create a viable entity that will preserve competition).

[7] The purchase of wheat, sale of flour, and arrangement of transportation of wheat and flour are examples of functions that are centralized rather than based at the mill sites.

appropriate to ensure that the acquirer will have all assets necessary to be an effective, long-term competitor in the production and sale of flour. The United States can evaluate the ability of a buyer to take the Divestiture Assets and operate them as part of a complete flour milling company that can replace the competition lost due to the proposed joint venture.

The Proposed Final Judgment requires Defendants, within ten (10) days after the Court signs the Hold Separate Stipulation and Order, to divest to Miller Milling four mills: ConAgra's mills located in New Prague, Minnesota; Oakland, California; and Saginaw, Texas; and Horizon's mill located in Los Angeles, California. In its sole discretion, the United States may agree to one or more extensions of this period not to exceed thirty (30) days in total. As the United States already has approved the acquirer, any such extensions need not be as long as ordinarily is the case when acquirers are not identified upfront. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that, through no action of the Defendants, the sale of any of the Divestiture Assets cannot be completed, the Final Judgment provides for the United States, in its sole discretion, to agree to the sale of the unsold Divestiture Assets to an alternative purchaser approved by the United States. If Defendants fail to sell the Divestiture assets to Miller Milling or approved alternative purchasers within the time permitted by the Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture.

If a trustee is appointed, the Proposed Final Judgment provides that Defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the

divestiture is accomplished. After the trustee's appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

In addition, because experienced, knowledgeable personnel are critical to success in the relevant markets—and may be even more critical to a new entrant seeking to secure customers' business—the Proposed Final Judgment provides the acquirer(s) with an expansive right to hire relevant personnel without interference. The Proposed Final Judgment gives the acquirer(s) the right to hire any and all of Defendants' employees who are employed at, purchase or advise on the purchase of wheat or wheat futures for, provide instructions, guidance, or assistance relating to food safety or quality assurance for, or sell or arrange for transportation of wheat flour or any wheat flour byproducts from the assets to be divested. The Proposed Final Judgment contains numerous provisions to facilitate the hiring and retention of these employees. These provisions require Defendants to provide detailed information about each relevant employee, to grant reasonable access to relevant employees and the ability to interview them, and to refrain from interfering with negotiations to hire any relevant employee.

B. Nondisclosure of Wheat Customer Confidential Information Requirement

The Proposed Final Judgment prohibits Cargill, CHS, and ConAgra from disclosing to Ardent Mills any non-public, customer-specific information relating to wheat sales or usage, and it prohibits Ardent Mills from soliciting or receiving such information from Cargill, CHS, or ConAgra, or from using such information. No later than seven (7) calendar days after the Final

Judgment is entered by the Court, the Proposed Final Judgment requires Defendants to distribute a copy of the Final Judgment to each of their employees with responsibility for wheat sales or flour sales. The Proposed Final Judgment requires Defendants to distribute a copy of the Final Judgment and this Competitive Impact Statement to each of their employees with responsibility for wheat sales or flour sales, as well as to any person who succeeds to a position with responsibility for wheat sales or flour sales within thirty (30) calendar days of that succession. These documents also are to be distributed annually to such employees.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the Proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the Proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the Proposed Final Judgment is in the public interest. The APPA provides a period of at least sixty (60) days preceding the effective date of the Proposed Final Judgment within which any person may submit to the United States written comments regarding the Proposed Final Judgment. Any person who wishes to comment should do so within sixty (60)

days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the Proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street NW, Suite 8700
Washington, DC 20530

The Proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the Proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Defendants' formation of Ardent Mills. The United States is satisfied, however, that the divestiture of assets requirement and the nondisclosure of wheat customer confidential information requirement described in the Proposed Final Judgment will preserve competition for the provision of hard wheat flour to customers in Northern California, Southern California, Northern Texas, and the Upper Midwest, and for the provision of soft wheat flour to customers in Southern California and Northern Texas, the relevant markets identified by the United States. Thus, the Proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

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

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (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 7 including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one, as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing the public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed

remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").[8]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, 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)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The 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*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[9] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the

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[8] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[9] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F.

government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and the APPA

Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot 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.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "The court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply

proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[10]

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the Proposed Final Judgment.

