

5. *Outstanding action jackets*: none.

CONTACT PERSON FOR MORE INFORMATION: Sharon Bellamy, Supervisory Hearings and Information Officer, 202–205–2000.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.
Issued: December 5, 2023.

Sharon Bellamy,

Supervisory Hearings and Information Officer.

[FR Doc. 2023–26967 Filed 12–5–23; 4:15 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Koch Foods Incorporated; 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, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the Northern District of Illinois, Eastern Division, in *United States v. Koch Foods Incorporated*, Civil Action No. 23–15813. On November 9, 2023, the United States filed a Complaint alleging that Koch Foods Incorporated (“Koch”), one of the largest poultry processors in the United States, unlawfully requires independent chicken farmers to pay Koch an exit fee if the farmers switch from working with Koch to working with one of its rivals. Koch’s practices are alleged to violate section 202(a) of the Packers and Stockyards Act and section 1 of the Sherman Act.

The proposed Final Judgment, filed at the same time as the Complaint, requires Koch to refrain from including a termination payment obligation in any farmer contracts and from taking any steps to collect any termination payments for the next seven years. It also requires Koch to repay all termination payments it has received from farmers, and to reimburse farmers for legal costs they incurred in responding to Koch’s efforts to collect termination payments.

Koch is required to certify that it has given the required notices to farmers, made the required payments and reimbursements within 120 days of

entry of the Final Judgment, and submitted any disputed claims for payment or reimbursement to a referee selected by the Division, whose decision will be final. Koch will provide an annual certification that it continues to comply with provisions of the proposed Final Judgment for its duration of seven years, unless it is terminated earlier by agreement with the Division and a determination by the Court that termination is in the public interest. The proposed Final Judgment also imposes other cooperation and reporting requirements.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division’s website at <http://www.justice.gov/atr> and at the Office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division. 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 Antitrust Division’s website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be submitted in English and directed to Chief, Civil Conduct Task Force, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 8600, Washington, DC 20530 (email address: ATRJudgmentCompliance@usdoj.gov).

Suzanne Morris,

Deputy Director of Civil Enforcement Operations, Antitrust Division.

United States District Court for the Northern District of Illinois Eastern Division

United States of America, 450 Fifth Street NW, Washington, DC 20530, Plaintiff, v. Koch Foods Incorporated, 1300 W Higgins Road, Suite 100, Park Ridge, IL 60068, Defendant.

Case No. 1:23–cv–15813

Judge John F. Kness

Complaint

Raising chickens is a bet-the-farm proposition. Many chicken farmers must borrow hundreds of thousands of dollars to finance the construction of chicken houses—huge structures that hold over 50,000 chickens each. A farmer is largely beholden to a poultry processor, which owns the chicks, feed, antibiotics, and other inputs for raising chickens. Without a loan from the bank, there is no farm; without a contract with a processor, there is no loan; and

without the processor’s fair dealing, the farm may fail.

To secure better working conditions or pay, a chicken farmer’s only recourse often is switching processors. Even in the best of circumstances, competition for farmers’ chicken growing services is uncertain because switching processors can be a costly, risky, and difficult endeavor. But Koch Foods, a leading poultry processor, has suppressed competition even further by imposing exit penalties on its chicken farmers who want to switch to a competitor. Koch’s conduct deprives farmers of the benefits of competition and lowers their compensation. Koch’s exit penalties are an unfair practice under section 202(a) of the Packers and Stockyards Act and violate section 1 of the Sherman Act. These practices should be enjoined.

I. Introduction

1. A chicken farmer’s success depends on a processor. A farmer must invest hundreds of thousands of dollars to build chicken houses to a processor’s specifications. A bank will loan money for the construction only if a processor has agreed to offer the farmer a contract; the bank often sees the farmer’s contract before the farmer. After obtaining a loan and building the houses, the farmer generally has no practical alternative but to accept the contract terms for growing chickens offered by the processor.

2. Once built, chickens houses cannot be relocated or readily repurposed. If the processor provides insufficient flocks, poor quality chicks, or substandard feed, the farmer may not earn enough to meet the terms of the loan—and can literally lose the farm.

3. Broiler chicken farmers, commonly called “growers,” generally can contract only with a processor operating a processing facility close enough to transport chickens and feed cost-effectively.¹ Few growers have more than three other processors close enough to contract for their growing services. And when the grower wants to switch processors, alternative processors may not need new growers.

4. For these reasons, processors have substantial leverage over contract growers. Where it exists, competition among processors for chicken growers can sometimes increase their compensation and motivate a processor to provide better terms to farmers. Growers’ ability to switch processors

¹ Most chicken farmers raise “broilers,” the chickens that are slaughtered and processed for people to consume. Other chicken farmers raise breeder hens or pullets (chicks). In at least some cases, Koch imposed its exit fees on breeder-hen and pullet farmers as well as broiler farmers.

provides some check, even if a limited one.

5. Beginning in 2014, Koch Foods—one of the five largest chicken processors in the United States—introduced an exit penalty in its grower contracts to insulate itself from competition. If a farmer switches from Koch to a different processor within 10 years (later extended to 15 years) of contracting with Koch, the farmer must pay a penalty. Depending on the size of the farm, the penalty amount can range from \$24,000 to \$56,000 or, for one facility's farmers, up to hundreds of thousands of dollars. Such penalties exceed 50 to 100 percent of many farmers' annual income given farmers' limited take-home pay after deducting operating expenses.

6. The goal of Koch's exit penalty is clear: Koch wants to make it more difficult for its growers to switch to another processor. Koch claims that the exit penalty was meant to compensate Koch Foods for the real impact growers leaving has on Koch. But that is just another way of saying that, without the exit penalty, Koch would have to pay farmers competitive rates to keep them from switching to one of Koch's competitors.

7. Koch has enforced its exit penalty to prevent its chicken farmers from leaving. Koch has sued or threatened to sue at least 14 farmers who wanted to switch to a competing processor. Other farmers, faced with the exit penalty and threat of litigation, have declined better opportunities with other processors and returned to Koch.

8. The exit penalty is an "unfair . . . practice or device" under the Packers and Stockyards Act, 7 U.S.C. 192(a), because growers cannot reasonably avoid the penalty provision, its existence and enforcement substantially harm growers, and any countervailing benefit to growers does not outweigh the harm.

9. In addition, under Packers and Stockyards Act regulations, 9 CFR 201.100(h)(2), a broiler farmer has the right to terminate its poultry growing arrangement in writing with at least 90 days' prior notice. By unreasonably burdening farmers' right to terminate their production contracts, the Koch exit penalty provision violates this regulation.

10. The exit penalty has harmed competition, and therefore suppressed compensation, for growers. Koch has a sufficient share of the relevant markets for the penalty to foreclose competition; its purpose for imposing and enforcing the penalty is to prevent or limit competition; and the penalty has prevented growers from accepting better

terms. The exit penalty therefore unreasonably restrains trade in violation of section 1 of the Sherman Act.

11. The Department of Justice brings this action on behalf of the United States and the U.S. Department of Agriculture to enjoin Koch's unlawful exit penalty practices.

II. Factual Allegations

A. Koch Uses Independent Farmers To Raise Its Broiler Chickens

12. Koch Foods is the fifth largest broiler chicken processor in the United States, with \$4.7 billion in sales in 2022. Koch is a privately held company, whose CEO owns 99 percent of its shares.

13. Like most other broiler chicken processors, Koch is vertically integrated. This means the company controls most steps in the production of chicken meat, from hatching chicks to slaughtering and packaging broiler chickens to be consumed in homes, restaurants, and other venues. One important exception, however, is that Koch (like other major processors) pays independent farmers to raise its broiler chickens for delivery to Koch's processing plants. By outsourcing chicken growing, Koch shifts the substantial cost, capital requirements, and risk to small poultry farmers. Farmers who build chicken houses to raise chickens for Koch bear the risks of their investment, including risks of weather damage, such as tornados or floods. Outsourcing chicken growing also allows Koch to avoid the burden and costs associated with employing farmers.

14. Koch, like other processors, provides chicks and feed to its broiler farmers and pays farmers only for the service of growing chickens. To reduce transportation costs for feed and chickens, and to limit injury or death to chickens during transport, most processors contract with farmers located near each processing complex.

15. Once broiler chickens reach their target weight, Koch collects and trucks them to a processing plant, where Koch slaughters and packs them for distribution. A farmer providing broiler services for Koch gets paid only when a flock is brought to slaughter. The farmer's pay depends on the weight of the broiler chickens collected from the farmer, the farmer's "feed-conversion ratio" (that is, the weight of feed consumed by broiler chickens to their full-grown weight) relative to other local Koch-contracted farmers, and various other adjustments for items such as for fuel costs, litter control, and pest control.

16. Koch operates eight poultry processing complexes: two in Tennessee (Morristown and Chattanooga), four in Alabama (Ashland, Montgomery, Collinsville and Gadsden), one in Georgia (Pine Mountain Valley), and one in Mississippi (Morton).

17. Each of Koch's eight complexes enters into contracts with independent farmers to provide growing services. In total, more than 800 farmers grow broiler chickens for Koch. The duration of Koch's contractual commitment does not usually exceed five years. Many of these farmers operate small family farms. Koch does not allow broiler farmers in any way to own, maintain or care for any competitor's birds of any kind *anywhere*—even on property that is not used to grow chickens for Koch.

B. Broiler Houses Are Large, Debt-Financed Capital Investments

18. To operate at a scale sufficient to grow broilers for a major processor like Koch, a contract farmer typically needs two to four modern broiler houses. These houses are large: Koch specifies that new broiler houses should generally be 66 feet wide by 600 feet long, nearly the length of two football fields.

19. Each modern broiler house costs approximately \$500,000 to build. Most farmers must take out loans to fund 90 percent or more of this cost. Many chicken farmers operate as small, highly leveraged family farms, and bank debt repayment is their largest expense.

20. Koch typically provides a prospective farmer with the required specifications for the houses and a simple pro forma cash-flow statement, or "payback analysis," showing the farmer's projected total gross pay before debt service and other operating expenses. Koch then notifies a local lender, either by a commitment letter or through informal means, that Koch considers the prospective farmer acceptable and that Koch is prepared to place flocks with the farmer upon the completion of the broiler housing.

