UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff*, v. BIGLARI HOLDINGS INC. *Defendant*.	Civil Action No. 1:21-cv-03331-TSC

RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), 15 U.S.C. § 16, the United States hereby responds to the one public comment received regarding the proposed Final Judgment in this case. After careful consideration of the submitted comment, the United States continues to believe that the civil penalty required by the proposed Final Judgment provides an effective and appropriate remedy for the violation alleged in the Complaint and is therefore in the public interest. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published as required by 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On March 16, 2020, Biglari Holdings Inc. ("Biglari") acquired 55,141 voting securities of Cracker Barrel Old Country Store, Inc. ("Cracker Barrel"), which increased Biglari's holdings of Cracker Barrel voting securities to a value of approximately $159.4 million. Biglari did not file a notification with the Department of Justice and the Federal Trade Commission (collectively, the

"federal antitrust agencies") or observe a waiting period before acquiring the Cracker Barrel voting securities. The United States filed a civil antitrust Complaint on December 22, 2021, seeking civil penalties for the violation of the notice and waiting period requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act" or "Act"). The Complaint alleges that Biglari was in continuous violation of the HSR Act from March 16, 2020 through July 20, 2020, when the waiting period expired on its corrective filing. *See* Dkt. No 1-1.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and a Stipulation and Order in which the United States and Defendant consent to entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. § 16. *See* Dkt. Nos. 1-2, 1-3. The proposed Final Judgment requires Defendant to pay a civil penalty of $1,374,190 within 30-days of entry of the Final Judgment.

Pursuant to the APPA's requirements, the United States filed a Competitive Impact Statement ("CIS") on December 22, 2021, describing the transaction and the proposed Final Judgment. *See* Dkt. No. 1-4. On January 5, 2022, the United States published the Complaint, proposed Final Judgment and CIS in the *Federal Register*, *see* 87 Fed. Reg. 484 (2022), and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in *The Washington Post* for seven days, from December 31, 2021 through January 6, 2022. The 60-day period for public comment ended on March 7, 2022. The United States received one comment, attached as Exhibit A.

II. THE COMPLAINT AND THE PROPOSED FINAL JUDGMENT

The Complaint alleges that Biglari was in continuous violation of the HSR Act each day during the period beginning March 16, 2020 through July 20, 2020, when the waiting period expired on its corrective filing. In particular, the Complaint alleges that Biglari held 2 million Cracker Barrel voting securities prior to March 16, 2020, with a value of approximately $155.1 million. On March 16, 2020, two entities controlled by Biglari acquired an additional 55,141 Cracker Barrel voting securities. When aggregated with the voting securities already held by Biglari, these acquisitions resulted in Biglari holding 2,055,141 Cracker Barrel voting securities, valued at approximately $159.4 million. Biglari's holdings of Cracker Barrel voting securities therefore exceeded the size of transaction threshold, which in March 2020 was $94 million. Additionally, Biglari and Cracker Barrel exceeded the size of person thresholds, which in March 2020 were $18.8 million and $188 million. The HSR Act required Biglari to file a notification with the federal antitrust agencies and to observe a waiting period before consummating the March 16, 2020, acquisitions of Cracker Barrel voting securities. By acquiring the voting securities without filing the required notification and observing the waiting period, Biglari violated the HSR Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a.

The violation alleged in the Complaint is not Biglari's first violation of the HSR Act. On September 25, 2012, the United States filed a complaint alleging that Biglari's acquisitions of voting securities of Cracker Barrel in June 2011 violated the HSR Act. *United States v. Biglari Holdings*, Inc., Civil Action No. 1:12-cv-01586 (D.D.C. 2012). At the same time the 2012 complaint was filed, the United States filed a proposed final judgment settling the case. The final judgment, entered by the court on May 30, 2013, required Biglari to pay a civil penalty of $850,000 for violating the reporting and waiting period requirements of the HSR Act.

As explained in the CIS, the proposed Final Judgment imposes a civil penalty of $1,374,190 and is designed to address the HSR violation alleged in the Complaint, penalize the Defendant, and deter the Defendant and others from violating the HSR Act. The penalty amount reflects that this is Defendant's second violation of the HSR Act in connection with the same issuer (Cracker Barrel), that Defendant did not make a corrective filing until the Federal Trade Commission's Premerger Notification Office notified Defendant of its failure to file, and that Defendant did not consult HSR counsel prior to its acquisition as it had committed to do in connection with its 2011 HSR Act violation. *See* Dkt. No. 1-4.

III. STANDARD OF JUDICIAL REVIEW

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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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). 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 APPA 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 consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the 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 the 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 consent 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 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 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 APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and 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 APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 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 APPA). This language explicitly wrote into the statute what Congress intended when it first enacted the APPA 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).

IV. SUMMARY OF THE COMMENT AND THE UNITED STATES' RESPONSE

The United States received one public comment in response to the proposed Final Judgment from Alan Fishbein, a member of the public. Mr. Fishbein asserts that the settlement is inadequate. He asserts that Biglari should be required to divest its entire holdings in Cracker Barrel and be precluded from acquiring any Cracker Barrel voting securities in the future. *See* Exhibit A.

The United States believes that nothing in the comment warrants a change to the proposed Final Judgment or supports a conclusion that the proposed Final Judgment is not in the public interest. Section (g)(a) of the HSR Act, 15 U.S.C. §18(a)(g)(1) provides that the United States may recover a civil penalty for violations of the Act up to $43,280 per day of violation.[1] Biglari will pay a penalty of $1,374,190 pursuant to the terms of the proposed Final Judgment, representing 25 percent of the statutory maximum. The United States has determined that this amount will appropriately penalize Biglari and deter it and others from future violations of the HSR Act. As required by the APPA, the comment[2] and this response will be published in the *Federal Register*.

V. CONCLUSION

After careful consideration of the public comment, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the violation

[1] 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 the time of Biglari'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).

[2] Aside from a redaction of personally identifiable information the comment is provided in its entirety.

alleged in the Complaint and is therefore in the public interest. The United States will move this Court to enter the Final Judgment after the comment and this response are published as required by 15 U.S.C. § 16(d).

Dated: April __, 2022

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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