UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. CLARENCE L. WERNER *Defendant.*	Civil Action No. 1:21-cv-03332-JEB

UNITED STATES' UNOPPOSED MOTION AND MEMORANDUM IN SUPPORT OF ENTRY OF FINAL JUDGMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), the United States of America ("United States") moves the Court to enter the proposed Final Judgment filed in this civil antitrust proceeding on December 22, 2021 (Dkt No. 1-3) (attached as Exhibit A).

The proposed Final Judgment may be entered at this time without further proceedings if the Court determines that entry is in the public interest. 15 U.S.C. § 16(e). The Competitive Impact Statement ("CIS") filed in this matter on December 22, 2021 (Dkt 1-4) explains why entry of the proposed Final Judgment is in the public interest. The United States is also filing a Certificate of Compliance (attached as Exhibit B) showing that the parties have complied with all applicable provisions of the APPA and certifying that the 60-day statutory public comment period has expired.

I. BACKGROUND

On December 22, 2021, the United States filed a civil antitrust Complaint against Defendant Clarence L. Werner ("Werner") related to Defendant's acquisition of voting securities of Werner Enterprises, Inc. ("Werner Inc.") from May 2007 through February 2020. The Complaint alleges that Defendant violated Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are to be acquired to file pre-transaction notification with the Department of Justice and the Federal Trade Commission (collectively, the "federal antitrust agencies" or "agencies") and to observe a waiting period before consummating certain acquisitions of voting securities or assets.[1] A fundamental purpose of the notification and waiting period is to provide the agencies an opportunity to review proposed acquisitions and, if appropriate, to challenge transactions under applicable law before the transactions are consummated.

The Complaint alleges that Defendant was in continuous violation of the HSR Act each day during the period beginning May 14, 2007 through April 3, 2020, when the waiting period expired on his corrective filings. Under section (g)(1) of the HSR Act, 15 U.S.C § 18a(g)(1), the United States may recover a civil penalty for violations of the HSR Act up to $43,280 per day of violation.[2] Accordingly, the Complaint seeks "an appropriate civil penalty."

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[1] The HSR Act requires that "no person shall acquire, directly or indirectly, any voting securities of any person" exceeding certain thresholds until both have made premerger notification filings and the post-filing waiting period has expired. 15 U.S.C. § 18a(a). The post-filing waiting period is 30-days for most transactions (all-cash tender offers and certain bankruptcies observe a 15-day waiting period). 18 U.S.C. § 18a(b). If neither agency issues an additional request for information pursuant to 18 U.S.C. § 18a(e) prior to the expiration of this initial waiting period, the parties may consummate the transaction.

[2] The maximum daily civil penalty, which had been $10,000, was increased to $11,000 for violations occurring on or after November 20, 1996, pursuant to the Debt Collection Improvement Act of 1996, Pub. L. 104-134 § 31001(s) and FTC Rule 1.98, 16 DC.F.R. § 1.98, 61 Fed. Reg. 54548 (Oct. 21, 1996). The maximum daily penalty in effect at

At the same time the Complaint was filed, the United States also filed a proposed Final Judgment, a Stipulation and Order, and a CIS describing the events giving rise to the alleged violation and the proposed Final Judgment. The Stipulation and Order, which was agreed to by the parties and which was entered by the Court on January 21, 2022 (Dkt No. 5), provides that the proposed Final Judgment may be entered by the Court once the requirements of the APPA have been met. The proposed Final Judgment requires Defendant to pay a civil penalty of $486,900 within 30-days of entry of the Final Judgment.

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 Final Judgment and to punish violations thereof.

II. COMPLIANCE WITH THE APPA

The Certificate of Compliance filed with this Motion and Memorandum states that all the requirements of the APPA have been satisfied. In particular, the APPA requires a 60-day period for the submission of written comments relating to the proposed Final Judgment, 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed the proposed Final Judgment and the CIS with the Court on December 22, 2021; published the proposed Final Judgment and CIS in the *Federal Register* on January 5, 2022, *see* 87 Fed. Reg. 478-484 (2022); and caused a summary of the terms of the proposed Final Judgment and CIS, along with directions for the submission of written comments, to be published in *The Washington Post* for seven days during the period from December 29, 2021, through January 4, 2022. The public comment period concluded on March 7, 2022, and the United States did not receive any comments.

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the time of Werner's corrective filing was $43,280 per day. The maximum daily penalty was increased to $46,517 for violations occurring on or after January 10, 2022, 87 Fed Reg. 1070 (Jan. 10, 2022).

III. STANDARD OF JUDICIAL REVIEW

Before entering the proposed Final Judgment, the APPA requires the Court to determine whether the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court shall 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
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> (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). Section 16(e)(2) of the APPA states 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). In its CIS, the United States explained the meaning and the proper application of the public interest standard under the APPA to this case and now incorporates those statements by reference.

IV. ENTRY OF THE PROPOSED FINAL JUDGEMENT IS IN THE PUBLIC INTEREST

The United States alleged in its Complaint that Defendant was in continuous violation of the HSR Act each day during the period beginning May 14, 2007 through April 3, 2020 in violation of Section 7A of the Clayton Act, 15 U.S.C. §18a. As explained in the CIS, the proposed Final Judgment imposes a $486,900 civil penalty and is designed to penalize Defendant for violating the HSR Act and to deter others from violating the HSR Act. The public has had the

opportunity to comment on the proposed Final Judgment and no comments were submitted. As explained in the CIS, entry of the proposed Final Judgment is in the public interest.

IV. CONCLUSION

For the reasons set forth in this Motion and Memorandum and in the CIS, the United States respectfully requests that the Court find that the proposed Final Judgment is in the public interest and enter the proposed Final Judgment.

Dated: April 20, 2022

Respectfully Submitted,

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