21. A lender will generally evaluate the farmer's projected cash flow based on the standard-form Koch contract, with the understanding that Koch will require the farmer to sign the contract without amendment after the houses are built. The lender generally conditions a loan for new-house construction on a farmer's willingness to execute the Koch standard contract "as is" once the new broiler houses are ready to receive their first flocks. Most loans for broiler houses span 10 or 15 years, while some are longer. As a practical matter, Koch offers contracts to farmers on a "take-it-or-leave-it" basis, and a prospective

farmer typically has no opportunity to negotiate the compensation terms of a Koch contract.

22. Under its grower contracts, Koch determines a farmer's compensation for a flock after it arrives at a Koch processing plant and is weighed. Before disbursing payment, however, Koch deducts a farmer's loan payment, which it remits directly to the lender, as required by the farmer's loan agreement.

23. Koch wields enormous leverage over the farmers who grow its broiler chickens. Indebted farmers generally need at least six flocks each year to stay current on their broiler-house loans, yet Koch decides the number of flocks to allot to each farmer. If Koch elects not to renew a farmer's contract, or merely reduces the number of flocks placed per year, many farmers would be unable to make their loan repayments. Koch also controls other factors that can significantly affect farmer compensation, such as the number and quality of chicks provided, the type of feed, the timing of when flocks are collected, the use of antibiotics, and various payment adjustments.

24. The only realistic way for farmers to repay their loans for newly constructed broiler houses is by growing broiler chickens. Once built, broiler houses cannot be relocated, and farmers can raise chickens only for processors that are both nearby and willing to accept new farmers. Farmers know that their farm is just one among many nearby, and none is an irreplaceable supplier of broiler services for Koch or any other processor.

C. Koch Introduces the Exit Penalty To Stifle Competition

25. Almost all Koch-contracted farmers reside near enough to the complex of at least one other processor to raise broilers for that processor, so there is potential competition for their broiler growing services.

26. In 2014, Koch introduced the exit penalty provision into its grower contracts—a new policy designed to weaken competition between Koch and other processors for broiler farmers' services by stymieing its farmers' ability to switch to Koch's competitors.

27. Part of a farmer's compensation is a per-flock payment that Koch calls a "New House Incentive." If the farmer switches to one of Koch's competitors in the next 10 years, the grower must pay an exit penalty:

If [farmer] elects to terminate the Poultry Production Agreement during the ten (10) year time period applicable to this NEW HOUSE INCENTIVE AGREEMENT, then [farmer] shall refund Company, within 90 days of its notice of termination to Company,

any payments made by Company within the preceding 12 months under this NEW HOUSE INCENTIVE AGREEMENT, and no additional amounts shall be owed by Company under this NEW HOUSE INCENTIVE AGREEMENT.

28. The fixed per-flock payment is roughly \$2,000 per modern ("Class A") house. For an average farm of two or four houses, each of which receives six or seven flocks a year, the exit penalty over a year would be \$24,000 to \$56,000. This obligation to "refund . . . any payments" made by Koch under the "new house incentive" agreement "for the preceding 12 months" means that the exit penalty represents for most farmers *at least half*—and for some farmers *up to 100 percent or more*—of their annual take-home income after paying bank debt and operating costs.

29. The exit penalty implemented at Koch's complex in Montgomery, Alabama is even more burdensome. Koch charges Montgomery-area farmers an exit penalty equal to the "new house incentive" paid in *all years* prior to termination, rather than the amount paid in the preceding 12 months:

If [farmer] elects to terminate the Production Agreement at any time prior during the ten (10) year time period applicable to the NEW HOUSE INCENTIVE, then [farmer] shall refund to COMPANY, within ninety (90) days of its notice of termination to COMPANY, all payments received under this NEW HOUSE INCENTIVE AGREEMENT.

Under this provision, a farmer with, say, four houses who received new house incentive payments for seven years would likely have to pay over \$300,000 to switch from Koch to a competing processor.

30. As the percentage of Koch broiler farmers with qualifying houses has steadily increased, more farmers have become subject to the exit penalty. For example, by the end of 2017, the farmers providing more than half of the total square footage of broiler housing for Koch's Gadsden, Alabama complex were subject to the exit penalty.

31. Koch also includes exit penalties in at least some of its contracts with breeder-hen farmers and pullet farmers.

32. In rolling out the "new house incentive," Koch has sought out prospective farmers who are young, financially insecure, less familiar with the growing business, and short on collateral—making them more inclined to accept 90 or 100 percent financing from lenders. Koch understands that, for these prospective farmers, the decision to build new houses is based largely on the potential cash flow. Koch generally shows prospective farmers a "payback analysis" predicated on raising 6.5

flocks each year (that is, alternating between six and seven flocks per year), though Koch is not obligated by its contracts to deliver that many flocks.

33. Once the new houses are built, however, Koch can choose to deliver fewer than six flocks or deliver flocks that are smaller than Koch has projected. Many broiler-house loans are structured to be repaid through six flock settlements in a year; a farmer who receives fewer than six flocks frequently incurs negative cash flow and the prospect of default.

34. Koch has failed to inform some farmers of the exit penalty until the farmer has signed a loan for the new housing with the bank, drawn down the loan, and completed the construction of the new broiler houses. Koch's typical sample payback analysis is a pro forma cash flow statement that does not mention the exit penalty.

35. When a farmer finally has the opportunity to sign the lengthy broiler-services contract, the exit penalty is non-negotiable, and farmers have little choice but to accept Koch's terms given their impending loan payments. As a practical matter, it is impossible for farmers to choose not to work for Koch without defaulting on their bank loans.

36. Prospective farmers must trust Koch to provide reasonable contract terms when the farmer eventually receives (and signs) the Koch broiler production contract.

37. Even if farmers did receive proper notice and understood the exit penalty provision, the exit penalty would still serve as an unreasonable burden on switching.

38. The so-called "new house incentive" and concomitant exit penalty originally only applied for the first 10 years that the chicken farmer stayed with Koch. Within the past two years, however, Koch's new contracts extend the supplemental payments and exit penalty for the first 15 years that the farmer stays with Koch. Koch has also extended the supplemental payments and exit penalty to 15 years for at least some farmers who were subject to the original 10-year exit penalty obligation.

39. Koch's exit penalty makes it harder for farmers to switch from Koch to competing processors. As a result, Koch need not compete as vigorously to retain farmers as it would absent the exit penalty. In effect, the exit penalty functions as a non-compete clause that curtails farmers' ability to switch to competitors that might offer greater compensation or otherwise superior contract terms.

D. No Legitimate Purpose Justifies the Exit Penalty

40. Although Koch adopted the exit penalty as part of its “new house incentive” program, Koch does not advance any funds to farmers to build new houses as part of the program. Instead, Koch expects farmers to pay for new houses by taking out their own loans on their own credit. Nor does the exit penalty serve to recoup costs that Koch has expended on special training for farmers or to protect Koch against the risk that any trade secrets or special know-how might be shared with another processor if a farmer stopped growing for Koch.

41. The “new house incentive” program has been profitable to Koch from the very first flock even without any exit penalty. With each flock, Koch saves money on feed from the improved quality of new broiler housing. These savings far exceed the “new house incentive” payments to farmers.

42. Before adopting the “new house incentive” in 2014, Koch senior executives verified that “[t]he incentive will pay for itself with better performance,” without any exit penalty. A senior employee in the Koch finance department provided Koch executives with a detailed analysis showing that only a slight improvement in the feed conversion ratio would allow Koch to break even on its “new house incentive” payments. Koch’s executives responded that the program “would seem to be a no brainer,” especially considering that the “improvement should be a lot higher than that.”

43. Koch analyses in 2016 and 2017 confirmed that the “new house incentive” has paid for itself many times over without any exit penalty. The analyses showed that new houses provided cost savings to Koch more than seven times greater than the extra payments that Koch paid to farmers. In each year since Koch implemented the “new house incentive,” Koch has saved millions of dollars. For example, by the end of 2016, less than two years after first imposing the exit penalty in its contracts, Koch determined that it had already enjoyed cost savings of many times the amount that it had paid to farmers as “new house incentives.”

E. Koch Enforces Its Exit Penalty When Farmers Seek To Switch to Competing Processors and Sues Farmers Who Do Not Pay

44. Koch actively enforces its exit penalty to deter farmers from switching

to competing processors. Koch has demanded exit penalties from at least 14 farmers—including 13 from broiler chicken farmers and one from a breeder farmer—and filed nearly a dozen lawsuits over the past three years against farmers who attempted to switch processors. Some farmers returned to Koch rather than face litigation, while others declined to pursue a switch because the exit penalty would be too onerous.

45. Since at least May 2020, Koch has sent letters demanding the exit penalty from farmers who gave notice of their intention to switch to another processor.

46. In November 2020, Koch began suing farmers to collect the exit penalty. Koch sued one married couple for a total of \$95,040; another farmer for \$55,440; and yet another for \$27,720. Since November 2020, Koch has demanded comparable exit penalties from at least nine other farmers. Some of these farmers returned to Koch rather than pay the exit penalty or bear the costs of litigation.

47. One farmer who had earned less than \$4,000 in “new house incentive” payments received a demand from Koch for seven times the amount actually due under the exit penalty provision. The farmer managed to pay a lesser amount only after litigating the issue.

48. For all of these farmers, the exit penalty was substantial compared to their earnings after deducting loan payments and other costs of operating their farms.

49. Koch’s highly visible efforts to collect its exit penalties have deterred farmers who might otherwise avail themselves of competition between Koch and other processors to obtain better compensation for themselves and their families. Koch’s exit penalty is unfair and unreasonably harms competition for broiler farmer growing services.

III. Relevant Markets and Market Power

50. The relevant markets are the purchases of broiler growing services in the locations encompassing each Koch poultry processing facility and the rival processors with which it competes.

A. The Market for the Purchase of Broiler Growing Services

51. The purchase of broiler growing services by chicken processors is a relevant product market under the Sherman Act.

52. Broiler farmers own the facilities required to raise broiler chickens, which

are typically financed by loans made directly to the farmers. Broiler farmers use houses designed specifically for growing broiler chickens that cannot be repurposed for other agricultural operations without significant cost.

