Judgments related to the PSA are not subject to Tunney Act review.[28]

Comments regarding the acquisition of Sanderson are also not subject to Tunney Act review in this matter because the Complaint does not challenge the Sanderson acquisition. Rather, the Complaint alleges that the Settling Defendants' multi-decade collaboration on compensation decisions, sharing of compensation information, and facilitation of such conduct was anticompetitive and that Wayne and Sanderson violated the Packers and Stockyards Act. Under the Tunney Act, the court reviews only whether the proposed remedies address the violations the United States has alleged in its complaint.[29] Potential harms arising from that acquisition that were identified by some public comments are therefore outside the permissible scope of review under the Tunney Act.[30]

The United States understands that some of the commenters are advocating for additional enforcement in the poultry industry. Parts of the CCAR and CFFE Comments urge the United States to continue working to address ''the antitrust implications of industry data sharing activities.'' [31] The Carstensen Comment focuses almost wholly on information-sharing; it asks the United States to continue pursuing other conspirators, to ''forbid any exchange of confidential business information of any kind'' between the Settling Defendants, and to ''revisit [its] outdated guidance on information exchange to emphasize that such conduct among rivals is likely to be unlawful absent specific, limited justifications.'' [32]

The United States does not contend that the proposed Final Judgments resolve all issues in the poultry industry, but these comments are outside the scope of Tunney Act review. They concern conduct not challenged in the Complaint and thus do not provide a basis for measuring the relief included in the proposed Final Judgments.[33] The proposed Final Judgments do address the claims raised against the Settling Defendants.

Additionally, the United States believes the proposed Final Judgments demonstrate to companies both inside and outside the poultry industry that anticompetitive information-sharing risks significant legal consequences, and the broad scope of the monitor contained in the proposed Final Judgments provides protection against anticompetitive information-sharing in contexts other than poultry processing compensation. The United States takes the conduct alleged in the Complaint seriously; the investigation into such conduct is ongoing and the United States will pursue additional claims where the evidence and the law justifies action. Members of the public are encouraged to submit information about potentially unlawful exchanges of information between competitors to the Department of Justice Antitrust Division's Citizen Complaint Center (*https://www.justice.gov/atr/citizen-complaint-center*).

V. Conclusion

After careful consideration of the public comments, the United States continues to believe the proposed Final Judgments provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint and are therefore in the public interest. The United States will move this Court to enter the proposed Final Judgments after the public comments and this response are published as required by 15 U.S.C. 16(d).

Dated: May 23, 2023.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

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[28] Competitive Impact Statement at 3; *see also* 15 U.S.C. 12(a). The PSA-related provisions include changes to compensation and disclosure requirements for Sanderson and Wayne growers.

[29] *See Microsoft,* 56 F.3d at 1459. 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. *Id.* at 1459–60.

[30] The United States has statutory authority to review certain proposed transactions under the Hart-Scott-Rodino Act, 15 U.S.C. 18a, but contrary to some of the public comments the United States does not ''approve'' transactions. *See, e.g., Steves and Sons, Inc.* v. *JELD–WEN, Inc.,* 988 F.3d 690, 713–14 (4th Cir. 2021) (''The Department's decision not to pursue the matter isn't probative as to the merger's legality because many factors may motivate such a decision, including the Department's limited resources.''); *see also In re High Fructose Corn Syrup Antitrust Litig.,* 295 F.3d 651, 664 (7th Cir. 2002).

[31] CFFE Comment at 3 (highlighting the impact of such information-sharing on poultry growers); CCAR Comment at 8 (recommending the United States ''consider the anti-trust implications of such data sharing arrangements regarding poultry growers and production details as well'').