[10] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

Dated: May 20, 2014

Respectfully submitted,

_____/s/_____

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. CONAGRA FOODS, INC., HORIZON MILLING, LLC, CARGILL INCORPORATED, and CHS INC., *Defendants.*	Case No.: 1:14-cv-00823 Judge: Hon. Ketanji Brown Jackson Dated: May 20, 2014

PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiff United States of America ("United States") filed its Complaint on May 20, 2014, the United States and Defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by Defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the divestitures required below can and will be made and that Defendants will later raise no claim of mistake, hardship or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18), and Section 1 of the Sherman Act, 15 U.S.C. § 1.

II. DEFINITIONS

As used in this Final Judgment:

A. "Acquirer" means Miller Milling, or another entity or entities to which Defendants divest the Los Angeles Mill, the New Prague Mill, the Oakland Mill, and the Saginaw Mill.

B. "Ardent Mills" means the joint venture that will be formed by the Transaction.

C. "Cargill" means Defendant Cargill Incorporated, a privately held company that is incorporated in Delaware and headquartered in Wayzata, Minnesota, its successors and assigns,

and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, including Ardent Mills, and their directors, officers, managers, agents, and employees.

D. "CHS" means Defendant CHS Inc., a Minnesota corporation headquartered in Inver Grove Heights, Minnesota, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, including Ardent Mills, and their directors, officers, managers, agents, and employees.

E. "ConAgra" means Defendant ConAgra Foods, Inc., a Delaware corporation headquartered in Omaha, Nebraska, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, including Ardent Mills, and their directors, officers, managers, agents, and employees.

F. "Horizon" means Defendant Horizon Milling, LLC, a joint venture between Cargill and CHS headquartered in Wayzata, Minnesota, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, including Ardent Mills, and their directors, officers, managers, agents, and employees.

G. "Divestiture Assets" means the assets listed in Schedule A.

H. "Los Angeles Mill" means Item 2 on Schedule A and the assets associated with Item 2 that are listed in Item 3 on Schedule A.

I. "New Prague Mill" means Item 1(a) on Schedule A and the assets associated with Item 1(a) that are listed in Item 3 on Schedule A.

J. "Oakland Mill" means Item 1(b) on Schedule A and the assets associated with Item 1(b) that are listed in Item 3 on Schedule A.

K. "Saginaw Mill" means Item 1(c) on Schedule A and the assets associated with Item 1(c) that are listed in Item 3 on Schedule A.

L. "Miller Milling" means Miller Milling Company, LLC, a Minnesota limited liability company headquartered in Minneapolis, Minnesota, its parent, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

M. "Transaction" means the proposed formation of the Ardent Mills Joint Venture pursuant to the March 4, 2013 Master Agreement by and among ConAgra, Cargill, CHS, and HM Luxembourg S.A.R.L., as amended.

N. "Wheat Customer Confidential Information" means any customer-specific information not in the public domain that reflects:

1. wheat sales by Defendants to customers or potential customers other than Ardent Mills, including, but not limited to, the type of wheat purchased, origination or delivery point of purchased wheat, date of purchase, purchase price or quantities, or mode or cost of delivery; or
2. wheat use by such customers or potential customers (other than Defendants in connection with their wheat use to manufacture products for themselves or others), including, but not limited to, the types of products produced using wheat as an input, and the price charged, quantity produced, or capacity or cost to produce such products.

III. APPLICABILITY

A. This Final Judgment applies to Defendants and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer(s) of the assets divested pursuant to this Final Judgment.