53. Broiler farmers take financial risk and invest their labor and capital in building and operating a specialized farming service. Broiler farmers cannot switch to producing other agricultural products in sufficient numbers to render unprofitable a small but significant decrease in price (compensation) by a hypothetical monopsonist. Nor would farmers likely abandon their investments and credit obligations to take up alternate employment.

54. To become growers, farmers must borrow considerable amounts of money and invest time building chicken houses.

B. The Relevant Geographic Markets Are the Areas Around the Locations of Each Koch Poultry Processing Facility and Its Rival Processors

55. Processors require sufficient growers to supply their processing complexes. Processors typically pay for the chickens’ transportation, feed, veterinary care, and collection. The cost and risk of transporting feed and chickens limit the area in which processors can contract with broiler farmers. The geographic radius within which a processor can economically contract with farmers for chicken growing services constitutes its “draw area.”

56. Although there may be some processor-specific requirements, top-quality chicken housing that satisfies one processor’s requirements is often acceptable to other processors in the area. Farmers with top-quality housing may be able to improve their compensation by switching processors, depending on competitive conditions in the relevant market. A processor competes with a Koch complex for chicken growing services if the draw area of one or more of its complexes overlaps significantly with Koch’s draw area.

57. For each Koch complex that competes with one or more rival processors, the relevant geographic market is the area around the Koch complex and its set of competing processors. Koch contracts with a significant share of the broiler farmers within the geographic market of each Koch complex.

C. Koch Has Market Power in Each Relevant Market

58. Koch contracts with a significant share of the broiler farmers who contract to deliver broiler growing services to processors within the draw area of each Koch complex.

59. Most Koch farmers have a few alternative processors with which to contract. Nearly all Koch farmers are within the draw area of at least one competitor's complex. Over 80 percent of Koch farmers are located within the draw areas of the complexes of at least two of Koch's competitors. More than half of the farmers who provide their services to Koch are located within the draw areas of the complexes of three or more of Koch's competitors.

60. Each Koch complex competes with one or more rival processors to sign up farmers who deliver growing services within their overlapping draw areas. But the Koch exit penalty artificially raises the cost to farmers to switch from Koch to a competitor. Because Koch contracts with a significant share of the farmers under contract with processors in each complex's geographic market, these switching costs significantly lessen competition in those markets.

61. Koch's market share and ability to impose and enforce the termination penalty clause establish that Koch has market power in the relevant markets.

IV. Jurisdiction, Venue, and Commerce

62. The United States brings this action pursuant to section 404(a) of the Packers and Stockyards Act, 7 U.S.C. 224, upon the referral by the Secretary of the United States Department of Agriculture, and under section 1 of the Sherman Act, 15 U.S.C. 1, to protect the farmers of the United States and to restore competition in the market for broiler growing services.

63. Koch is a privately held corporation headquartered in Park Ridge, Illinois, with live poultry operations in Alabama, Georgia, Mississippi, and Tennessee. Koch complexes enter into broiler services contracts with farmers located in multiple states, and Koch's chicken products are sold to customers in many states. Koch is engaged in interstate commerce and activities that substantially affect interstate commerce.

64. The Court has subject matter jurisdiction under 28 U.S.C. 1331, 1337, and 1345, as well as 7 U.S.C. 224, to prevent and restrain Koch from violating section 202(a) of the Packers and Stockyards Act.

65. The Court has subject matter jurisdiction under 28 U.S.C. 1331, 1337,

and 1345 as well as section 4 of the Sherman Act, 15 U.S.C. 4, to prevent and restrain Koch from violating section 1 of the Sherman Act, 15 U.S.C. 1.

66. The Court has personal jurisdiction over Koch under section 12 of the Clayton Act, 15 U.S.C. 22.

67. Venue is proper in this judicial district under section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(b)–(c), because Koch transacted business, was found, and resided in this district; a substantial part of the events giving rise to the United States' claim arose in this district; and a substantial portion of the affected interstate trade and commerce described herein has been carried out in this district.

V. Violations Alleged

Count I

(Violation of Section 202(a) of the Packers and Stockyards Act)

68. The United States repeats and realleges paragraphs 1 through 67 as if fully set forth herein.

69. Koch, with its subsidiaries, is a "live poultry dealer" under 7 U.S.C. 182(10), because it is engaged in the business of obtaining live poultry under a poultry growing arrangement for the purpose of slaughtering and processing poultry.

70. Koch's contracts with chicken farmers concern "live poultry" under 7 U.S.C. 182(6), 192, because the contracts pertain to the raising of chickens for slaughter.

71. Koch's exit penalty is an "unfair . . . practice or device," in violation of section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a). First, farmers cannot reasonably avoid the exit penalty. Lenders' anticipated cash flow analyses are based on the assumption that farmers' compensation for each flock will include the "new house incentive." Koch makes the exit penalty a condition of receiving the "new house incentive." Farmers are required to accept the exit penalty as part of the Koch contract. Koch sometimes even fails to disclose the exit penalty before the farmer takes out a loan to build new broiler houses.

72. Second, the exit penalty substantially harms farmers by curtailing their ability to switch and, accordingly, pursue better wages and working conditions. Once built, chicken houses cannot be repurposed without significant expense, and the out-of-pocket cost of paying the exit penalty is prohibitive for most farmers. The prospect of paying Koch at least 50 percent (and, for some, 100 percent or more) of the farmer's annual take-home pay restrains the farmer from switching

to a Koch competitor, even when the competing processor offers higher compensation or otherwise better contract terms. Koch's illegal conduct has imposed substantial costs on farmers seeking to switch processors and deprived farmers of the benefits of competition for their services.

73. Third, any purported benefit to Koch from the exit penalty does not outweigh the harm inflicted on farmers. The exit penalty does not recoup any upfront capital expenditure by Koch; farmers bear all the financial and operational risk of building new broiler houses. The efficiencies derived from new housing make Koch's "new house incentive" payments to farmers profitable for Koch from the very first flock. The exit fee thus simply insulates Koch from competition with other processors for farmers' services.

74. Koch's unfair and deceptive practices are ongoing and likely to continue and recur unless the Court grants the requested relief.

Count II

(Violation of Section 202(a) of the Packers and Stockyards Act and 9 CFR 201.100(h)(2))

75. The United States repeats and realleges paragraphs 1 through 74 as if fully set forth herein.

76. Pursuant to 9 CFR 201.100(h)(2), chicken farmers have the right to terminate their poultry growing arrangement with at least 90 days' prior written notice.

77. The Koch exit penalty provision unreasonably burdens farmers' right under 9 CFR 201.100(h)(2) to terminate the Koch production contract.

78. Koch's illegal conduct has imposed substantial costs on farmers seeking to switch and deprived farmers of the benefits of competition for their services.

79. Koch's conduct will likely continue and recur unless this Court grants the requested relief.

Count III

(Violation of Section 1 of the Sherman Act)

80. The United States repeats and realleges paragraphs 1 through 79 as if fully set forth herein.

81. The exit penalty provisions in Koch's contracts with farmers had the purpose and likely effect of unreasonably restraining interstate trade and commerce in the relevant markets, within the meaning of section 1 of the Sherman Act, 15 U.S.C. 1.

82. Koch's illegal conduct has imposed substantial costs on farmers seeking to switch and deprived farmers

of the benefits of competition for their services, including their compensation. Koch's illegal conduct has also reduced competition in the market for broiler services, which likely undercuts other processors' ability to hire and the compensation of farmers who do not contract with Koch.

83. Koch's conduct will likely continue and recur unless this Court grants the requested relief.

Requested Relief

The United States requests that this Court:

a. adjudge that the Koch exit penalty provision in its contracts with farmers is an unfair and deceptive practice or device in violation of section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a);

b. adjudge that the Koch exit penalty provision in its contracts with farmers is an unfair and deceptive practice or device in that it unreasonably burdens the right of farmers to terminate their "poultry growing arrangement" with Koch on 90-days' notice, in violation of 9 CFR 201.100(h);

c. adjudge that the Koch exit penalty provision in its contracts with farmers unreasonably restrains trade and commerce and therefore is unlawful under section 1 of the Sherman Act, 15 U.S.C. 1;

d. permanently enjoin and restrain Koch from demanding payment of the exit penalty or otherwise enforcing the exit penalty provision;

e. enjoin Koch from including any exit penalty or substantially similar provision in its agreements with farmers;

f. require that Koch promptly give notice to all farmers with Koch contracts that contain an exit penalty provision that the exit penalty provision is unenforceable and void;

g. require Koch to take such internal measures as are necessary to ensure compliance with any injunction;

h. grant equitable monetary relief by refunding to all affected farmers any funds collected by Koch pursuant to the exit penalty provision, including any funds collected in a settlement or other resolution of a claim by Koch seeking to enforce the exit penalty provision, and all attorneys' fees and costs incurred in defending against Koch's collection efforts;

i. grant any other relief as required by the nature of this case and as is just and proper to prevent the recurrence of the alleged violation and to reverse its anticompetitive effects; and

j. award the United States the costs of this action and any other relief that the Court may deem just and proper.

Dated: November 9, 2023.

Respectfully submitted,

For Plaintiff United States of America

/s/

Jonathan S. Kanter,
Assistant Attorney General for Antitrust.

/s/

Doha Mekki,
Principal Deputy Assistant Attorney General
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/s/

Michael B. Kades,
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/s/

Brian R. Young,
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/s/

Ryan Danks,
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/s/

Miriam R. Vishio,
Deputy Director of Civil Enforcement.

/s/

Daniel S. Guarnera,
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/s/

Kate M. Riggs,
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/s/

Eun-Ha Kim,
Mark H.M. Sosnowsky,
Senior Litigation Counsel.

