UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff*, v. CLARENCE L. WERNER *Defendant*.	Civil Action No.

COMPETITIVE IMPACT STATEMENT

The United States of America ("United States"), under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On December 22, 2021, the United States filed a Complaint against Defendant Clarence L. Werner ("Werner" or "Defendant"), relating to Werner's acquisitions of voting securities of Werner Enterprises, Inc. ("Werner Inc.") from May 2007 through February 2020. The Complaint alleges that Werner 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 acquired to file notifications with the Department of Justice and the Federal Trade Commission (collectively, the "federal antitrust agencies") and to observe a waiting period before consummating certain acquisitions of voting securities or assets. 15 U.S.C. § 18a (a) and (b).

These notification and waiting period requirements apply to acquisitions that meet the HSR Act's size of transaction and size of person thresholds, which have been adjusted annually since 2004. The size of transaction threshold is met for transactions valued over $50 million, as adjusted ($94 million in 2020). In addition, there is a separate filing requirement for transactions in which the acquirer will hold voting securities in excess of $100 million, as adjusted ($188 million in 2020), and for transactions in which the acquirer will hold voting securities in excess of $500 million, as adjusted ($940.1 million in 2020).

With respect to the size of person thresholds, the HSR Act requires one person involved in the transaction to have sales or assets in excess of $10 million, as adjusted ($18.8 million in 2020), and the other person to have sales or assets in excess of $100 million, as adjusted ($188 million in 2020). A key purpose of the notification and waiting period requirements is to protect consumers and competition from potentially anticompetitive transactions by providing the federal antitrust agencies an opportunity to conduct an antitrust review of proposed transactions before they are consummated.

An exemption from HSR Act filings may apply under certain circumstances. Section 802.21 of the HSR Rules, 16 C.F.R. § 802.21, provides that, once a person has filed under the HSR Act and the waiting period has expired, that person can acquire additional voting securities of the same issuer without filing a new notification for five years from the expiration of the waiting period, so long as the value of the person's holdings do not exceed a threshold higher than was indicated in the filing ("802.21 exemption").

The Complaint alleges that Werner acquired voting securities of Werner Inc. without filing the required pre-acquisition HSR Act notifications with the federal antitrust agencies and without observing the waiting period. Werner's acquisitions of Werner Inc. voting securities

exceeded the $100-million statutory threshold, as adjusted, and Werner and Werner Inc. met the then-applicable adjusted statutory size of person thresholds. Moreover, none of Werner's acquisitions were exempt from HSR Act notification and waiting period requirements under the 802.21 exemption because he had not previously filed the requisite pre-acquisition HSR Act notifications.

At the same time the Complaint was filed in the present action, the United States also filed a Stipulation and Order and proposed Final Judgment that resolve the allegations made in the Complaint. The proposed Final Judgment is designed to address the violation alleged in the Complaint and penalize Werner's HSR Act violations. Under the proposed Final Judgment, Werner must pay a civil penalty to the United States in the amount of $486,900.

The United States and Werner have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States first withdraws its consent. 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 proposed Final Judgment and punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

The crux of Werner's violation is that he failed to submit HSR Act notifications even though his acquisitions of Werner Inc. voting securities satisfied the HSR Act filing requirements and he was not eligible to take advantage of the 802.21 exemption. At all times relevant to the Complaint, Werner had sales or assets in excess of $10 million, as adjusted. At all times relevant to the Complaint, Werner Inc. had sales or assets in excess of $100 million, as adjusted.

Werner is the founder of Werner Inc. and during the relevant period alternatively served as the Chairman, Chairman Emeritus, and Executive Chairman of its Board of Directors. On

May 14, 2007, Werner exercised options to acquire 475,000 shares of Werner Inc. voting securities, which resulted in his aggregated holdings of Werner Inc. voting securities exceeding the $100 million threshold, as adjusted, which in May 2007 was $119.6 million. Although required to do so, Werner did not file under the HSR Act or observe the HSR Act's waiting period prior to completing the May 14, 2007, transaction.

Werner continued to acquire Werner Inc. voting securities, through open market purchases, the exercise of options, and otherwise. Werner acquired 320,100 voting securities on November 18, 2009, 8,500 voting securities on November 24, 2009, 59,406 voting securities on November 27, 2009, and 32,094 voting securities on November 30, 2009. All of these acquisitions were made on the open market. Open market acquisitions require an acquirer to affirmatively and actively decide to acquire voting securities; in particular for very large open market acquisitions, it is not excusable negligence to be unaware of HSR Act legal requirements.