IV. DIVESTITURES

A. Defendants are ordered and directed, within ten (10) calendar days after the Court signs the Hold Separate Stipulation and Order in this matter, to divest the Los Angeles Mill, New Prague Mill, Oakland Mill, and Saginaw Mill to Miller Milling in a manner consistent with this Final Judgment. Defendants shall use their best efforts to accomplish the divestitures ordered by this Final Judgment as expeditiously as possible. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed thirty (30) calendar days in total, and shall notify the Court of any such extension. In the event that, through no action of Defendants, the sale of any of the Divestiture Assets cannot be consummated, the United States, in its sole discretion, may agree to the sale of the unsold Divestiture Assets to an alternative Acquirer(s) approved by the United States.

B. Defendants shall offer to furnish to Acquirer(s), subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process, except such information or documents subject

to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to the Acquirer(s).

C. Defendants shall permit the Acquirer(s) to have reasonable access to personnel and to make inspections of the physical facilities associated with the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process, except such information or documents subject to the attorney client privilege or the work-product doctrine.

D. Defendants shall warrant to the Acquirer(s) that each asset will be operational on the date of sale.

E. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

F. Defendants shall warrant to the Acquirer(s) that there are no material defects in the environmental, zoning or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

G. At the option of the Acquirer(s) of the Divestiture Assets, Defendants shall enter into one or more transition services agreements. These agreements may include, but not be limited to, services relating to the packaging of flour, the purchase of wheat or other ingredients, the inbound transportation of wheat or other ingredients, the outbound transportation of flour or millfeed, or the milling of flour.

1. The terms and conditions of any contractual arrangement meant to satisfy this provision must be reasonably related to market conditions. The duration of any transition services agreement shall not be longer than six (6) months from the date of divestiture. The United States, in its sole discretion, may approve an extension of the term of any transition services agreement for a period of up to six (6) months. If the Acquirer(s) seeks an extension of the term of any transition services agreement, it shall so notify the United States in writing at least two (2) months prior to the date the transition services agreement expires. The United States shall respond to any such request for extension in writing at least one (1) month prior to the date the transition services agreement expires.

2. If in conjunction with a transition services agreement pursuant to Subparagraph (1) above, Defendants temporarily assign any employee to the Acquirer(s) to fill a position at a mill to be divested, such employee (a) shall not be assigned to Acquirer(s) longer than six (6) months from the date of divestiture of the Divestiture Assets; (b) shall be located at the mill; (c) shall not, during the temporary assignment, reveal to the Acquirer(s), or make use of, any non-public information concerning Defendants; (d) shall not, during or subsequent to the temporary assignment, reveal to Defendants or anyone else any non-public information concerning Acquirer(s); (e) shall not, subsequent to the temporary assignment, make use of any non-public information concerning Acquirer(s); and (f) shall not retain or convey to others any documents, data, or tangible things concerning the Acquirer(s) obtained during the temporary assignment. Any

temporary employee assignment pursuant to this subparagraph IV(G)(2) cannot be extended beyond six (6) months, even if the United States, in its sole discretion, approves an extension of the related transition services agreement.

3. Defendants shall distribute a copy of this Final Judgment and related Competitive Impact Statement to any employees who perform services for the Acquirer(s) pursuant to Paragraph IV(G)(2).

H. Unless the United States otherwise consents in writing, the divestiture by Defendants pursuant to Section IV, or by the trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable ongoing business producing and selling wheat flour. Divestiture of the Divestiture Assets may be made to one or more Acquirers, provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment:

1. shall be made to an Acquirer(s) that, in the United States's sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively as a producer and seller of wheat flour; and

2. shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirer(s) and Defendants gives Defendants the ability unreasonably to

raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer or Acquirers to compete effectively.

V. APPOINTMENT OF TRUSTEE

A. If Defendants have not divested all of the Divestiture Assets within the time period specified in Paragraph IV(A), Defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of any of the Divestiture Assets not yet divested.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Paragraph V(D) of this Final Judgment, the trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the trustee no later than ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of Defendants, on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications. The trustee shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Defendants and the trust shall be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. If the trustee and Defendants are unable to reach agreement on the trustee's compensation or other terms and conditions of sale within fourteen (14) calendar days of appointment of the trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures. The trustee and any consultants, accountants, attorneys, and other agents retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the assets to be divested, and Defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information, except such information or documents subject to the attorney client privilege or work-product doctrine. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestitures.