/s/

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United States District Court for the Northern District of Illinois Eastern Division

*United States of America, 450 Fifth Street
NW, Washington, DC 20530, Plaintiff, v.
Koch Foods Incorporated, 1300 W Higgins
Road, Suite 100, Park Ridge, IL 60068,
Defendant.*

Case No. 1:23-cv-15813

Judge John F. Kness

Proposed Final Judgment

Whereas, Plaintiff, the United States of America, filed its Complaint on November 9, 2023, alleging that Defendant Koch Foods Incorporated violated section 1 of the Sherman Act, 15 U.S.C. 1, and section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a);

And whereas, the United States and Defendant have consented to the entry of this Final Judgment without the taking of testimony, 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 relating to any issue of fact or law;

And whereas, Defendant agrees to undertake certain actions and refrain from certain conduct for the purpose of resolving the claims alleged in the Complaint;

And whereas, Defendant agrees that the relief required by this Final Judgment can and will be made and that Defendant will not later raise a claim of hardship or difficulty as grounds for asking the Court to modify any provision of this Final Judgment.

Now therefore, it is ordered, adjudged, and decreed:

I. Jurisdiction

The Court has jurisdiction over Defendant and the subject matter of this action. The Complaint states claims upon which relief may be granted against Defendant under sections 202(a) and 404 of the Packers and Stockyards Act, 7 U.S.C. 192(a), 224, and section 1 of the Sherman Act, 15 U.S.C. 1.

II. Definitions

As used in this Final Judgment:

A. The "Antitrust Division" means the Antitrust Division of the United States Department of Justice.

B. "Defendant" and "Koch" mean Defendant Koch Foods Incorporated, an Illinois corporation with its headquarters in Park Ridge, Illinois, its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and its and their owners, operators, directors, officers, managers, agents, representatives, and employees.

C. "Dispute Resolution Process" means the process that is the sole means for Koch to dispute a Request for Payment in whole or in part. To invoke the Dispute Resolution Process, within 14 calendar days of receipt of the disputed Request for Payment, Koch must: (i) notify the Independent Poultry Grower of the dispute, (ii) explain the basis for Koch's dispute to the Independent Poultry Grower in writing, and (iii) submit the dispute to the Antitrust Division in writing, attaching a copy of Koch's written notification to the Independent Poultry Grower. If Koch fulfills these requirements, the Antitrust Division will in its sole discretion identify three proposed independent referees, each of whom must be a licensed attorney, to resolve the dispute, give the Independent Poultry Grower and Koch five business days to strike one proposed referee each, and, at the conclusion of that five-day period, either name the remaining proposed referee as the referee or, if more than one of the proposed referees

have not been struck, select the referee from among the remaining proposed referees. Koch will bear all fees and costs of the referee regardless of the outcome of the Dispute Resolution Process. The referee will determine whether a hearing is required to resolve the dispute. Koch must provide the Antitrust Division with all documents and information related to the referee proceeding, including any submissions to or communications with the referee, and the Antitrust Division will have the right to attend hearings, if any, in the referee proceeding and to access any transcripts or recordings of such hearings. If the referee so requests, Koch agrees to waive any applicable confidentiality protections for documents, information, and other material Koch provided to the Antitrust Division in connection with the investigation or litigation of this action, whether directly or through a products-of-discovery Civil Investigative Demand to another party in litigation with Defendant, solely for the purpose of allowing the Antitrust Division to share information with the referee. The referee's decision must be final, binding on Koch and Independent Poultry Grower, and enforceable by the Antitrust Division or the Independent Poultry Grower through this Court's contempt power under this Final Judgment. Any objection or challenge to or appeal of the referee's decision may be made only in this case and must be subject to the procedures and standards of review set forth in Federal Rule of Civil Procedure 53(f), except that all factual findings must be reviewed only for clear error. In such case, the making of this Final Judgment must be without prejudice to either the Independent Poultry Grower or Koch in any dispute over any Request for Payment. *Provided, however,* that the Independent Poultry Grower may opt out of the referee proceeding at any time prior to a determination of the dispute by the referee.

D. "Including" means including, but not limited to.

E. "Independent Poultry Grower" means any Person who has entered into a Live Poultry Agreement, including a poultry grower within the meaning of section 2(a)(8) of the Packers and Stockyards Act, 7 U.S.C. 182(8).

F. "Live Poultry Agreement" means any formal or informal agreement or understanding, and any amendment, addendum or renewal of any such agreement or understanding, for the services of an Independent Poultry Grower who raises, grows, or cares for live chickens (including pullets, breeder chickens, by-product chickens, and

broilers), including under a poultry growing arrangement within the meaning of section 2(a)(9) of the Packers and Stockyards Act, 7 U.S.C. 182(9).

G. "Loan Agreement" means an agreement in which the Defendant pays a sum of money to or on behalf of an Independent Poultry Grower where the agreement (i) has an original term of five years or less and has not been extended prior to acceleration of the loan by a Termination, (ii) provides that the loan will be forgiven or repaid pro rata annually or more frequently during the original term, with only the outstanding balance of the original loan accelerated and payable upon Termination, (iii) does not impose additional charges for prepayment or Termination, such as a prepayment penalty; (iv) does not provide for the payment of interest on the loan, (v) is for the purpose of facilitating the construction or improvement of one or more poultry houses and/or ancillary facilities, including the purchase of related real estate and/or the purchase and installation of related equipment, and where the value of the poultry houses and/or ancillary facilities, including any related real estate and/or related equipment, is projected, at the time of the agreement, to meet or exceed the amount of any payment due as a result of the Independent Poultry Grower initiating a Termination of a Live Poultry Agreement with Defendant, and (vi) does not violate the antitrust laws or the Packers and Stockyards Act.

H. "Person" means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, institution, governmental unit, or other legal entity.

I. "Poultry Processor" means any person engaged in the business of obtaining live poultry by purchase or under a Live Poultry Agreement, including a live poultry dealer within the meaning of section 2(a)(10) of the Packers and Stockyards Act, 7 U.S.C. 182(10).

J. "PSD" means the Packers and Stockyards Division of the Agricultural Marketing Service, United States Department of Agriculture ("USDA") and, in the future, any agency within USDA that becomes responsible for live poultry matters under the Packers and Stockyards Act that are currently the responsibility of PSD.

K. "Recoverable Legal Costs" means all costs that an Independent Poultry Grower has paid or incurred for legal services or court costs in connection with any effort by Defendant to collect a Termination Payment or enforce a Termination Payment Obligation. *Provided, however,* that Recoverable

Legal Costs do not include any costs that were advanced, paid, or reimbursed for an Independent Poultry Grower by or on behalf of a Poultry Processor, or its agent, representative, or affiliate.

L. "Request for Payment" means a written statement, affirmed under penalty of perjury, from an Independent Poultry Grower that (i) requests payment of any Termination Payment or Recoverable Legal Costs and states that none of the requested amount was advanced, paid, or reimbursed by or on behalf of a Poultry Processor, or its agent, representative, or affiliate; and (ii) attaches invoices or other documents that demonstrate the requested payment amounts were incurred.

M. "Termination" means termination, cancellation, non-renewal, or expiration and subsequent non-replacement of a Live Poultry Agreement.

N. "Termination Payment" means anything of value (including money, goods, or services) that an Independent Poultry Grower is required to pay or provide to Defendant or any other person as a result of a Termination. *Provided, however,* that Termination Payments do not include: (a) the return or relinquishment of possession of personal property owned by Defendant such as chickens, medicines, and feed, or any payment of damages, if otherwise permitted under the Live Poultry Agreement, to Defendant based on the Independent Poultry Grower's conversion, abandonment, or destruction of, or actual or imminent harm to, personal property owned by Defendant, or (b) payments under a Loan Agreement.

O. "Termination Payment Obligation" means any obligation or commitment of an Independent Poultry Grower to make a Termination Payment.²

III. Applicability

This Final Judgment applies to Defendant and all other persons in active concert or participation with Defendant who receive actual notice of this Final Judgment.

IV. Prohibited Conduct

Defendant must not:

² For example and without limitation, a Termination Payment Obligation includes any provision in a Live Poultry Agreement in substantially the following form:

If [Independent Poultry Grower] elects to terminate the [Live Poultry Agreement] during the . . . [time period applicable to this New House Incentive Agreement/New House Payment Period], then [Independent Poultry Grower] shall refund Company, within ninety (90) days of its notice of termination to Company, [any/all] payments made by Company [during the previous 12 months] under this New House [Incentive/Payment] Agreement

A. Demand, request, collect, or accept any Termination Payment;

B. Take any steps, including through litigation or the threat of litigation, to demand, request, collect, or accept any Termination Payment or to enforce any Termination Payment Obligation;

C. Include a Termination Payment Obligation in any Live Poultry Agreement; or

D. Directly or indirectly, including through any third party, engage in, encourage, or support any retaliation against, or any intimidation or harassment of, any Independent Poultry Grower who is or was a party or witness to any dispute or litigation relating to a Termination Payment or Termination Payment Obligation or who cooperates or has cooperated with PSD or the Antitrust Division with respect to any investigation of Defendant's conduct relating to Termination Payments or Termination Payment Obligations.

V. Required Conduct

A. Within 30 calendar days of entry of this Final Judgment, Defendant must:

1. Repay all Termination Payments that Defendant has received and has identified to PSD and the Antitrust Division as of the date of entry of this Final Judgment;

2. Send a written notice, in the form attached as Appendix 1 by regular U.S. mail in an envelope marked from Defendant and with the notice conspicuously on the front, "LEGAL MAIL—IMPORTANT NOTICE" in no less than 26 point type, and, for each Independent Poultry Grower for whom Defendant has an email address, by email with the subject line "IMPORTANT LEGAL NOTICE FROM KOCH FOODS, INC.," to the last known postal and email addresses of each Independent Poultry Grower providing services to Defendant under a Live Poultry Agreement that contains a Termination Payment Obligation; and

3. Send a written notice, in the form attached as Appendix 2 by regular U.S. mail in an envelope marked from Defendant and with the notice conspicuously on the front, "LEGAL MAIL—IMPORTANT NOTICE" in no less than 26 point type, and, for each Independent Poultry Grower for whom Defendant has an email address, by email with the subject line "IMPORTANT LEGAL NOTICE FROM KOCH FOODS, INC.," to the last known postal and email addresses of each Independent Poultry Grower who formerly provided services to Defendant under a Live Poultry Agreement that contained a Termination Payment Obligation.