[32] Carstensen Comment at 2.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 18–31]

Morris & Dickson Co., LLC; Order

On May 19, 2023, I issued and served on the parties a Decision and Order (the Decision and Order) revoking, effective 30 days from the date of publication in the **Federal Register**, Certificate of Registration Nos. RM0314790 and RM0335732 issued to Morris & Dickson, Co., LLC (Respondent). By motion dated May 20, 2023, Respondent requested a stay of the Decision and Order. On May 21, I issued an order soliciting additional information from Respondent and asking the Government to respond to Respondent's Motion for Stay. On May 22, both parties responded. Respondent clarified that it was requesting a stay of at least 90-to-120 days so that it can renew settlement negotiations with the Government. Respondent's May 22, 2023 Letter re Motion for Stay, at 1. Respondent also stated that a stay was necessary to mitigate the impact on its ''customers, employees, and other stakeholders,'' including pharmacies, hospitals, and patients. *Id.* at 4–5. The Government indicated that it opposed any stay request, but stated that it was ''open to settlement offers'' and suggested it was willing to engage in settlement negotiations with Respondent. Government's Opposition to Motion to Stay, at 3.

Upon consideration of the entire record before me, the public interest—in particular, the potential need for Respondent's customers and their patients to find new suppliers given the revocation of Respondent's registrations—and the possibility for renewed settlement negotiations, I hereby order that the May 19, 2023 Decision and Order will be effective on August 28, 2023—ninety days from the date of the Decision and Order's publication in the **Federal Register**. This change is reflected in the published Decision and Order.

It is so ordered.

Signing Authority

This document of the Drug Enforcement Administration was signed on May 23, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the

document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Scott Brinks,

Federal Register Liaison Officer, Drug Enforcement Administration.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 18–31]

Morris & Dickson Co., LLC; Decision and Order

On May 2, 2018, the Drug Enforcement Administration (DEA or Government), issued an Order to Show Cause (OSC) and Immediate Suspension of Registration (ISO) to Morris & Dickson Co., LLC (Respondent), of Louisiana. Administrative Law Judge (ALJ) Exhibit (ALJX) 1, at 1. The OSC informed Respondent of the immediate suspension of its Certificates of Registration Nos. RM0314790 and RM0335732 (registrations) [1] and proposed their revocation pursuant to 21 U.S.C. 824(a)(4) and 823(b) because it alleged that Respondent's continued registrations were inconsistent with the public interest. *Id.*

Respondent requested a hearing before a DEA ALJ, which was conducted from May 13 to May 16, 2019. On August 29, 2019, the ALJ issued a Recommended Decision (RD), which was transmitted to the Agency along with the administrative record on November 26, 2019.[2] The Agency has incorporated portions of the ALJ's RD herein.

The Government presented a *prima facie* case. Respondent ultimately admitted to and accepted some responsibility for its failures in effectively applying its customer due diligence in assessing orders of controlled substances, its failures to implement a suspicious order monitoring system ''consistent with best practices for compliance,'' and its failures to adequately resolve red flags on orders that it shipped. *See infra* section V. Respondent also admitted that its three suspicious order reports to DEA during the relevant time period were insufficient. *Id.* Nonetheless, Respondent presented testimony and evidence aimed at rebutting the Government's case with regard to the scope of its regulatory noncompliance during the relevant time period.

After thoroughly reviewing the entire record, the Agency finds substantial record evidence that Respondent's continued registration is inconsistent with the public interest in light of the long-term, egregious failures of Respondent in its responsibility as a distributor to maintain effective controls against diversion of controlled substances. Furthermore, the Agency finds that Respondent has failed to demonstrate that the Agency should continue to entrust it with its controlled substance registrations.

I. Summary of the Allegations

1. The OSC primarily alleged that Respondent failed to maintain effective controls against diversion when it failed to report to DEA thousands of unusually large orders for hydrocodone and oxycodone, which constituted potential suspicious orders, and when it shipped orders to customers without resolving red flags of diversion or reporting the orders to DEA in violation of 21 U.S.C. 823(b)(1) and (e)(1) as well as 21 CFR 1301.71(a) and 1301.74(b). OSC, at 2. Further, the OSC alleged that Respondent failed to adequately design and operate a system to alert Respondent to suspicious orders of controlled substances and failed to report the suspicious orders to DEA in violation of 21 CFR 1301.74(b). *Id.*

2. The allegations included that, from January 2014 until April 2018, Respondent shipped approximately 7,000 unusually large orders of oxycodone and almost 5,000 unusually large orders of hydrocodone. OSC, at 5; Govt Prehearing, at 8. During this time, Respondent filed a total of only three suspicious order reports with DEA.