On November 20, 2012, Werner exercised options to acquire 100,000 Werner Inc. voting securities, which resulted in his aggregated holdings of Werner Inc. voting securities again exceeding the $100 million threshold, as adjusted, which in November 2012 was $136.4 million. Although required to do so, Werner did not file under the HSR Act or observe the HSR Act's waiting period prior to completing the November 20, 2012 transaction. Thereafter, Werner continued to acquire Werner Inc. voting securities.

On February 7, 2019, Werner received 3,738 Werner Inc. voting securities with the vesting of a tranche of restricted stock, which resulted in his aggregated holdings of Werner Inc. voting securities again exceeding the $100 million threshold, as adjusted, which in February 2019 was $168.8 million. Although required to do so, Werner did not file under the HSR Act or observe the HSR Act's waiting period prior to completing the February 7, 2019 transaction.

On January 17, 2020, Werner's counsel contacted the Premerger Notification Office ("PNO") of the Federal Trade Commission to inform PNO staff that counsel was analyzing a situation that counsel anticipated would likely entail multiple post-consummation filings. As of that date, Werner, through his counsel, was aware that he had violated the HSR Act. Thereafter, Werner made additional acquisitions of Werner Inc. voting securities on February 7 and 11, 2020, through the vesting of restricted stock awards. Werner did not file an HSR notification prior to either of these acquisitions.

On March 4, 2020, Werner made corrective filings under the HSR Act for the acquisitions he made on May 14, 2007, November 20, 2012, and February 7, 2019. Each of these transactions resulted in Werner's aggregated holdings of Werner Inc. stock exceeding the $100 million threshold, as adjusted. Had Werner filed under the HSR Act for these three acquisitions on a timely basis, all his other acquisitions of Werner Inc. voting securities during the relevant period would have been exempt pursuant to the 802.21 exemption.

Werner was in continuous violation of the HSR Act from May 14, 2007, when he acquired the Werner Inc. voting securities valued in excess of the HSR Act's $100 million filing threshold, as adjusted, through April 3, 2020, when the waiting period expired on his corrective filings.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment imposes a $486,900 civil penalty designed to address the violation alleged in the Complaint, penalize the Defendant, and deter others from violating the HSR Act. The United States adjusted the penalty downward from the maximum permitted under the HSR Act because the violation was inadvertent and the Defendant is willing to resolve the matter by proposed final judgment and thereby avoid prolonged investigation and litigation.

However, the penalty amount reflects that Defendant was serving in a director capacity throughout the period he was in violation of the HSR Act. In addition, many of these acquisitions were open market acquisitions, such that he should have been aware of his obligations under the HSR Act. Open market acquisitions require an acquirer to affirmatively and actively decide to acquire voting securities; in particular for very large open market acquisitions, it is not excusable negligence to be unaware of HSR Act legal requirements. Further, Defendant made reportable acquisitions even after Defendant, through his counsel, was aware that he had violated the HSR Act. The penalty will not have any adverse effect on competition; instead, the relief should have a beneficial effect on competition because it will deter the Defendant and others from failing to properly notify the federal antitrust agencies of future acquisitions, in accordance with the law.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

There is no private antitrust action for HSR Act violations; therefore, entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust action.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the Defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the

Federal Register or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the *Federal Register* unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website. Written comments should be submitted in English to:

Maribeth Petrizzi
Special Attorney, United States
c/o Federal Trade Commission
600 Pennsylvania Avenue, NW
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Washington, D.C. 20580
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The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Defendant. The United States is satisfied, however, that the proposed relief is an appropriate remedy in this matter. Given the facts of this case, including the Defendant's self-reporting of the violations and willingness to promptly settle this matter, the United States is satisfied that the proposed civil penalty is sufficient to address the violations alleged in the Complaint and to deter violations by similarly situated entities in the future, without the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

Under the Clayton Act and APPA, proposed Final Judgments or "consent decrees" in antitrust cases brought by the United States are 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 Tunney Act 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 proposed Final 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 mechanism to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, 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 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 Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act 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).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Date: December 22, 2021

Respectfully submitted,

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