B. Within 120 calendar days of entry of this Final Judgment, Defendant must:

1. Repay all Termination Payments not already repaid pursuant to V.A.1 and pay all Recoverable Legal Costs for which Defendant has received a Request for Payment, except those Termination Payments and Recoverable Legal Costs that are subject to the Dispute Resolution Process and not yet resolved; and

2. Provide a report to PSD and the Antitrust Division, affirmed under penalty of perjury by the CEO, COO, CFO, or other senior Koch officer, that:

(i) Sets forth (a) the name and address of each Independent Poultry Grower who submitted a Request for Payment and the date the request was submitted, (b) the dollar amount(s) requested in each such Request for Payment, listing separately amounts requested, if any, for Termination Payments and for Recoverable Legal Costs, and (c) the dollar amount(s) paid to each Independent Poultry Grower to whom Defendant made any payment pursuant to this Final Judgment, listing separately the amounts paid, if any, for Termination Payments and for Recoverable Legal Costs;

(ii) Sets forth, for any Independent Poultry Grower for whom the amount in the Request for Payment in (2)(i)(b) is greater than the amount paid in (2)(i)(c): (a) an explanation of any discrepancies between the amounts requested and the amounts paid, (b) the date Koch provided notice of a dispute to the Request for Payment, if any, (c) an explanation of any Requests for Payment rejected by Koch, (d) the total amounts of Termination Payments and Recoverable Legal Costs that Defendant has paid, and (e) an explanation of the status of any unresolved claim or dispute relating to a Request for Payment, including the date of any upcoming Dispute Resolution Process proceeding; and

(iii) Certifies that all other requirements of this Final Judgment have been completed by Defendant.

C. Inform PSD and the Antitrust Division within 30 calendar days of the final resolution of each outstanding claim or dispute identified pursuant to Paragraph V.B.2(ii).

D. Certify in writing to PSD and the Antitrust Division annually on the anniversary date of the entry of this Final Judgment that Defendant is in compliance with the provisions of this Final Judgment, and the status of each outstanding claim or dispute, if any, relating to a Request for Payment.

E. Within 14 calendar days of learning of any violation or potential violation of

any of the provisions of this Final Judgment, Defendant must:

1. Promptly take appropriate action to restore compliance with this Final Judgment; and

2. Provide PSD and the Antitrust Division with a statement describing the violation or potential violation and any steps Defendant has taken to address the violation or potential violation.

F. Defendant must maintain all documents relating to any Dispute Resolution Process or any violation or potential violation of this Final Judgment for the duration of this Final Judgment and must provide all such non-privileged documents to PSD and the Antitrust Division upon request. At the request of either PSD or the Antitrust Division, Defendant must within 30 calendar days of receiving the request furnish to PSD and the Antitrust Division a log of all documents maintained pursuant to this Paragraph V.F, that identifies any such documents for which Defendant claims protection under the attorney-client privilege, the attorney work product doctrine, or any other privilege.

G. PSD and the Antitrust Division, in their sole discretion, may extend each of the time periods set forth in Paragraphs V.A through V.C for a total of up to an additional 120 calendar days. If Defendant seeks an extension, it must make that request to the Antitrust Division in writing at least seven calendar days prior to the expiration of the operable time period.

VI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders in this case or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of PSD or the Antitrust Division, and upon reasonable notice to Defendant, Defendant must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by PSD or the Antitrust Division:

1. to have access during Defendant's office hours to inspect and copy, or at the option of the requesting agency, to require Defendant to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendant relating to compliance with any requirements of this Final Judgment; and

2. to interview, either informally or on the record, Defendant's officers, employees, or agents relating to compliance with any requirements of

this Final Judgment. Each interviewee may, at their option and without coercion, have any counsel of their choosing present. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

B. Upon the written request of an authorized representative of PSD or the Antitrust Division, Defendant must submit written reports or respond to written interrogatories, under oath if requested, relating to compliance with any requirements of this Final Judgment.

VII. Public Disclosure

A. No information or documents obtained pursuant to any provision in this Final Judgment may be divulged by USDA or the Antitrust Division to any person other than an authorized representative of the executive branch of the United States, except in the course of any Dispute Resolution Process or any legal proceedings to which the United States is a party, including grand-jury proceedings, for the purpose of securing compliance with this Final Judgment, for law enforcement purposes, or as otherwise required by law.

B. In the event of a request by a third party to the Antitrust Division pursuant to the Freedom of Information Act, 5 U.S.C. 552, for disclosure of information obtained pursuant to any provision of this Final Judgment, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7. When submitting information to the Antitrust Division, Defendant should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire 10 years after submission, “unless the submitter requests and provides justification for a longer designation period.” See 28 CFR 16.7(b).

C. In the event of a request by a third party to USDA pursuant to the Freedom of Information Act, 5 U.S.C. 552, for disclosure of information obtained pursuant to any provision of this Final Judgment, USDA will act in accordance with that statute, and USDA regulations at 7 CFR part 1, subpart A, including the provision on confidential commercial information, at 7 CFR 1.8. When submitting information to USDA in connection with the Final Judgment or related orders in this case, Defendant should designate the confidential commercial information portions of all

applicable documents and information under 7 CFR 1.8. Designations of confidentiality expire 10 years after submission, “unless the submitter requests and provides justification for a longer designation period.” See 7 CFR 1.8(c).

D. If at the time that Defendant furnishes information or documents to USDA or the Antitrust Division pursuant to any provision of this Final Judgment, Defendant represents and identifies in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, “Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,” USDA or the Antitrust Division must give Defendant 10 calendar days’ notice before divulging the material in any legal proceeding (other than a grand jury proceeding).

VIII. 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.

IX. Enforcement of Final Judgment

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendant agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States relating to an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendant waives any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws, to restore the competition the United States alleges was harmed by the challenged conduct, and to end an unfair practice or device in the market for the purchase of the services of Independent Poultry Growers the United States alleges was caused by Defendant’s inclusion of Termination Payment Obligations in its Live Poultry Agreements. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this

Final Judgment that, as interpreted by the Court in light of these procompetitive and fairness principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendant has violated this Final Judgment, the United States may apply to the Court for an extension of this Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce this Final Judgment against Defendant, whether litigated or resolved before litigation, Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts’ fees, incurred in connection with that effort to enforce this Final Judgment, including in the investigation of the potential violation.

D. For a period of four years following the expiration of this Final Judgment, if the United States has evidence that Defendant violated this Final Judgment before it expired, the United States may file an action against that Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the filing of the enforcement action; (2) all appropriate contempt remedies; (3) additional relief needed to ensure the Defendant complies with the terms of this Final Judgment; and (4) fees or expenses as called for by this section IX.

X. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment will expire seven years from the date of its entry, except that after three years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendant that continuation of this Final Judgment is no longer necessary or in the public interest.

XI. Reservation of Rights

This Final Judgment terminates only the claims stated in the Complaint against Defendant. This Final Judgment does not in any way affect any other charges or claims that may be filed by the United States. For the avoidance of doubt, the Antitrust Division and the PSD retain all rights to investigate and prosecute, including under the antitrust

laws or the Packers and Stockyards Act, any conduct, practice or device that (1) does not arise from a Termination Payment or Termination Payment Obligation, or (2) is an aspect of any ranked performance pay compensation (sometimes described as “tournament”) system.

XII. Notice

For purposes of this Final Judgment, any notice or other communication required to be filed with or provided to the United States or the Antitrust Division must be sent to the addresses set forth below (or such other addresses as the United States may specify in writing to Defendant):

Chief, Civil Conduct Task Force, U.S.

Department of Justice, Antitrust Division, 450 Fifth Street, Washington, DC 20530, ATRJudgmentCompliance@usdoj.gov; and the

PSD, Regional Director, Packers and Stockyards Division—Eastern Regional Office, United States Department of Agriculture, AMS FTTP, 75 Ted Turner Drive SW, Suite 230, Atlanta, GA 30303.

XIII. 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 by making available to the public copies of this Final Judgment and the Competitive Impact Statement, public comments thereon, and any response to comments by the United States. Based upon the record before the Court, which includes the Competitive Impact Statement and, if applicable, any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____, 2023.

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

United States District Judge

Appendix 1

[Koch letterhead]

[Name and address of sender (Koch’s Chief Operating Officer)]

[Date of actual mailing and email distribution]

[Name, mailing address, and email of addressee]

Re: Department of Justice’s Settlement with Koch Foods, Inc.

Dear [name of Independent Poultry Grower]:

The United States Department of Justice has reached a settlement with Koch Foods that may affect you. Under the agreement, Koch Foods is prohibited from trying to

require you to pay a termination payment if you choose to switch to another poultry processor. Also, you may be entitled to compensation if you paid any out-of-pocket expenses as a result of Koch attempting to require a termination payment from you for trying to switch to another poultry processor. Please read this letter carefully to learn more about your rights under the settlement.

The Lawsuit

The Department of Justice sued Koch Foods for seeking to recover payments from growers who tried to switch to other poultry processors. In the lawsuit, the Department of Justice alleged that Koch violated the federal antitrust laws and the Packers and Stockyards Act by requiring growers who tried to switch to another processor to pay back a portion of their new house incentive payments. Koch sued or threatened to sue several growers who did not pay back incentive payments sought by Koch. To resolve the dispute, the Department of Justice entered into a court-approved settlement with Koch. You can find the Department of Justice’s complaint and the Court’s Order approving the settlement here: [link to the Complaint and Final Judgment]. The Court’s Order requires Koch to distribute this notice to growers like yourself.

Koch Cannot Require You To Pay a Termination Payment for Switching to Another Poultry Processor

The Court’s Order prohibits Koch from requiring you to pay a termination payment when switching to another poultry processor. For example, Koch cannot enforce any provision like the following in a poultry production contract:

If [Independent Poultry Grower] elects to terminate the [Live Poultry Agreement] during the . . . [time period applicable to this New House Incentive Agreement/New House Payment Period], then [Independent Poultry Grower] shall refund Company, within ninety (90) days of its notice of termination to Company, [any/all] payments made by Company [during the previous 12 months] under this . . . New House [Incentive/Payment] Agreement

You are receiving this notice because you likely have a similar provision in your contract with Koch. Koch also will not include any termination payment obligation in any future poultry contract with you. The Court’s Order does not apply to loans Koch provides to a grower, as long as the loan had an original term of five years or less (no extensions), is being forgiven in equal amounts during that original term, and meets certain other conditions specified in the Court’s Order.

