IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

UNITED STATES OF AMERICA

Plaintiff,

v.

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

Defendants.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTIONS FOR ENTRY OF FINAL JUDGMENT WITH RESPECT TO DEFENDANTS SG INTERESTS I, LTD., AND SG INTERESTS VILL, LTD. AND FOR ENTRY OF FINAL JUDGMENT WITH RESPECT TO DEFENDANT GUNNISON ENERGY CORPORATION

The United States brought this lawsuit against the Defendants SG Interests I, Ltd., and SG Interests VII, Ltd. (collectively "SGI") and Defendant Gunnison Energy Corporation ("GEC") on February 15, 2012, alleging that they entered into an anticompetitive agreement that eliminated competitive bidding for four federal gas leases in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Concurrently with the Complaint, the United States filed the original proposed Final Judgment (the "Original PFJ") which would have required SGI and GEC to each pay $275,000 to the United States to settle claims made in both this action (the "Antitrust Action") and a separate *qui tam* action involving False Claims Act violations arising from the same facts and

circumstances (the "FCA Action").[1] On December 12, 2012, this Court rejected that settlement as not being in the public interest (the "12/12/12 Order"), holding, "[i]n sum, the settlement of this civil action for nothing more than the nuisance value of this litigation is not in the public interest and any settlement of [the FCA Action] must be separate and apart from this case." 12/12/12 Order (Dkt. 20) at 11.

Today, in response to the Court's concerns with the original settlement of this action, the United States is submitting revised settlements with SGI and GEC.[2] The revised settlements are intended to address the Court's concerns, by (1) separating the settlement of the Antitrust Action and the FCA Action;[3] and (2) settling the Antitrust Action by requiring SGI and GEC each (a) to pay the United States $275,000[4] and (b) to provide the Department of Justice notice and, if requested, information for a period of five years relating to any joint bidding at oil and gas lease auctions conducted by the Bureau of Land Management ("BLM").

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[1] *United States ex rel. Anthony B. Gale v. Gunnison Energy Corp., et al.*, Civil Action No. 09-CV-02471-RBJ-KLM (D. Colo.).

[2] On February 8, 2013, the United States and SGI reached an agreement in principle on the terms of a revised settlement, which is embodied in the revised Stipulation executed on March 5, 2013 and attaching a revised proposed Final Judgment (the "Revised SGI PFJ"). On February 14, 2013, the United States and GEC reached an agreement in principle on the terms of a revised settlement, which is embodied in the revised Stipulation executed on March 1, 2013 and attaching a revised proposed Final Judgment (the "Revised GEC PFJ"). We refer to the two revised proposed Final Judgments collectively as the "Revised PFJs."

[3] As described further below, under new settlements of the FCA Action, SGI and GEC have paid, respectively, $206,250 and $245,000. Joint notices of voluntary dismissal of SGI and GEC have been filed in the FCA Action and the case has been closed. These settlements of the FCA Action are not contingent on the resolution of the Antitrust Action.

[4] Together with the payments in the FCA Action, the United States will receive a total $1,001,250 from Defendants, in contrast to the total of $550,000 under the original proposed settlements.

The revised settlements constitute meaningful relief that compensate the United States for the damages it incurred as a result of the alleged antitrust violations, serve as a deterrent to these Defendants from engaging in joint bidding that violates the antitrust laws, and put others in the industry on notice that such anticompetitive conduct will not be tolerated. Accordingly, the United States respectfully requests that the Court find that the revised settlements are in the public interest and enter the Revised PFJs.

I. Background

A. Procedural Background

In October 2009, a former GEC employee (the "Relator") filed the FCA Action against SGI and GEC. The Relator alleged that GEC and SGI defrauded the United States when they acquired 22 federal gas leases from February 2005 through November 2006 at auctions conducted by the BLM when SGI certified (i) that SG's bid was reached "independently and without collusion for the purpose of restricting competition" and (ii) that it had not violated 18 U.S.C. § 1860, which prohibits unlawful combination or intimidation of bidders. GEC and SGI acquired four of these leases in February 2005 and May 2005 pursuant to a Memorandum of Understanding ("MOU") executed on February 8, 2005. The remaining 18 leases were acquired between August 2005 and November 2006 pursuant to an Area of Mutual Interest Agreement ("AMIA") executed in June 2005. The United States may recover up to treble damages for violations of the FCA. 31 U.S.C. § 3729(a).

