UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MITCHELL P. RALES, Defendant.	Civil Action No. 1:17-cv-00103 (CRC)

MOTION AND MEMORANDUM OF THE UNITED STATES IN SUPPORT OF ENTRY OF FINAL JUDGMENT

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), plaintiff United States of America ("United States") moves for entry of the proposed Final Judgment filed on January 17, 2017 (Document 1-3). 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 by the United States on January 17, 2017 (Document 1-5), explains why entry of the proposed Final Judgment is in the public interest. The United States is filing simultaneously with this Motion and Memorandum a Certificate of Compliance (attached as Exhibit 1) setting forth the steps taken by the parties to comply with the applicable provisions of the APPA and certifying that the sixty-day statutory public comment period has expired, and no public comments have been received.

I. BACKGROUND

On January 17, 2017, the United States filed a Complaint against Defendant Mitchell P. Rales ("Rales") related to the Defendant's acquisition of voting securities of Colfax Corporation ("Colfax") and Danaher Corporation ("Danaher").

The Complaint alleges that the 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 and acquired parties to file pre-acquisition Notification and Report Forms with the Department of Justice and the Federal Trade Commission (collectively, the "federal antitrust agencies" or "agencies") and to observe a statutorily mandated waiting period before consummating their acquisition.[1] A fundamental purpose of the notification and waiting period is to allow the agencies an opportunity to conduct an antitrust review of proposed transactions that meet the HSR Act's jurisdictional thresholds before they are consummated.

Compliance with the HSR Act is critical to the federal antitrust agencies' ability to investigate large acquisitions before they are consummated, prevent acquisitions determined to be unlawful under Section 7 of the Clayton Act (15 U.S.C. §18), and design effective divestiture relief when appropriate. Before Congress enacted the HSR Act, the federal antitrust agencies often were forced to investigate anticompetitive acquisitions that had already been consummated without public notice. In those situations, the agencies' only recourse was to sue to unwind the parties' merger. The combined entity usually had the incentive to delay litigation, and years often passed before the case was adjudicated and relief was pursued or obtained. During this extended time, consumers were harmed by the reduction in competition between the merging parties and, even after the court's adjudication, effective relief was often impossible to achieve. Congress enacted the HSR Act to address these problems and to strengthen and improve antitrust

[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 either 30 days after filing or, if the relevant federal antitrust agency requests additional information, 30 days after the parties comply with the agency's request. 15 U.S.C. § 18a(b). The agencies may grant early termination of the waiting period, 15 U.S.C. § 18a(b)(2), and often do so when an acquisition raises no competitive questions.

enforcement by giving the agencies an opportunity to investigate certain large acquisitions before they are consummated.

As alleged in the Complaint, Defendant's wife acquired voting securities of Colfax on the open market in 2011. Pursuant to 16 C.F.R. § 801.1(c)(2), the HSR Rules attributes that acquisition to Rales, and his holdings of Colfax voting securities were in excess of the $100 million threshold then in effect. Defendant thus acquired these shares without complying with the pre-merger notification and waiting period requirements of the HSR Act. Additionally, the Complaint alleged that Defendant also acquired voting securities of Danaher in excess of the then applicable $500 million size-of-transaction threshold in 2008 also without complying with the pre-merger notification and waiting period requirements of the HSR Act. Defendant's failure to comply undermined the statutory scheme and the purpose of the HSR Act by precluding the agencies' timely review of the Defendant's acquisitions. The Complaint seeks an adjudication that the Defendant's acquisitions of voting securities of Colfax and Danaher violated the HSR Act, and asks the Court to award an appropriate civil penalty.

At the same time the Complaint was filed, the United States also filed a Stipulation and proposed Final Judgment. The terms of the proposed Final Judgment are designed to deter Defendant's future HSR Act violations by imposing a civil penalty of $720,000.

Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

II. COMPLIANCE WITH THE APPA

The APPA requires a sixty-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 CIS with the Court on January 17, 2017, and published the proposed Final Judgment and CIS in the *Federal Register* on January 31, 2017, *see* 82 Fed. Reg. 8852-57 (2017). Summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, were published in *The Washington Post* for seven days during the period from January 26, 2017, through February 3, 2017. The sixty-day period for public comments ended on April 4, 2017. The United States received no written comments relating to the proposed Final Judgment.

The Certificate of Compliance filed with this Motion and Memorandum states that all the requirements of the APPA have been satisfied. It is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the Proposed Final Judgment.

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). In its Competitive Impact Statement filed with the Court on January 17, 2017, the United States explained the meaning and proper application of the public

interest standard under the APPA and now incorporates those portions of the Competitive Impact Statement by reference.

IV. CONCLUSION

For the reasons set forth in this Motion and Memorandum and the CIS, the Court should find that the proposed Final Judgment is in the public interest and should enter the proposed Final Judgment without further proceedings. The United States respectfully requests that the proposed Final Judgment, attached hereto as Exhibit 2, be entered at this time.

Dated: April 7, 2017

Respectfully Submitted,

/s/ Kenneth A. Libby
Kenneth A. Libby
Special Attorney