To be clear, this settlement does not prevent Koch from paying you a new house incentive or any other bonus. Instead, it prevents Koch from trying to recover any of those payments if you terminate your contract with Koch.

Koch Must Reimburse Out-of-Pocket Costs

You may be entitled to reimbursement by Koch if you paid any out-of-pocket costs as a result of Koch trying to require you to pay a termination payment when switching to another processor or for threatening to

require you to pay a termination payment if you switched to another processor. These reimbursable expenses include (1) any new house incentive payments that you paid back to Koch when you switched to another processor or (2) attorneys’ fees or court costs that you paid as a result of Koch suing or threatening to sue you for switching without paying the termination payment. If you did not pay any out-of-pocket expenses as a result of Koch attempting to require a termination payment from you when you switched processors or if another poultry processor reimbursed you for those expenses, you cannot make a claim and should not return the attached Request for Payment form.

How To Submit a Request for Payment

To qualify for reimbursement, you must submit a request for payment to Koch that (i) lists the relevant payments you have made (termination payments or recoverable legal costs), (ii) attaches documentation such as invoices that demonstrate you made the payments, (iii) confirms that the payments were not made or reimbursed by or on behalf of another poultry company, and (iv) swears that your claim is accurate under the penalty of perjury. A suggested Request for Payment form you can use is attached to this notice. You must submit your request for payment and attached documentation to Koch by email at [Koch email address] or by U.S. mail at [mailing address] no later than [60 days from date of notice].

What happens after a claim is submitted?

If Koch does not dispute your request, it will pay your request on or before [stated date that is 120 days after the date of entry of the Final Judgment]. If Koch disputes your request, Koch must notify you within 14 days of receiving your request, explain the basis for the dispute, and submit the dispute to the Department of Justice. The Department of Justice will select an independent referee to resolve the dispute and will contact you, giving you the opportunity to participate in or opt out of the referee proceeding if you prefer. You will not be charged any fee related to this dispute—Koch will bear all fees and costs of the referee.

* * * * *

The Court’s Order itself, rather than the brief description provided in this letter, controls your rights and Koch’s obligations. If you have any questions about the Court’s Order or how it affects you, please contact me or the Civil Conduct Task Force, U.S. Department of Justice, Antitrust Division, at ATRJudgmentCompliance@usdoj.gov.

Sincerely,

[Sender name, Koch Foods, Inc.]

Request for Payment

Return this form to Koch Foods Inc. by email at [email address] or U.S. mail at [mailing address] NO LATER THAN [stated date that is 60 days from date of notice].

SUBMIT THIS FORM ONLY IF YOU INTEND TO FILE A CLAIM FOR PAYMENT

Pursuant to the Final Judgment dated [date of entry of Final Judgment] in the matter of *United States v. Koch Foods, Inc.* (N.D. Ill.),

I am entitled to payment by Koch Foods, Inc. for the following amounts:

\$ _____ for a Termination Payment (Please attach invoices or other documents that demonstrate that you incurred the requested payment amount; if you incurred no Termination Payment, leave blank or enter "zero".)

\$ _____ for Recoverable Legal Costs (Please attach invoices or other documents that demonstrate that you incurred the requested payment amount; if you incurred no Recoverable Legal Costs, leave blank or enter "zero".)

(PLEASE READ AND CHECK BOX BELOW)

I confirm that I have incurred or paid all requested amounts as reflected on the attached invoices or other documents and that none of the requested amounts was paid or reimbursed by or on behalf of a Poultry Processor.

I, _____, under penalty of perjury, do hereby certify that the foregoing information is true and correct.

Signature _____

Email address (required) _____

Date _____

Appendix 2

[Koch letterhead]
[Name and address of sender (Koch's Chief Operating Officer)]
[Date of actual mailing and email distribution]
[Name, mailing address, and email of addressee]

Re: Department of Justice's Settlement with Koch Foods, Inc.

Dear [name of Independent Poultry Grower]:

The United States Department of Justice has reached a settlement with Koch Foods that may affect you. Under the agreement, you may be entitled to compensation if you paid any out-of-pocket expenses as a result of Koch attempting to require a termination payment from you for trying to switch to another poultry processor. Please read this letter carefully to learn more about your rights under the settlement.

The Lawsuit

The Department of Justice sued Koch Foods for seeking to recover payments from growers who tried to switch to other poultry processors. In the lawsuit, the Department of Justice alleged that Koch violated the federal antitrust laws and the Packers and Stockyards Act by requiring growers who tried to switch to another processor to pay back a portion of their new house incentive payments. Koch sued or threatened to sue several growers who did not pay back incentive payments sought by Koch. To resolve the dispute, the Department of Justice entered into a court-approved settlement with Koch. You can find the Department of Justice's complaint and the Court's Order approving the settlement here: [link to the Complaint and Final Judgment]. The Court's Order requires Koch to distribute this notice to former Koch growers like yourself.

Koch Must Reimburse Out-of-Pocket Expenses

Although you are no longer a Koch grower, you are receiving this letter because your contract with Koch likely had a provision similar to the following:

If [Independent Poultry Grower] elects to terminate the [Live Poultry Agreement] during the . . . [time period applicable to this New House Incentive Agreement/New House Payment Period], then [Independent Poultry Grower] shall refund Company, within ninety (90) days of its notice of termination to Company, [any/all] payments made by Company [during the previous 12 months] under this . . . New House [Incentive/Payment] Agreement . . .

You may be entitled to reimbursement by Koch if you paid any out-of-pocket costs as a result of Koch trying to require you to pay a termination payment when switching to another processor or for threatening to require you to pay a termination payment if you switched to another processor. These reimbursable expenses include (1) any new house incentive payments that you paid back to Koch when you switched to another processor or (2) attorneys' fees or court costs that you paid as a result of Koch suing or threatening to sue you for switching without paying the termination payment. If you did not pay any out-of-pocket expenses as a result of Koch trying to require you to pay a termination payment when you switched processors or if another poultry processor reimbursed you for those expenses, you cannot make a claim and should not return the attached Request for Payment form.

The Court's Order does not apply to repayment of any loans Koch provided to growers as long as the loan had an original term of five years or less (no extensions), was forgiven in equal amounts during that original term, and met certain other conditions specified in the Court's Order.

How To Submit a Request for Payment

To qualify for reimbursement, you must submit a request for payment to Koch that (i) lists the relevant payments you have made (termination payments or recoverable legal costs), (ii) attaches documentation such as invoices that demonstrate you made the payments, (iii) confirms that the payments were not made or reimbursed by or on behalf of another poultry company, and (iv) swears that your claim is accurate under the penalty of perjury. A suggested Request for Payment form you can use is attached to this notice. You must submit your request for payment and attached documentation to Koch by email at [Koch email address] or by U.S. mail at [mailing address] no later than [60 days from date of notice].

What happens after a claim is submitted?

If Koch does not dispute your request, it will pay your request on or before [stated date that is 120 days after the date of entry of the Final Judgment]. If Koch disputes your request, Koch must notify you within 14 days of receiving your request, explain the basis for the dispute, and submit the dispute to the Department of Justice. The Department of Justice will select an independent referee to resolve the dispute and will contact you,

giving you the opportunity to participate in or opt out of the referee proceeding if you prefer. You will not be charged any fee related to this dispute—Koch will bear all fees and costs of the referee.

Additional Information About the Order

Besides obligating Koch to repay certain expenses as described above, the Court's Order prohibits Koch from penalizing growers for trying to switch processors.

* * * * *

The Court's Order itself, rather than the brief description provided in this letter, controls your rights and Koch's obligations. If you have any questions about the Court's Order or how it affects you, please contact me or the Civil Conduct Task Force, U.S. Department of Justice, Antitrust Division, at *ATRJudgmentCompliance@usdoj.gov*.

Sincerely,
[Sender name, Koch Foods, Inc.]

Request for Payment

Return this form to Koch Foods Inc. by email at [email address] or U.S. mail at [mailing address] NO LATER THAN [stated date that is 60 days from date of notice].

SUBMIT THIS FORM ONLY IF YOU INTEND TO FILE A CLAIM FOR PAYMENT

Pursuant to the Final Judgment dated [date of entry of Final Judgment] in the matter of *United States v. Koch Foods, Inc.* (N.D. Ill.), I am entitled to payment by Koch Foods, Inc. for the following amounts:

\$ _____ for a Termination Payment (Please attach invoices or other documents that demonstrate that you incurred the requested payment amount; if you incurred no Termination Payment, leave blank or enter "zero".)

\$ _____ for Recoverable Legal Costs (Please attach invoices or other documents that demonstrate that you incurred the requested payment amount; if you incurred no Recoverable Legal Costs, leave blank or enter "zero".)

(PLEASE READ AND CHECK BOX BELOW)

I confirm that I have incurred or paid all requested amounts as reflected on the attached invoices or other documents and that none of the requested amounts was paid or reimbursed by or on behalf of a Poultry Processor.

I, _____, under penalty of perjury, do hereby certify that the foregoing information is true and correct.

Signature _____

Email address (required) _____

Date _____

United States District Court for the Northern District of Illinois Eastern Division

United States of America, 450 Fifth Street NW, Washington, DC 20530, Plaintiff, v. Koch Foods Incorporated, 1300 W Higgins Road, Suite 100, Park Ridge, IL 60068, Defendant.

Case No. 1:23-cv-15813

Judge John F. Kness

Competitive Impact Statement

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (the “Tunney Act”), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment as to Defendant Koch Foods Incorporated (“Koch” or “Defendant”).