On February 15, 2012, the United States filed the Complaint in this action alleging that SGI and GEC violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing not to compete at BLM auctions held in February and May 2005. Under the

terms of the MOU, only SGI would bid at the BLM auctions. SGI and GEC would jointly set a maximum price for SGI to bid for the leases. If SGI successfully acquired the leases, it would assign a fifty percent interest to GEC at cost.

Under Section 4A of the Clayton Act, 15 U.S.C. §15a, the United States may recover treble damages for injuries sustained as a result of a violation of the Sherman Act. The injuries suffered by the United States from the alleged antitrust violations arose from the same transaction and occurrence as the injury suffered from the alleged FCA violations at the February and May 2005 BLM auctions, namely, the government received lower revenues than it would have but for the MOU.

At the same time that it filed its complaint in this action, the United States filed documents relating to its global settlement of the Antitrust Action and the FCA Action. In the Antitrust Action, the United States filed the Original PFJ and a Stipulation signed by the United States, SGI, and GEC consenting to entry of the Original PFJ after compliance with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"). *See* Dkt. 4. The United States also filed a Competitive Impact Statement explaining the Original PFJ and attaching the settlement agreements resolving the FCA Action. *See* Dkt. 5. In brief, the global settlement required SGI and GEC to each pay $275,000 to the United States to resolve all claims relating to the alleged collusion at the BLM auctions.[5] The Settlement Agreements in the

[5] Under the FCA, if the United States intervenes in a *qui tam* action a Relator is entitled to a 15-25 percent share of the proceeds of the action; if the United States has not intervened, a Relator is entitled to a 25-30 percent share. 31 U.S.C. § 3730(d). The United States intervened in the FCA Action with respect to SGI but not with respect to GEC. Accordingly, the Relator's share of the Original PFJ reflected 15% of the SGI payment ($41,250) and 25% of the GEC payment ($68,750). Therefore, of the $550,000 payment to the United States under the Original PFJ, the Relator would have received

FCA Action contained a provision that conditioned that settlement on entry of the Original PFJ in the Antitrust Action. Upon entry of the Original PFJ, GEC and SGI would each make their $275,000 payments to the United States via the offices of the United States Attorney for the District of Colorado and the United States would voluntarily dismiss the FCA Action.

Pursuant to the Tunney Act requirements, the United States published the Original PFJ and Competitive Impact Statement in the Federal Register on February 23, 2012 and caused summaries of the terms of the Original PFJ and Competitive Impact Statement to be published in *The Washington Times* and *The Denver Post.* The United States received seventy-six comments. On August 3, 2012, the United States filed its response to public comments ("Response to Comments"). *See* Dkt. 16. On August 16, the United States filed a motion seeking entry of the Original PFJ. *See* Dkt. 18.

On December 12, 2012, the Court issued the 12/12/12 Order denying the United States' motion for entry of the Original PFJ. *See* Dkt. 20.

B. Nature of the Alleged Conduct

In 2001, SGI and GEC began independently acquiring and developing gas leases in the Ragged Mountain Area of western Colorado.[6] Prior to 2003, their activities generally focused on different parts of the Ragged Mountain Area, with SGI acquiring

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$110,000 leaving the United States with a net recovery of $440,000. The Court's December 12 Order states that the Government's net recovery would be $390,000 due to the payment of a total of $50,000 in fees to the Relator's attorney. 12/12/12 Order (Dkt. 20) at 3-4 & 11. In their respective original FCA Settlement Agreements, however, SGI and GEC each agreed to pay $25,000 to the Relator for attorneys' fees in addition to the combined $550,000 payment to the United States. *See* Attachments 1 and 2 to the 2/15/12 Stipulation (Dkt. 4) at ¶ 3 (ECF pp. 10 & 25).

[6] For purposes of this case, we define the Ragged Mountain Area as covering roughly the region encompassed by the Townships 10S thru 12S and Ranges 89W thru 91W, as designated by the Public Land Survey System, comprising portions of Delta, Gunnison, Mesa and Pitkin Counties.

leases on the eastern side of the area while GEC acquired leases along the southern boundary. However, over the course of 2003 and 2004, their interests began to overlap as each sought to acquire the Ragged Mountain Pipeline Gathering System ("Ragged Mountain Pipeline"), which was the only existing pipeline accessing the Ragged Mountain Area, and leases from BDS International, LLC and affiliated entities (collectively, "BDS") and as the BLM leased additional parcels in the Ragged Mountain Area. Conflicting efforts by SGI and GEC to acquire assets held by BDS resulted in litigation between Defendants in 2004.