3. Furthermore, the OSC alleged that, from approximately January 2014 to April 2018,[3] Respondent failed to carry out its due diligence and suspicious order monitoring policies and failed to conduct or failed to document the resolution of meaningful due diligence into orders placed by the following pharmacies: Wallace Drug Company, Inc.; Bordelon's Super-Save Pharmacy; Folse Pharmacy; Pharmacy Specialties Group, Inc.; Dave's Pharmacy; the Wellness Pharmacy, Inc.; Wilkinson Family Pharmacy; and Hephzibah Pharmacy, L.L.C. (hereinafter, the exemplar pharmacies).

II. The Witnesses

A. The Government's Witnesses

The Government presented its case through the testimony of six witnesses and the introduction of 70 exhibits. The Government's first witness was the Acting Section Chief of the Pharmaceutical Investigation Section of the DEA (the Section Chief), who testified generally regarding the regulatory requirements for distributors. Tr. 47–87. The Government also presented testimony from two Diversion Investigators (DI 1 and DI 2) regarding the history of the investigation and the identification of Government exhibits.[4] *See* RD, at 11–12 (citing Tr. 94–101; 144–177). Next, the Government presented testimony from the Chief of the Statistical Services Section of DEA, G.R., who was qualified without objection as an expert in ''developing and implementing statistical models and methods of analyzing large and complex data sets.'' RD, at 13 (citing Tr. 192). G.R. testified to the methodology he employed in analyzing the statistical data that was used by DEA in its determination that Respondent had failed to report suspicious orders.[5] RD, at 12–15 (citing Tr. 187–245). The Government also presented testimony from the Group Supervisor of the New Orleans Field Division (the GS), who was accepted as an expert in ''the identification of common red flags suggestive of an illicit pharmaceutical operation and as well [as] with respect to the requirements imposed on DEA registrants to identify and investigate

[1] Respondent sought and obtained a temporary restraining order against enforcement of the ISO. *See* ALJX 89, at 7. On May 18, 2018, the DEA Acting Administrator rescinded the ISO issued on May 2, 2018. Tr. 12; *see Stip.* 26.

[2] On October 8, 2019, Respondent filed Exceptions to the Recommended Decision (Resp Exceptions) and on November 7, 2019, the Government filed a response to Respondent's Exceptions. On January 5, 2022, Respondent filed a Motion to Reopen the Administrative Record. On January 14, 2022, the Government filed an opposition to this motion and on January 21, 2022, Respondent filed a Reply Memorandum in Support of its Motion to Reopen the Administrative Record. The Agency addresses the Exceptions throughout and the Motion to Reopen at the end of this Decision.

[3] The allegations for three of the exemplar pharmacies only spanned a subset of this timeframe: Wellness Pharmacy, January 2014–December 2017; Wilkinson Family Pharmacy, January 2014–April 2017; Hephzibah Pharmacy, April 2017–May 2017. Govt Prehearing, at 3.

[4] The Government presented testimony from a third Diversion Investigator (DI 3) to rebut the testimony of Respondent's witness, however, the Agency agrees with the RD that the testimony of DI 3 was not essential to the case and is therefore not including it herein. RD, at 20.

[5] G.R. testified that he had corrected DEA's admitted error in the calculations in the OSC, which applied a Three Interquartile Range (IQR) to the median of the data set, or the 50th percentile, instead of the 75th percentile, and as a result, produced a larger group of outliers. Tr. 204, 208–09. G.R. further acknowledged that the error was identified by Respondent's expert. Tr. 218.