I. Nature and Purpose of the Proceeding

On November 9, 2023, the United States filed a civil complaint against Koch. Koch contracts with independent chicken farmers, generally known as “growers,”³ to breed and care for Koch’s chickens until they are ready for slaughter and processing. The Complaint alleges that, since 2014, Koch contracts require many of its growers to pay Koch an exit penalty if they terminate their contracts with Koch and switch to another processor.⁴ Since at least 2018, Koch has sought to enforce this exit penalty provision through threatened or actual litigation against growers who try to switch. Koch’s conduct has deterred growers from leaving Koch and switching to its competitors. The Complaint alleges Koch’s exit penalty and efforts to enforce the exit penalties are unlawful practices under section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a), and section 1 of the Sherman Act, 15 U.S.C. 1.

Count One of the Complaint alleges that, by including the exit penalty provision in its contracts and taking steps to enforce it, Koch has violated section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a), which prohibits unfair and deceptive practices by “live poultry dealers” such as Koch. Growers are required to accept the exit penalty provision as part of the standard Koch contract and cannot reasonably avoid it. Koch sometimes fails to disclose the exit penalty provision before a grower takes out a loan to build new broiler houses to grow chickens for Koch. The existence and enforcement of the exit penalty provision are practices that unfairly harm growers, and no

countervailing benefit exists for these practices.

Count Two of the Complaint alleges that Koch violates section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a), by imposing the exit penalty provision because it unfairly burdens growers’ rights under 9 CFR 201.100(h)(2) to terminate their production contracts on 90 days’ prior notice to Koch.

Count Three of the Complaint alleges that, by including the exit penalty provision in its production contracts with growers, Koch unreasonably restrains interstate trade and commerce in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. 1. Koch’s illegal conduct reduces competition in the market for the purchase of growers’ services, imposes unreasonable costs on growers who might otherwise switch poultry processors, and deprives growers of the benefits of competition for their services. The exit penalty provision has prevented growers from accepting better compensation from Koch competitors.

Along with the Complaint, the United States filed a proposed Final Judgment and a Stipulation and Order (“Stipulation and Order”) to remedy the unfair and anticompetitive effects resulting from the harmful conduct alleged in the Complaint. The Final Judgment is subject to review under the Tunney Act only to the extent that it resolves the Sherman Act claim because the Packers and Stockyards Act is not an “antitrust law[.],” as defined in 15 U.S.C. 12(a). *See* 15 U.S.C. 16(b) (mandating the Tunney Act’s procedures only for “civil proceeding[s] brought by or on behalf of the United States under the antitrust laws” (emphasis added)).

Under the proposed Final Judgment, which is explained more fully below, Koch must cease all efforts to collect exit penalties, return all exit penalties, repay all affected growers their “Recoverable Legal Costs” (as defined in the proposed Final Judgment), notify all former or current Koch growers whose production contract contained an exit penalty that the provision is of no further force or effect, and refrain from including an exit penalty provision in any chicken production contracts for the term of the decree.

While the proposed Final Judgment is pending before the Court, Koch must cease all efforts to collect exit penalties and refrain from including an exit penalty provision in any future chicken production contracts. The terms of the Stipulation and Order require Koch to abide by and comply with the provisions of the proposed Final Judgment until it is entered by the Court

or until the time for all appeals of any Court ruling declining entry of the proposed Final Judgment has expired.

The United States and Koch have stipulated that the proposed Final Judgment may be entered after compliance with the Tunney Act. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and punish violations thereof.

II. Description of Events Giving Rise to the Alleged Sherman Act Violation

A. The Defendant and the Growers

Koch is the fifth largest poultry processor in the United States. Like other processors, Koch contracts with growers to raise its broiler chickens for delivery to Koch’s processing plants. To operate at a scale sufficient to grow broilers for a major processor like Koch, a poultry farmer typically needs two to four modern broiler houses, with a construction cost of approximately \$500,000 per house. The growers thus bear the risks of their investment, including risks of weather damage, such as tornadoes. By outsourcing chicken growing, Koch shifts the substantial cost, capital requirements, and risk to small poultry farmers. Outsourcing chicken growing also allows Koch to avoid the burden and costs associated with employing the growers who care for the chickens.

Koch operates eight poultry processing complexes. Each of Koch’s eight complexes has contracts with approximately 100 growers to provide growing services. In total, Koch has more than 800 growers under contract. Most of these growers operate as small, highly leveraged family farms, and bank debt repayment is their largest expense.

The only realistic way for most growers to repay their loans for newly constructed broiler houses is by growing broiler chickens. Once built, broiler houses cannot be relocated, and farmers can raise chickens only for processors that are both nearby and willing to accept new farmers. Growers know that their farm is just one among many, and none is an irreplaceable supplier of growing services for Koch or any other processor.

In deciding whether to approve the grower’s loan, a lender will generally evaluate a grower’s projected cash flow based on the standard-form Koch contract. The lender expects that Koch will require the farmer to sign the contract without amendment after the chicken houses are built. The lender generally conditions a loan for new-

³ Most farmers who contract their services to Koch raise “broilers,” the chickens that are slaughtered and processed for people to consume. Some farmers raise Koch’s breeder hens or pullets (chicks). This Competitive Impact Statement and the Final Judgment use the term “growers” to refer to all chicken farmers raising broilers, breeders, or pullets for Koch.

⁴ Although the termination provisions by their terms applied to all qualifying growers who terminated their contract with Koch, as a matter of practice, Koch enforced the provision only against growers who intended to switch to another processor.

house construction on a farmer's willingness to execute the Koch standard contract "as is" once the new broiler houses are ready to receive their first flocks. Most loans for broiler houses span 10 or 15 years, while some are longer. As a practical matter, Koch offers contracts to growers on a "take-it-or-leave-it" basis, and a prospective grower typically has no opportunity to negotiate the compensation terms of a Koch contract.

Koch wields enormous leverage over the farmers who grow its broiler chickens. These indebted growers generally need at least six flocks each year to stay current on their broiler-house loans, yet Koch decides the number of flocks to allot to each farmer. If Koch elected not to renew a grower's contract, or merely reduced the number of flocks placed per year, many growers would be unable to make their loan repayments. Koch also controls other factors that can significantly affect the compensation of growers, such as the number and quality of chicks provided, the type of feed, the timing of when flocks are collected, the use of antibiotics, and various payment adjustments.

B. The Anticompetitive Effects of the Koch Exit Penalty Provision

Count Three of the Complaint, which charges the Sherman Act violation, alleges that the Koch exit penalty and Koch's efforts to enforce it through threatened or filed litigation against growers result in anticompetitive effects in the market for the purchase of farmers' growing services.

Processors typically own the chicks they place with growers under production contracts, and pay for the chickens' transportation, feed, veterinary care, and collection. The cost and risk of transporting feed and chickens limit the area in which processors can contract with growers. The geographic radius within which a processor can economically contract with farmers for chicken growing services constitutes its "draw area."

Although there may be some processor-specific requirements, top-quality chicken housing that satisfies one processor's requirements can be acceptable to other processors in the area. Growers with top-quality housing may be able to improve their compensation by switching from Koch to another processor, depending on the competitive conditions in the relevant market. Another processor competes with a Koch complex for chicken growing services if the draw area of one or more of its complexes overlaps

significantly with the draw area of that Koch complex.

For each Koch complex that competes with one or more rival processors, the relevant geographic market is an area around the Koch complex and its set of competing processors. Koch contracts with a significant share of the growers working for processors within the geographic market of each Koch complex.

Nearly all growers contracting with Koch are also within the draw area of at least one competitor's complex and therefore can benefit from competition for their services. Over 80 percent of growers working for Koch are located within the draw areas of the complexes of at least two of Koch's competitors. More than half of the growers who provide their services to Koch are located within the draw areas of the complexes of three or more of Koch's competitors.

Each Koch complex competes with one or more rival processors to sign up growers within their overlapping draw areas. But the Koch exit penalty provision artificially restrains growers from switching from Koch to a competitor. Because Koch contracts with a significant share of the growers under contract with processors in each complex's geographic market, these switching restraints significantly lessen competition in those markets.

Koch's highly visible efforts to collect its exit penalties have deterred growers who might otherwise avail themselves of competition between Koch and other processors to obtain better compensation for themselves and their families. Koch's exit penalty unreasonably harms competition for growers' services.

III. Explanation of the Proposed Final Judgment

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in Count Three. Under the proposed judgment, Koch must eliminate the exit penalty provision from Koch's current contracts and omit it from future contracts. Further, Koch must repay all exit penalties that it has collected and to reimburse all Recoverable Legal Costs that growers have incurred as a result of Koch's threatened or filed litigation. The proposed judgment requires Koch to refrain from collecting any exit penalty, taking any steps to collect any exit penalty, or including an exit penalty in its chicken production contracts. It also prohibits Koch from engaging in any retaliation, intimidation, or harassment of any grower who was involved in any exit penalty dispute or who cooperated

with the United States Department of Justice or the United States Department of Agriculture in their investigations of Koch's exit penalties.

Sections IV and V of the proposed Final Judgment require Koch to:

- a. Inform all growers with contracts that contain an exit penalty provision that the provision is unenforceable.
- b. Repay exit penalties collected from growers.
- c. Notify all growers whose production agreements contain or contained an exit penalty provision that they may make a claim for repayment of any exit penalties not already repaid by Koch and for reimbursement of any Recoverable Legal Costs by submitting to Koch a request for payment. The form of notices to current and former growers are attached to the proposed Final Judgment as Appendix 1 and Appendix 2, respectively.
- d. Repay all growers' undisputed requests for payment within 120 days of entry of the proposed Final Judgment.
- e. Commence a dispute resolution process set forth in the proposed Final Judgment within 14 days of receipt of any request for payment that Koch disputes. Under this process, the Antitrust Division will select a referee, whose decision will be final, binding on Koch and the grower or former grower, and enforceable by the Antitrust Division or the grower through this Court's contempt power under the proposed Final Judgment.
- f. Refrain from accepting the payment of any exit penalty, taking any steps to collect any exit penalty, or including an exit penalty provision in any production agreement with a grower.
- g. Refrain from engaging in any retaliation, intimidation, or harassment of any grower who was involved in any exit penalty dispute or who cooperated with the United States Department of Justice or the United States Department of Agriculture in their investigations related to the subject matter of this action.

h. Meet certain reporting obligations to the United States Department of Justice and the United States Department of Agriculture, including an annual certification that Koch is in compliance with the proposed Final Judgment.