In October 2004, GEC and SGI met to discuss the prospect of settling the litigation and entering into a collaboration to develop the Ragged Mountain Area. The potential collaboration contemplated joint acquisition of the BDS assets, improvements to the existing BDS pipelines, and joint development of new pipelines to serve the area. These discussions, however, quickly foundered.

On or about December 23, 2004, BLM announced that it would hold an auction on February 10, 2005 that would include three tracts in the Ragged Mountain Area, comprising a total of approximately 2,925 acres.[7] Both SGI and GEC were independently interested in certain of the tracts that would be auctioned and both likely would have bid – and bid against each other – at the February auction.

On or about February 2, 2005, SGI and GEC embarked on discussions to forestall competing against one another for the three BLM leases to be auctioned. These discussions resulted in the drafting of the written MOU by attorneys for SGI and GEC that was executed by the parties on February 8, 2005, just two days before the February 10, 2005 auction. Under the MOU, only SGI would bid at the auction for the three leases in the Ragged Mountain Area offered by the BLM at the February auction. SGI and GEC

[7] The three tracts are: COC068350 and COC068351, located in Gunnison County; and COC0068352, located in Delta and Gunnison Counties.

would jointly set a maximum price for SGI to bid for the three leases. If SGI successfully acquired the leases, it would assign a fifty percent interest to GEC at cost. The MOU specifically named and was limited to the three parcels being auctioned in February 2005.

At the February auction, SGI bid for and obtained the three BLM leases covered by the MOU. GEC attended the auction, but, honoring the terms of the MOU, did not bid.

On or about May 10, 2005, SGI and GEC amended the MOU to include an additional lease, comprising 643 acres,[8] in the Ragged Mountain Area set to be auctioned by the BLM on May 12, 2005. The parties agreed to bid as high as $300 per acre for this parcel. Though the Defendants had recommenced their discussions regarding litigation settlement and a possible development collaboration in March 2005, they had not yet been able to reach terms of an agreement. On May 12, 2005, SGI bid for and obtained COC068490 pursuant to the terms of the MOU. Again, GEC attended the auction but did not bid and SGI won the lease.

In June 2005, the Defendants entered into a broad collaboration, memorialized in the AMIA and an Option and Participation Agreement ("OPA"), to jointly acquire and develop leases and pipelines in the Ragged Mountain Area. The AMIA effectively provided that the parties would bid jointly at BLM auctions and otherwise cooperate with respect to acquisition of privately held gas leases in an area encompassing the Ragged Mountain Area. The AMIA also provided that the parties would work together with respect to permitting of pipelines to service the area and granted GEC rights, which it subsequently exercised, to participate in the ownership of the Bull Mountain Pipeline. The OPA settled the Defendants' outstanding litigation and provided for joint acquisition of the Ragged Mountain Pipeline and other assets held by BDS, which the parties

[8] COC068490 is located in Delta County.

successfully accomplished in July 2005. Pursuant to the joint bidding provisions of the AMIA, rather than those of the MOU, GEC and SGI acquired all 18 leases in the Ragged Mountain Area that were auctioned by the BLM from July 2005 through November 2006. Also pursuant to the AMIA and OPA, the Defendants made significant upgrades to the Ragged Mountain Pipeline and developed and constructed a new, higher capacity pipeline to serve the Ragged Mountain Area.

As explained in the Response to Comments,[9] the United States determined that SGI's and GEC's agreement to bid jointly pursuant to the MOU constituted a *per se* violation of Section 1 of the Sherman Act. In contrast, the United States determined that the Defendants' agreement to bid jointly pursuant to the AMIA was ancillary to the broader efficiency enhancing collaboration reflected in other provisions of the AMIA and the simultaneously executed OPA. Accordingly, the Complaint alleges that SGI and GEC violated Section 1 of the Sherman Act only with respect to the leases acquired at the February and May 2005 auctions.[10]

If this matter were to proceed to trial, the Defendants may have contended that the MOU was somehow ancillary to the agreements that they later reached in June 2005. The United States determined that this purported ancillarity defense amounted to little more than a contention that by successfully colluding under the MOU at the February and May 2005 auctions, the Defendants eventually learned to overcome their mutual distrust. However, the mere hope that parties might someday come to an understanding on terms

[9] *See* Response to Comments (Dkt. 16) at 15-17.

[10] This parallels the United States' determination in the FCA Action. As filed by the Relator, the Complaint in the FCA Action alleged that GEC and SGI violated the FCA with respect to all 22 of the jointly acquired leases. However, the United States investigated all 22 of the leases but concluded that only the 4 leases acquired pursuant to the MOU violated the FCA. Accordingly, the United States represents that only the four leases acquired pursuant to the MOU served as a basis for the United States's settlement amount in the FCA Action.

of a legitimate venture does not justify their agreeing to a naked restraint of trade in the interim.