F. After its appointment, the trustee shall file monthly reports with the United States and, as appropriate, the Court, setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished the divestitures ordered under this Final Judgment within six (6) months after the trustee's appointment, the trustee shall promptly file with the Court a report setting forth: (1) the trustee's efforts to accomplish the required divestitures; (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished; and (3) the trustee's recommendations. To the extent such report contains information that the trustee deems confidential, such report shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

H. If the United States determines that the trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute trustee.

VI. NOTICE OF PROPOSED DIVESTITURE

A. If the trustee is responsible for effecting the divestitures required herein, within two (2) business days following execution of a definitive divestiture agreement, the trustee shall notify the United States and Defendants of any proposed divestiture required by Section V of this Final Judgment. The notice provided to the United States shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer(s), any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s), and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested, except such information or documents subject to the attorney client privilege or work-product doctrine within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer or Acquirers, any third party, and the trustee, whichever is later, the United States shall provide written notice to Defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Paragraph V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon

objection by the United States, a divestiture proposed under Sections IV or V shall not be consummated. Upon objection by Defendants under Paragraph V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. RIGHT TO HIRE

A. To enable the Acquirer(s) to make offers of employment, Defendants shall provide the Acquirer(s) and the United States information relating to the personnel who are employed at, purchase wheat for, purchase or advise on the purchase of wheat futures for, provide instructions, guidance, or assistance relating to food safety or quality assurance for, or who sell or arrange transportation for flour, millfeed or any other product produced at any of the mills listed in 1 (a)-(c) and 2 in Schedule A. The information provided by Defendants shall include for each employee his or her name, job title, responsibilities as of January 1, 2014, training and educational history, relevant certifications, and, to the extent permissible by law, job performance evaluations, and current salary and benefits information.

B. Defendants shall make personnel available for interviews with the Acquirer(s) during normal business hours at a mutually agreeable location and will not interfere with any negotiations by the Acquirer or Acquirers to employ any of the personnel employed at the facilities listed in 1 (a)-(c) and 2 in Schedule A. Interference with respect to this paragraph includes, but is not limited to, enforcement of noncompete and nondisclosure agreements and offers to increase an employee's salary or benefits other than as a part of a company-wide increase in salary or benefits.

1. For each employee who elects employment by the Acquirer(s), Defendants shall vest all unvested pension and other equity rights of that employee and provide all benefits to which the employee would have been entitled if

terminated without cause, per the terms of the applicable plan(s). Defendants also shall waive all noncompete and nondisclosure agreements.

2. Nothing in this Section shall prohibit Defendants from maintaining any reasonable restriction on the disclosure by an employee who accepts an offer of employment with the Acquirer(s) of the Defendants' proprietary, non-public information that is (1) not otherwise required to be disclosed by this Final Judgment, (2) related solely to Defendants' businesses and clients, and (3) unrelated to the Divestiture Assets.

VIII. NONDISCLOSURE OF WHEAT CUSTOMER CONFIDENTIAL INFORMATION

A. Cargill, CHS, and ConAgra shall not disclose to Ardent Mills any Wheat Customer Confidential Information.

B. Ardent Mills shall not solicit or receive from Cargill, CHS, or ConAgra any Wheat Customer Confidential Information, or use any Wheat Customer Confidential Information received from Cargill, CHS, or ConAgra.

C. No later than seven (7) calendar days after the entry of this Final Judgment, Defendants shall distribute a copy of this Final Judgment and the Competitive Impact Statement to each of their employees with responsibility for wheat sales or flour sales.