For any loans Koch makes to growers, the acceleration of such a loan upon the termination of a grower's production agreement constitutes a prohibited exit penalty under the proposed Final Judgment unless the loan terms conform to specific criteria set forth in the definition of "Loan Agreement" (Paragraph II.G). In particular, a loan

agreement permitted under the proposed Final Judgment must:

- Have an original term of five years or less and not have been extended prior to acceleration of the loan by a Termination;

- Provide that the loan will be forgiven or repaid pro rata annually or more frequently during the original term, with only the outstanding balance of the original loan accelerated and payable upon termination;

- Not impose additional charges for prepayment or termination, such as a prepayment penalty;

- Not provide for the payment of interest on the loan;

- Be for the purpose of facilitating the construction or improvement of one or more poultry houses and/or ancillary facilities, including the purchase of related real estate and/or the purchase and installation of related equipment, and where the value of the poultry houses and/or ancillary facilities, including any related real estate and/or related equipment, is projected, at the time of the agreement, to meet or exceed the amount of any payment due as a result of the grower initiating a termination of a production agreement with Koch; and

- Not violate the antitrust laws or the Packers and Stockyards Act.

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the proposed Final Judgment as effective as possible. In order to determine and secure compliance with the proposed Final Judgment and related orders such as the Stipulation and Order, and to determine whether the proposed Final Judgment should be modified or vacated, Paragraph VI.A of the proposed Final Judgment provides that, upon written request and with reasonable notice, from time to time and subject to legally recognized privileges, Koch must permit authorized representatives or agents of the Packers and Stockyards Division of the USDA (the "PSD") or the Antitrust Division of the United States Department of Justice:

1. to have access during Koch's office hours to inspect and copy, or at the option of the requesting agency, to require Koch to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Koch relating to compliance with any requirements of the proposed Final Judgment; and

2. to interview, either informally or on the record, Koch's officers, employees, or agents relating to compliance with any requirements of the proposed Final Judgment. Each interviewee may, at

their option and without coercion, have any counsel of their choosing present. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Koch.

Paragraph VI.B of the proposed Final Judgment provides that upon the written request of an authorized representative of the PSD or the Antitrust Division, Koch must submit written reports or respond to written interrogatories, under oath if requested, relating to any matters contained in the proposed Final Judgment.

Paragraph IX.A provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including the right to seek an order of contempt from the Court. Koch agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States relating to an alleged violation of the proposed Final Judgment, the United States may establish a violation of the proposed Final Judgment and the appropriateness of a remedy by a preponderance of the evidence, and Koch waives any argument that a different standard of proof should apply.

As a further reservation of rights, Section XI of the proposed Final Judgment provides that the proposed Final Judgment terminates only the claims expressly stated in the Complaint against Koch and does not in any way affect any other charges or claims that may be filed by the United States. For the avoidance of doubt, Section XI further provides that the Antitrust Division and the PSD retain all rights to investigate and prosecute, including under the antitrust laws or the Packers and Stockyards Act, any conduct, practice or device that: (1) does not arise from an exit penalty or exit penalty provision, or (2) is an aspect of any ranked performance pay compensation (sometimes described as "tournament") system.

Paragraph IX.B of the proposed Final Judgment provides that the proposed Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws, to restore the competition the United States alleges was harmed by the challenged conduct, and to end an unfair practice or device in the market for the purchase of growers' services caused by Koch's inclusion of exit penalty provisions in its production agreements. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of the proposed Final Judgment that, as interpreted by the Court in light of these procompetitive

and fairness principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of the proposed Final Judgment should not be construed against either party as the drafter.

Paragraph IX.C provides that, in an enforcement proceeding in which the Court finds that Koch has violated the proposed Final Judgment, the United States may apply to the Court for an extension of the proposed Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce the proposed Final Judgment against Koch, whether litigated or resolved before litigation, Koch agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that effort to investigate the potential violation and enforce the proposed Final Judgment.

Paragraph IX.D provides that, for a period of four years following the expiration of the proposed Final Judgment, if the United States has evidence that Koch violated the proposed Final Judgment before it expired, the United States may file an action against Koch in this Court requesting that the Court order: (1) Defendant to comply with the terms of the proposed Final Judgment for an additional term of at least four years following the filing of the enforcement action; (2) all appropriate contempt remedies; (3) additional relief needed to ensure Koch complies with the terms of the proposed Final Judgment; and (4) fees or expenses as called for by Section IX of the proposed Final Judgment.

Finally, Section X of the proposed Final Judgment provides that, unless this Court grants an extension, the proposed Final Judgment will expire seven years from the date of its entry, except that after three years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Koch that continuation of the Final Judgment is no longer necessary or in the public interest.

IV. Remedies Available to Potential Private Plaintiffs

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor

assists the bringing of any private antitrust damage action. Under the provisions of section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Koch.

Section 308 of the Packers and Stockyards Act, 7 U.S.C. 209, provides that any person subject to the Act who violates any provisions of the Act (or of any order of the Secretary of Agriculture relating to the Act) related to the purchase or handling of poultry or any poultry growing arrangement (among other violations) may be liable to persons injured as a result of those violations for the full amount of damages sustained as a consequence, and such injured persons may bring suit in federal court or may complain to the Secretary of Agriculture.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Koch have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Tunney Act, provided that the United States has not withdrawn its consent. The Tunney Act conditions entry of the Final Judgment's resolution of the Sherman Act claim upon the Court's determination that the proposed Final Judgment with respect to the Sherman Act claim is in the public interest.

The Tunney Act provides a period of at least 60 days preceding the effective date of a proposed final judgment that resolves a Sherman Act claim during which time any person may submit to the United States written comments regarding the proposed final judgment. Any person who wishes to comment on the proposed final judgment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or within 60 days of the first 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 United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the **Federal Register** unless the Court agrees that the United States instead may

publish them on the United States Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to: Daniel S. Guarnera, Chief, Civil Conduct Task Force, Antitrust Division, United States Department of Justice, 450 Fifth St. NW, Suite 8600, Washington, DC 20530, ATRJudgmentCompliance@usdoj.gov.

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

VI. Alternatives to the Proposed Final Judgment

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Koch. The United States could have commenced contested litigation and brought the case to trial, seeking relief including a declaration that the exit penalty provisions in the growers' production agreements with Koch were neither enforceable nor effective, an injunction requiring Koch to give appropriate notices to current and former growers, and monetary relief to repay growers from whom Koch has collected exit penalties and to reimburse growers for Recoverable Legal Costs as a consequence of Koch's collection efforts. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition in the market for the purchase of poultry growing services. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation against Koch but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. Standard of Review Under the Tunney Act for the Proposed Final Judgment

Under the Clayton Act and Tunney Act, proposed final judgments, or "consent decrees," that resolve antitrust claims brought by the United States are subject to a 60-day comment period, after which the Court must determine whether entry of a proposed final judgment with respect to those antitrust claims "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and

modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a proposed Final Judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the Tunney Act, a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's Complaint, whether a proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by a proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993

F.2d at 1577 (quotation marks omitted). “The court should also bear in mind the flexibility of the public interest inquiry: the court’s function is not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest.”

Microsoft, 56 F.3d at 1460 (quotation marks omitted); see also *United States v. Deutsche Telekom AG*, No. 19–2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would “have enormous practical consequences for the government’s ability to negotiate future settlements,” contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. “The Tunney Act was not intended to create a disincentive to the use of the consent decree.” *Id.*

The United States’ predictions about the efficacy of the remedy are to be afforded deference by the Court. See, e.g., *Microsoft*, 56 F.3d at 1461 (recognizing courts should give “due respect to the Justice Department’s . . . view of the nature of its case”); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) (“In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.” (internal citations omitted)); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting “the deferential review to which the government’s proposed remedy is accorded”); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (“A district court must accord due respect to the government’s prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case.”). The ultimate question is whether “the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest.’” *Microsoft*, 56 F.3d at 1461 (quoting *W. Elec. Co.*, 900 F.2d at 309).

Moreover, the Court’s role under the Tunney Act is limited to reviewing the remedy in relationship to the antitrust violations that the United States has alleged in its Complaint, and the Tunney Act does not authorize the Court to “construct [its] own hypothetical case and then evaluate the decree against that case.” *Microsoft*, 56 F.3d at 1459; see also *U.S. Airways*, 38

F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government’s decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 (“[T]he ‘public interest’ is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged.”). Because the “court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, Public Law 108–237 § 221, and added the unambiguous instruction that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. 16(e)(2); see also *U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). “A court can make its public interest determination based on the competitive impact statement and response to public comments alone.” *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. Determinative Documents

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

Dated: November 17, 2023.

Respectfully submitted,
For Plaintiff, United States of America
Jack G. Lerner,

U.S. Department of Justice Antitrust Division,
Civil Conduct Task Force, 450 Fifth Street
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[FR Doc. 2023–26794 Filed 12–6–23; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Modification To Consent Decree Under the Clean Water Act

On December 3, 2023, the Department of Justice lodged with the United States District Court for the Eastern District of Tennessee in the lawsuit entitled *United States and the State of Tennessee v. The City of Chattanooga*, Civil Action No. 1:12–cv–00245, a proposed modification to the existing Consent Decree.

The United States, on behalf of the U.S. Environmental Protection Agency (“EPA”), and the State of Tennessee filed this lawsuit on July 17, 2012, under the Clean Water Act and Tennessee State law alleging violations with respect to the City of Chattanooga’s publicly owned treatment works. A Consent Decree resolving these claims was entered by the Court on April 24, 2014. The proposed modification to the Consent Decree extends certain deadlines to achieve compliance with the Consent Decree while adding significant remedial projects that the city must complete in the next five years. The cost of the additional required projects is estimated to be \$185 million.

The publication of this notice opens a period for public comment on the proposed modification to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States and the State of Tennessee v. The City of Chattanooga*, D.J. Ref. No. 90–5–1–1–10145. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By email	pubcomment-ees.enrd@usdoj.gov.
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: <https://>