C. Status of the FCA Action

On February 14, 2013 and on March 1, 2013, respectively, SGI and GEC executed new settlement agreements with the United States in the FCA Action.[11] Under those agreements, SGI paid the United States $206,250[12] on February 26, 2013 and a Joint Notice of Voluntary Dismissal of SGI was filed on the same day;[13] and GEC paid the United States $245,000[14] on March 4, 2013 and a Joint Notice of Voluntary Dismissal of GEC was filed the next day.[15] The FCA Action closed on March 5, 2013.[16] As a result, the United States will retain a net $341,240 from the settlement of the FCA Action. Additionally, SGI and GEC have each separately paid $25,000 to the Relator for attorney's fees. Under these settlement agreements, SGI and GEC have agreed that settlement of the FCA Action does not resolve the United States' antitrust claims. Additionally, the Relator agreed to release all claims, if any existed, that he may have under the alternate remedy provision of the FCA, 31 U.S.C. § 3730(c)(5),[17] to any payments made to the United States resolving the antitrust claims.

[11] These settlements are appended to this memorandum as Attachments 1 and 2.
[12] The Relator's share of the $206,250 is $41,250.
[13] FCA Action at Dkt. 41.
[14] The Relator's share of the $245,000 is $68,750.
[15] FCA Action at Dkt. 42.
[16] FCA Action at Dkt. 43.
[17] Section 3709(c)(5) of the FCA provides, in relevant part: "Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section."

D. Status of the Antitrust Action

SGI and GEC have now agreed to settle the Antitrust Action on revised terms to address the Court's concerns with the Original PFJ. The United States filed the Revised PFJs today.

The Revised PFJs require GEC and SGI to each pay $275,000 to the United States within 30 days of entry. This payment will satisfy the United States' claims for damages under Section 4A of the Clayton Act. In addition to the monetary payment, GEC and SGI agree to provide thirty days advance notice to the United States of any joint bidding, either between themselves or with another party, at a BLM auction. Upon the United States' request, each must provide additional information to the United States regarding its plans to bid jointly.

The United States, SGI and GEC have each stipulated that their respective Revised PFJ may be entered upon this motion. Entry of the Revised PFJs would terminate this action except that this Court would retain jurisdiction to construe, modify, and enforce the Revised PFJs and to punish violations thereof.[18]

II. STANDARDS GOVERNING THE COURT'S PUBLIC INTEREST DETERMINATION UNDER THE TUNNEY ACT

The Tunney Act requires that proposed consent judgments in antitrust cases be entered upon a determination by the court that entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). As the United States explained in greater detail in the Competitive Impact Statement and Response to Comments,[19] the scope of

[18] As reflected in SGI's stipulation, SGI also agreed to cooperate in the United States' prosecution of this matter. If the Court were to enter only the Revised SGI PFJ, SGI's obligation to cooperate in any ongoing prosecution against GEC would continue.
[19] *See* Competitive Impact Statement (Dkt. 5) at 9-12; RPC (Dkt 16) at 6-8.

the Court's review is very limited. The public interest 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, 14561 (D.C. Cir. 1995) (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'"); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act). Under the Tunney Act, the "Court's function is not to determine whether the proposed [d]ecree results in the balance of rights and liabilities that is the one that will *best* serve society, but only to ensure that the resulting settlement is within the *reaches* of the public interest." *United States v. KeySpan*, 763 F. Supp. 2d 633, 637 (S.D.N.Y. 2011) (internal citations and quotations omitted; emphasis in original); *see also United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (court should not "engage in an unrestricted evaluation of what relief would best serve the public"). The United States is entitled to deference as to its views of the nature of the case, its perception of the market structure, and its predictions as to the effect of proposed remedies. *See, e.g., KeySpan*, 763 F. Supp. 2d at 642; *SBC Commc'ns*, 489 F. Supp. 2d at 17.[20]

III. The Revised PFJs Address The Court's Concerns with the Original PFJ

A. The Terms of the Revised PFJs Are In The Public Interest

The first ground for the Court's rejection of the Original PFJ was that "settlement of this civil action for nothing more than the nuisance value of this litigation is not in the

[20] Under this standard, the United States need not show that a settlement will perfectly remedy the alleged antitrust harm; rather, it need only provide a factual basis for concluding that the settlement is a reasonably adequate remedy for the alleged harm. *SBC Commc'ns*, 489 F. Supp. 2d at 17.