D. Defendants shall distribute a copy of this Final Judgment and related Competitive Impact Statement to any person who succeeds to a position described in Paragraph VIII(C) within thirty (30) days of that succession.

E. Defendants shall annually furnish to each person designated in Paragraphs VIII(C) and VIII(D) a description and summary of the meaning and requirements of Section VIII of this Final Judgment.

F. Defendants shall report to the United States any violations of Section VIII (A) or VIII(B) of this Final Judgment.

IX. FINANCING

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

X. HOLD SEPARATE

Until the divestitures required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestitures ordered by this Court.

XI. AFFIDAVITS

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section X of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this Section within fifteen (15) calendar days after the change is implemented.

B. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

XII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as the Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

1. access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If, at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XIII. NO REACQUISITION

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment, other than incidental purchases of finished goods, raw materials, spare parts, or other equipment offered by the Acquirer in the ordinary course of business.

XIV. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XV. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XVI. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making available to the public copies of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date:

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

_____

United States District Judge

SCHEDULE A

1. ConAgra's ownership and leasehold interest in each of the following properties:

    a. New Prague

        i. The property at 100 2nd Avenue SW, New Prague, Minnesota 56071-2314;

        ii. 2.46 acres of real property at 302 Second Street Northwest, New Prague, Minnesota pursuant to Lease Agreement, effective as of September 1, 2012, by and between ConAgra Foods, Inc. and City of New Prague, Minnesota;

        iii. Lease of Property, dated June 1, 2001, by and between Union Pacific Railroad Company and ConAgra Foods, Inc.;

        iv. Track Lease Agreement, dated March 1, 1989, by and between Union Pacific Railroad Company (as assignee of Chicago and North Western Transportation Company) and ConAgra Flour Milling Company;

    b. Oakland

        i. The property at 2201 East 7th Street, Oakland, California 94606-5301;

        ii. The property at 401 Kennedy Street, Oakland, California 94606;

        iii. The agreement for Service from Track of Railroad, dated July 26, 1991, by and between Southern Pacific Transportation Company and ConAgra, Inc.;

    c. Saginaw

        i. The property at 221 Fairmount Street, Saginaw, Texas 94606;

        ii. The property at 221 South Fairmount Street, Saginaw, Texas 76179;

iii. The property at 220 South Fairmount Street, Saginaw, Texas 76179 (maintenance office that includes the machine shop and spare parts);

2. Horizon's ownership and leasehold interest in each of the following properties in Los Angeles, California:

   a. Parcel 1 of Parcel Map NO 23131, in the City of Commerce, in the County of Los Angeles, State of California, as per map filed in Book 276 Pages 33-36 inclusive of Parcel Maps, in the Office of the County Recorder of said county;

      i. Except therefrom all coal, oil, and other minerals, without the right to use any surface thereof, in and under that portion of said land lying within the lands described therein, as reserved by Las Vegas Land and Water Company, in deed recorded August 16, 1944 as instrument no. 15;

      ii. Also excepting therefrom all minerals and minerals rights of every kind and nature, including oil and gas rights, without the right to enter upon the surface thereof, in and under that portion of said land lying within the lands described therein, as reserved by Union Pacific Railway Company, in deed recorded September 30, 1947 as instrument no. 278;

   b. A perpetual easement for ingress and egress as established and more particularly described in that certain document entitled "Reciprocal Easement Agreement for Driveway" recorded May 23, 1980 as instrument no. 80-511791, of official records;

   c. The Industry Track Contract between Union Pacific Railroad Company and Cargill, Incorporated, dated May 10, 2005;

   d. The Sublease Agreement between Horizon Milling, LLC and Lowey Enterprises d/b/a Sunrise Produce, dated August 16, 2004;

e. The License Agreement between Horizon Milling LLC and 5469 Ferguson Drive, LLC ("Licensor") allowing Horizon Mill's employees to park on a portion of Licensor's property.

