

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

**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). 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”) and Response of the United States to Public Comment on the Proposed Final Judgment (“Response to Public Comment”) filed in this matter on December 22, 2021, and April 29, 2022, respectively (Dkt.1-4 and 5), explain why entry of the proposed Final Judgment is in the public interest. The United States is also filing simultaneously 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 Biglari Holdings, Inc. (“Biglari”) related to Biglari’s acquisition of voting securities of Cracker Barrel Old Country Store, Inc. (“Cracker Barrel”) in March 2020. 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 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 statutorily mandated waiting period before consummating their acquisition.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 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. 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 \$43,280² per day of violation. Accordingly, the Complaint seeks “an appropriate civil penalty.”

At the same time the Complaint was filed, the United States filed a proposed Final

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 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).

Judgment, a Stipulation and Order, and a CIS describing the events giving rise to the alleged violation and the proposed Final Judgment. The Stipulation, which was agreed to by the parties, 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 Biglari to pay a civil penalty of \$1,374,190 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 the 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 CIS with the Court on December 22, 2021, and published the proposed Final Judgment and CIS in the *Federal Register* on January 5, 2022, *see* 87 Fed. Reg. 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 31, 2021, through January 6, 2022. The public comment period concluded on March 7, 2022, and the United States received one comment. Pursuant to 15 U.S.C. § 16(d), the United States filed a Response to Public Comment on April 29, 2022 (Dkt. No.5) and published it and the public comment in the *Federal Register* on May 5, 2022, *see* 87 Fed. Reg. 26787 (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
- (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 JUDGMENT IS IN THE PUBLIC INTEREST

The United States alleged in its Complaint that Biglari was in continuous violation of the HSR Act each day during the period beginning March 16, 2020 through July 20, 2020 in violation of Section 7A of the Clayton Act, 15 U.S.C. §18a. As explained in the CIS and the Response to Public Comment, the proposed Final Judgment imposes a \$1,374,190 civil penalty and is designed to address the HSR violation alleged in the Complaint, penalize the Defendant, and deter Defendant and others from violating the HSR Act. The public has had the opportunity to comment on the proposed Final Judgment. As explained in the CIS and Response to Public Comment, entry of the proposed Final Judgment is in the public interest.

V. **CONCLUSION**

For the reasons set forth in this Motion and Memorandum, the CIS, and the Response to Public Comment, 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: May 9, 2022

Respectfully Submitted,

/s/ Kenneth A. Libby
Kenneth A. Libby
Special Attorney
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2694

COUNSEL FOR PLAINTIFF
UNITED STATES OF AMERICA