public interest." 12/12/12 Order (Dkt. 20) at 11. We understand the Court's conclusion to rest on its view that $275,000 from each of the defendants to settle *both* the antitrust claims and the FCA Action relating to the four leases was insufficient and would fail to deter violations of the antitrust laws.[21]

Under the Revised PFJs, SGI and GEC will each pay $275,000 to the United States to settle *only* the Antitrust Action. The Relator will not share in any of the $550,000 payment to settle the antitrust claims. Additionally, SGI and GEC have paid, respectively, $206,250 and $245,000 to the United States in the FCA Action for damages arising from their conduct at the February and May 2005 BLM auctions. By paying the United States a total of $1,001,250 to settle the FCA and Antitrust Actions,[22] SGI and GEC will have paid more than twelve times their original cost of acquisition of the four parcels.[23]

The United States's judgment regarding the reasonableness of a settlement amount as compared to the amount it might recover if successful in litigation is entitled to deference. *See, e.g., SBC Commc'ns*, 489 F.Supp.2d at 17; *United States v. Archer-Daniels-Midland Co.*, 272 F.Supp.2d 1, 6 (D.D.C. 2003) (noting that the court should

[21] Because the antitrust violations alleged in the Complaint are confined to the four leases acquired pursuant to the MOU, consideration of the leases jointly acquired pursuant to the AMIA are outside the scope of the Court's public interest inquiry. *Microsoft*, 56 F.3d at 1462.

[22] The United States will have received $891,250 net of the share received by the Relator in the FCA Action. That is nearly a half a million dollars more than the United States would have netted under the Original PFJ.

[23] It is appropriate to consider the amount that GEC and SGI have paid to settle the FCA Action when evaluating the sufficiency of their payment to settle the Antitrust Action. Under 15 U.S.C. § 15a, the United States' potential recovery for its injury is limited to "threefold the damages by it sustained." Therefore, any litigated judgment in this action providing treble damages for the United States' injury would be offset by other payment of damages made by Defendants to the United States relating to the same injury.

grant due respect to the United States's predictions as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case). Such deference is not unique to antitrust cases, as the Second Circuit recently emphasized: "The scope of a court's authority to second-guess an agency's discretionary and policy-based decision to settle is at best minimal." *SEC v. Citigroup*, 673 F.3d 158, 164 (2d Cir. 2012).

The United States has not proved its case at trial. The monetary amount is a product of settlement and accounts for litigation risk and costs.[24] Litigation risks include (1) whether the United States would succeed in establishing liability, (2) if liability were established, whether the United States would be entitled to treble damages under 15 U.S.C. § 15a or be limited to equitable monetary relief under 15 U.S.C. § 4,[25] and (3) if entitled to treble damages, what the appropriate baseline for calculating damages would be.[26] As the Tenth Circuit has noted, "the well-known costs, risks, delay and

[24] By settling this matter the United States saves both the actual costs of litigation and the opportunity costs of dedicating scarce enforcement resources to the litigation. In considering settlement, governmental agencies, such as the Department of Justice, "must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). *See also Board of Trade v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989) (discussing how the Securities and Exchange Commission is best situated to evaluate "the opportunity costs of [reallocating resources] within the agency."). *See also* Response to Comments (Dkt. 16) at 18-20.

[25] For example, if this case were to proceed to trial, the parties likely would litigate whether the four-year statute of limitations, 15 U.S.C. §15b, would act to bar a claim for treble damages. Equitable monetary remedies, such as restitution and disgorgement, would reflect the value that Defendants wrongfully obtained by acquiring leases jointly rather than competing for them. In this case, the measure of such equitable relief would likely be the same as the measure of the United States's single damages.

[26] For example, the Defendants would likely have claimed at trial that the United States's injury, if any, was limited to approximately $275,000, averring that SGI and GEC would have competed for only two of the four parcels and that, had they competed, the winning bid would have been no higher than $150 per acre. Though the United States would

uncertainties of litigation mean parties 'routinely settle cases for less money than what they might receive from a jury upon successful prosecution of [a] case.'" *McKissick v. Yuen*, 618 F.3d 1177, 1188 (10th Cir. 2010) (citation omitted). In reaching a settlement with SGI and GEC, the United States has appropriately weighed these risks. *SBC Commc'ns*, 489 F.Supp.2d at 15; *see also KeySpan*, 763 F.Supp.2d at 642 ("The adequacy of the [settlement] amount must be evaluated in view of the Government's decision to settle its claims and seek entry of the Consent Decree. When a litigant chooses to forgo discovery and trial in favor of settlement, full damages cannot be expected.").