3. For each property listed in 1 (a)-(c) and 2 above and for the mill on that property,

a. all tangible assets (leased or owned) used at or for the operation or maintenance of the mill, including, but not limited to, all real property and improvements; machinery; equipment; hardware; fixtures (including production fixtures); computer hardware, other tangible information technology assets; furniture; laboratories or other assets used to test or evaluate wheat or flour; equipment or buildings used for the storage, offloading, or onloading of wheat, flour, or millfeed; supplies; materials; vehicles; and spare parts in respect of any of the foregoing;

b. all improvements, fixed assets, and fixtures pertaining the mill or any other facility on the real property described in 1 (a)-(c) or 2 above, and for any real property on which any facility is located that is used in connection with the operation or maintenance of the mill, or for any real property used for wheat that will be processed at the mill or for flour, millfeed, or any other product produced at the mill;

c. all inventories, ingredients, raw materials, works-in-progress, finished goods, supplies, stock, parts, packaging materials and other accessories related thereto,

including wheat or other ingredients that are in transit to the mill or flour, millfeed, or other products produced at the mill that is in transit to customers;

d. all real property and other legal rights possessed by Defendants relating to the use, control or operation of the mill, for elevators, storage, offloading or onloading or other facilities used for wheat to be processed by the mill or for flour, millfeed, or any other product produced at the mill, whether located on the same land as the mill or not, including but not limited to, fee simple ownership rights, easements and all other real property rights for land, improvements, and fixtures; leasehold and rental rights for facilities that are leased or rented, including all renewal or option rights; personal property ownership rights for equipment and other personal property; and contract rights with respect thereto;

e. all real property and other legal rights possessed by Defendants and not described in 3(d) above, relating to the real property described in 1 (a)-(c) or 2 above, or any building thereon, including but not limited to, fee simple ownership rights, easements and all other real property rights for land, improvements, and fixtures; leasehold and rental rights for facilities that are leased or rented, including all renewal or option rights; personal property ownership rights for equipment and other personal property; and contract rights with respect thereto;

f. all assets not otherwise described in 3 (a)-(e) above that relate to the transportation of wheat to the mill, or flour, millfeed, or any other product from the mill, including, but not limited to, leases or rights to use rail-to-truck transfer facilities, or leases or ownership interests in rail spurs or rail lines;

g. all business records relating to operation of the mill located on the property, to transportation of wheat, flour, millfeed, or any other product produced at the mill, to the purchase of wheat, or to the sale of flour, millfeed, or any other product produced at the mill, or to any legal right in the real property described in 1 (a)-(c) or 2 above and any building affixed thereto, including, but not limited to, maintenance records, financial records, accounting and credit records, leases, correspondence, tax records, governmental licenses and permits, bid or quote records, customer lists, customer communications, customer contracts, supplier contracts, service agreements, operations records, research and development records, testing records, non-employee specific health, environment and safety records, equipment, repair and performance records, training records, and all manuals and technical information Defendants provide to their employees, customers, suppliers, agents or licensees; and

4. All intangible assets that are used to operate the mill or any facility located on the real property described in 1(a)-(c) or 2 above, to operate, maintain, or repair any of the equipment in the mill or in any facility located on the real property described in 1 (a)-(c), or 2 above, including, but not limited to, contractual rights (to the extent assignable) relating to energy, packaging, transportation, purchases of wheat or other materials for processing at the mill, sales of flour, millfeed or other products produced at the mill, including but not limited to, open contracts or orders for the purchase of wheat that have been assigned to the mill and open contracts or orders for the sale of flour, millfeed or other products produced at the mill that have been assigned to the mill; rights to use know-how, trade secrets, patents, licenses, sublicenses and other intellectual property in connection with the Divested Assets, and any

assigned trademarks; technical information; computer software and related documentation; blueprints; specifications for materials; specifications provided by customers for flour, millfeed or other products produced at the mill; specifications for parts and devices; safety procedures; and quality assurance and control procedures.

To the extent transference of any contract, lease or other rights described above requires the consent of the other party, Defendants shall use their best efforts to obtain that consent.

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