In addition to revising the amount of the settlement, the Revised PFJs also address the Court's concern about deterrence by requiring GEC and SGI to report to the United States any joint bidding activity prior to a BLM auction and, upon receiving a request from the United States, to provide information relating to that joint bidding.[27] As a result of this requirement, the United States will deter Defendants by monitoring their

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vigorously dispute these contentions at trial, it appropriately considered them when evaluating whether the Revised PFJs are in the public interest. If Defendants prevailed on this issue, treble damages would be $825,000, well below the $1,001,250 that the United States will obtain under the settlements of the FCA Action and the Revised PFJs.

[27] The United States determined that other injunctive remedies available under 15 U.S.C. § 4 were neither necessary nor appropriate in this case. For example, public comments suggested that Defendants be debarred from participating in future auctions but, in the circumstances of this case, such debarment would likely injure competition by eliminating GEC and SGI as potential bidders at auctions for leases outside of the Ragged Mountain Area. Public comments also suggested requiring Defendants to forfeit the four leases but, in the circumstances of this case, doing so would likely have the effect of stalling development of natural gas in the area. The improper joint bidding by Defendants occurred nearly eight years ago and since that time they have been engaged in a legitimate venture that has resulted in substantial development of the Ragged Mountain Area. In civil actions brought by the United States, the goal of a civil antitrust remedy is to terminate the violation, undo its effects and, in cases where the United States is the injured party, obtain compensation for its injury.

conduct at BLM auctions over the next five years. Should monitoring reveal that Defendants are engaging in anticompetitive joint bidding, the United States can and will take appropriate action.

Finally, though the United States does not understand the Court to be requiring an admission of liability by the Defendants,[28] we appreciate that GEC's comments[29] filed in the Tunney Act notice and comment period provided a source for the Court's concerns that the Original PFJ merely reflected a nuisance fee that would not deter GEC or others in the future. Because permitting defendants to enter into civil settlements without an admission of liability is vital to the Department of Justice's mission to enforce the antitrust laws,[30] the United States did not attempt to seek retraction of GEC's comments as a condition of the Revised GEC PFJ. GEC has not admitted liability and would, no doubt, vigorously defend itself if this matter proceeded to trial. Though GEC's comments contain more than the usual bluster, the United States does not view them as amounting to much more than the kind of public statement that settling defendants often make, namely, that they are settling not because of any wrong-doing but to avoid the

[28] Failure of a defendant to admit liability is not a valid ground for disapproving an antitrust consent decree. *United States v. Morgan Stanley*, 2012 WL 3194969 at *4, -- F.Supp.2d – (S.D.N.Y. 2012). *See* RPC (Dkt. 16) at 20-23.
[29] *See* Exhibit 5 to Response to Comments (Dkt. 16).
[30] The ability of the Department of Justice to bring the number of enforcement actions that it does depends on its ability to enter into consent judgments. Consent decrees allow the United States to conserve its enforcement resources while still obtaining remedies that benefit the public. *Cf. SEC v. Everest Mgmt. Corp*, 475 F.2d 1236, 1240 (2d Cir. 1973)("The SEC can bring the large number of enforcement actions it does only because in all but a few cases consent decrees are entered.").

distractions and costs of litigation.[31] As stated above, regardless of GEC's views on the merits of the case, it is now agreeing to provide the United States notice of joint bids.

Moreover, the violation the United States alleged necessarily limited the monetary relief available through settlement or litigation, because the injury to the United States was limited.[32] The MOU encompasses only four parcels, involving approximately 3,568 acres. Given the substantial expenses involved in modern litigation, it is unlikely that,

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[31] *See, e.g.*, Leslie Kaufman, *Awaiting Merger with Random House, Penguin Settles E-Book Case*, New York Times (Dec. 18, 2012) ("In a statement, the company said, "Penguin has always maintained, and continues to maintain, that it has done nothing wrong and has no case to answer."), available at http://mediadecoder.blogs.nytimes.com/2012/12/18/awaiting-merger-with-random-house-penguin-settles-ebook-case/; *Michael D. Davis*, Credo Petroleum Announces Agreement to Settle Merger Litigation, Globe Newswire (Sep. 14, 2012) ("Credo agreed to the settlement solely to avoid the costs, risks and uncertainties inherent in litigation and without admitting liability or wrongdoing. Credo denies all liability with respect to the facts and claims alleged in the Merger Litigation . . . ."), available at http://globenewswire.com/news-release/2012/09/14/490891/10005272/en/Credo-Petroluem-Announces-Agreement-To-Settle-Merger-Litigation.html; Erin Crum, *HarperCollins Publishers Settles e-Book Pricing Dispute with the Department of Justice*, HarperCollins Corporate Press Releases (Apr. 11, 2012) ("HarperCollins did not violate any anti-trust laws . .") available at http://www harpercollins.com/footer/release.aspx?id=994&b=&year=2012; Paul Harrop, *Department of Justice Reaches a Settlement with United Regional*, Newschannel6now.com (Feb. 25, 2011) (attaching United Regional press release, which states "United Regional is pleased that this matter has been resolved. While we disagree with the Department's interpretation of facts and would have welcomed the opportunity to address this matter in a court of law, we believe it is in the best interest of United Regional and our patients to instead move forward . . .") available at http://www newschannel6now.com/Global/story.asp?S=14144340; *Intel and U.S. Federal Trade Commission Reach Tentative Settlement*, Intel News Release (Aug. 4, 2010) ("The settlement agreement expressly states that Intel does not admit either any violation of law or that the facts alleged in the complaint are true.") available at http://www.intel.com/pressroom/archive/releases/2010/20100804corp htm; *Smithfield Foods and Justice Department Settle Civil Suit*, Smithfield Press Releases (Nov. 10, 2004) ("Although we remain convinced that Smithfield complied fully with the law, we agreed to settle the matter to avoid the risk and expense of further litigation . . . The cost to defend ourselves against the federal government in this matter was expected to far exceed the amount we agreed to pay in settlement.") available at http://investors.smithfieldfoods.com/releases.cfm?Year=&ReleasesType=Investor&PageNum=23&archive=1.

[32] The Sherman Act does not provide for civil penalties or civil fines.

even if the United States prevailed on every contested issue, the United States would obtain a treble damages award exceeding the Defendants' litigation expenses.[33] And, as noted in note 27 *supra*, neither debarment from future auctions nor forfeiture of the four leases would have benefited competition or consumer welfare. Accordingly, to compare the settlement amount with Defendants' potential litigation costs fundamentally distorts the significance of the settlement.

This case is significant because the United States for the first time alleged that a joint bidding agreement for oil and gas leases at a BLM auction violated the Sherman Act and then obtained a settlement appropriate to the violation alleged. Because it usually involves a collaboration through which pro-competitive efficiencies arise, joint bidding at BLM auctions is both common and appropriate. Even in this investigation, the United States concluded that such efficiencies justified joint bidding pursuant to the AMIA by SGI and GEC after July 2005. In contrast, the United States concluded that SGI's and GEC's agreement to bid jointly under the MOU in February and May 2005 reflected a deviation from common industry practice, as the MOU was merely a naked restraint that allowed Defendants to avoid a bidding war.[34]

By bringing this novel action, the United States will deter others from crossing the line from appropriate to illegal joint bidding at BLM auctions. *Cf. United States v. Morgan Stanley*, 2012 WL 3194969, *3, -- F.Supp.2d – (S.D.N.Y. 2012) (innovative

[33] To put it another way, if measuring the settlement amount against Defendants' potential litigation costs defines "nuisance value," a requirement that a settlement exceed "nuisance value" would make settlement effectively impossible in this matter. *Cf. Citigroup*, 673 F.3d at 166-167 (government is irreparably harmed where court imposes, as a condition of approval of a settlement, a condition that virtually precludes the possibility of settlement).

[34] *See* Response to Comments (Dkt. 16) at 13-17 and n.12.

application of antitrust laws "suggests that the settlement will have meaningful deterrent effects"). The United States' decision to settle is especially entitled to deference under these circumstances. *Id.* ("[T]he Government's decision to settle for less than full damages is entitled to judicial deference, particularly in view of the novelty of the Government's theory."). Indeed, the filing of the Original PFJ has already had the effect of making the oil and gas industry more concerned with its responsibilities under the antitrust laws.[35]

B. The Revised PFJs are separate and apart from the FCA Action

The Court's second ground for rejecting the Original PFJ was that settlement of the Antitrust Action "must be separate and apart" from the FCA Action. 12/12/12 Order (Dkt. 20) at 11. The United States understands the Court's concern to have been that if the Court entered the Original PFJ it would have been indirectly approving a settlement of the FCA Action pending before a different judge.[36] The Revised PFJs address this concern by separating settlement of the Antitrust Action from the FCA Action.

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[35] *See, e.g.*, Sean Boland and Tim Fina, *Competitor Collaborations in the Exploration and Production Industry: Lawful or Unlawful*, Baker Botts Antitrust Update (Aug. 13, 2012), available at http://www.bakerbotts.com/file_upload/Update201208Antitrust-CompetitorCollaborationsintheExplorationandProductionIndustry2.htm; Brian Meiners, *DOJ Announces First-Ever Settlement of False Claims Act and Antitrust Claims Involving Mineral Rights Lease Auctions*, King & Spaulding Energy Newsletter (Apr. 2012), available at http://www kslaw.com/library/newsletters/EnergyNewsletter/2012/April/article7 html; Richard Donovan and August Horvath, *Recent DOJ Settlement Highlights the Risks Associated with Certain Joint Bid or Non-Bid Arrangements*, Kelley Drye Client Advisory (Feb. 28, 2012), available at http://www kelleydrye.com/publications/client_advisories/0728; John Dubrow and Shauna Barnes, *Case Study: US v. SG Interests and Gunnison Energy*, Law 360 (February 28, 2012), available at http://www.law360.com/articles/312830/case-study-us-v-sg-interests-and-gunnison-energy.

[36] We read the Court's order as holding neither that the United States is barred from coordinating settlement of multiple claims or actions arising from the same transaction and occurrence; nor that it would be improper for a Relator to share of payments received

The settlements of the FCA Action with respect to GEC and SGI have been executed. SGI and GEC have paid the United States, respectively, $206,250 and $245,000, and the United States has voluntarily dismissed its FCA claims. Accordingly, the settlement of the FCA Action is not conditioned on this Court's approval or disapproval of the Revised PFJs. Further, the Relator will not receive any portion of the $550,000 payment to the United States under the Revised PFJs to settle the Antitrust Action.[37]

IV. The Revised PFJs Need No Separate Round of Public Comment and Response

The Tunney Act does not require the United States to publish the Revised PFJs for public comment. The publication and comment provisions of the Tunney Act serve "to enable the district court to make" its public interest determination. *Hyperlaw, Inc. v. United States*, 1998 WL 388807, at *3, 159 F.3d 636 (D.C. Cir. 1998) (unpublished table decision). Accordingly, a "court should treat notice and comment under the Tunney Act as analogous to agency rulemaking notice and comment." *Id.* (quotation marks omitted). Applying that analogy, "there is no need for successive rounds of notice and comment on each revision," provided the final decree "is a 'logical outgrowth' of the proposed decree. . . . Further notice and comment should be required only if it 'would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its [proposal].'" *Id.* (quoting *American Water Works Ass'n v. EPA*, 40 F.3d 1266,

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by the United States in settling an antitrust claim if sharing were required under the alternate remedy provision of the FCA, 31 U.S.C. § 3730(c)(5).

[37] As discussed in Section II.C. above, the Relator has released any claim that he may have had under the alternate remedy provision of the FCA to payments received by the United States in the antitrust action.

1274 (D.C. Cir. 1974)). *See also United States v. Microsoft*, 215 F.Supp.2d 1, 17 n.17 (D.D.C. 2002).[38]

The Revised PFJs are the logical outgrowth of the Original PFJ and so requires no further notice and comment. As discussed above, the changes to the proposed final judgments respond to the specific concerns that the Court identified with the Original PFJ after it had reviewed the public comments. In light of the public comments received on the Original PFJ and the relationship between the Original PFJ and the Revised PFJs, the public has already had ample opportunity to offer comments that could persuade the government to modify the Revised PFJs. The public comments to the Original PFJ urged a more stringent settlement and the changes between the Original PFJ and the Revised PFJs, while plainly not all that some public comments sought, are more stringent. Accordingly, additional comments are unlikely to generate objections that have not already been aired.

[38] Entry of a decree following modification without a new round of notice and comment is conventional in Tunney Act practice. For example, after notice and comment in *United States v. AT&T*, the court said it would enter the decree as in the public interest if the parties agreed to a number of modifications and the court entered the modified decree without a new round of notice and comment. *United States v. American Tel. and Tel. Co.*, 552 F.Supp. 131, 225-26 (D.D.C. 1982). *See also Massachusetts School of Law v. United States*, 118 F.3d 776, 778 (D.C. Cir. 1997).

V. Conclusion

For the reasons set forth above, the United States respectfully asks the Court to enter the Revised PFJs in this case.

Dated: March 6, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2013, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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