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, Public Law 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,

Kenneth A. Libby,

Special Attorney, U.S. Department of Justice, Antitrust Division, c/o Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, Phone: (202) 326–2694, Email: klibby@ftc.gov.

[FR Doc. 2021–28538 Filed 1–4–22; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Biglari Holdings Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Biglari Holdings Inc.,* Civil Action 1:21–cv–03331. On December 22, 2021, the United States filed a Complaint alleging that Biglari Holdings Inc. violated the premerger notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a, in connection with the acquisition of voting securities of Cracker Barrel Old Country Store Inc. The proposed Final Judgment, filed at the same time as the Complaint, requires Biglari Holdings Inc. to pay a civil penalty of $1,374,190.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments in English should be directed to Maribeth Petrizzi, Special Attorney, United States, c/o Federal Trade Commission, 600 Pennsylvania Avenue NW, CC–8416, Washington, DC 20580 or by email to *bccompliance@ftc.gov.*

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

United States District Court for the District of Columbia

United States of America, c/o Department of Justice, Washington, DC 20530, Plaintiff, v. *Biglari Holdings Inc., 17802 IH 10 West, Suite 400, San Antonio, TX 78257,* Defendant.

Civil Action No. 1:21–cv–03331

Judge: Tanya S. Chutkan

Complaint for Civil Penalties for Failure To Comply With the Premerger Reporting and Waiting Requirements of the Hart-Scott Rodino Act

The United States of America, acting under the direction of the Attorney General of the United States and at the request of the Federal Trade Commission, brings this civil antitrust action to obtain monetary relief in the form of civil penalties against Defendant Biglari Holdings Inc. (''Biglari''). The United States alleges as follows:

Nature of the Action

1. Biglari violated 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''), with respect to the acquisition of voting securities of Cracker Barrel Old Country Store, Inc. (''Cracker Barrel'') in 2020.

Jurisdiction and Venue

2. This Court has jurisdiction over the subject matter of this action pursuant to Section 7A(g) of the Clayton Act, 15 U.S.C. 18a(g), and 28 U.S.C. 1331, 1337(a), 1345, and 1355 and over Defendant by virtue of Defendant's consent, in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

3. Venue is proper in this District by virtue of Defendant's consent, in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

The Defendant

4. Biglari is a corporation organized under the laws of Indiana with its principal office and place of business at 17802 IH 10 West, Suite 400, San Antonio, TX 78257. Biglari is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. 18a(a)(1). At all times relevant to this complaint, Biglari had sales or assets in excess of $18.8 million.

Other Entity

5. Cracker Barrel is a corporation organized under the laws of Tennessee with its principal place of business at 305 Hartmann Drive, Lebanon, TN 37087. Cracker Barrel is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. 18a(a)(1). At all times relevant to this complaint, Cracker

Barrel had sales or assets in excess of $188 million.

The Hart-Scott-Rodino Act and Rules

6. 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). The 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 applies if one person involved in the transaction has sales or assets in excess of $10 million, as adjusted ($18.8 million in 2020), and the other person has sales or assets in excess of $100 million, as adjusted ($188 million in 2020).

7. The HSR Act's notification and waiting period requirements are intended to give the federal antitrust agencies prior notice of, and information about, proposed transactions. The waiting period is also intended to provide the federal antitrust agencies with the opportunity to investigate a proposed transaction and to determine whether to seek an injunction to prevent the consummation of a transaction that may violate the antitrust laws.

8. Pursuant to Section (d)(2) of the HSR Act, 15 U.S.C. 18a(d)(2), rules were promulgated to carry out the purposes of the HSR Act. 16 CFR 801–03 (''HSR Rules''). The HSR Rules, among other things, define terms contained in the HSR Act.

9. Pursuant to Section 801.13(a)(1) of the HSR Rules, 16 CFR 801.13(a)(1), ''all voting securities of [an] issuer which will be held by the acquiring person after the consummation of an acquisition''—including any held before the acquisition—are deemed held ''as a result of'' the acquisition at issue.

10. Pursuant to Sections 801.13(a)(2) and 801.10(c)(1) of the HSR Rules, 16 CFR 801.13(a)(2) and § 801.10(c)(1), the value of voting securities already held is the market price, defined to be the lowest closing price within 45 days prior to the subsequent acquisition.

11. Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1), provides that any person, or any officer, director, or partner thereof, who fails to comply with any provision of the HSR Act is liable to the United States for a civil penalty for each day during which such person is in violation. Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, § 701 (further amending the Federal Civil Penalties Inflation Adjustment Act of 1990), the dollar amounts of civil penalties listed in Federal Trade Commission Rule 1.98, 16 CFR 1.98, are adjusted annually for inflation; the maximum amount of civil penalty in effect at the time of Biglari's corrective filing was $43,280 per day. 85 FR 2014 (January 14, 2020).

Defendant's Prior Violation of the HSR Act

12. The violation alleged in this complaint is not Biglari's first violation of the HSR Act. On June 8, 2011, Biglari acquired Cracker Barrel voting securities that resulted in its holdings exceeding the adjusted $50 million threshold then in effect under the HSR Act. Biglari continued to acquire Cracker Barrel voting securities through June 13, 2011. Although required to do so, Biglari did not file under the HSR Act or observe the HSR Act's waiting period prior to acquiring Cracker Barrel voting securities on June 8, 2011.

13. Biglari claimed that its acquisitions of Cracker Barrel voting securities beginning June 8, 2011, were exempt from the reporting and waiting period requirements of the HSR Act under the exemption for certain acquisitions made solely for the purpose of investment. 15 U.S.C. 18a(c)(9) and 16 CFR 802.9. On August 26, 2011, Biglari filed under the HSR Act to increase its holdings of Cracker Barrel voting securities beyond the 10% limit of the exemption for acquisitions made solely for the purpose of investment. The waiting period on this filing expired on September 22, 2011.

14. On March 2, 2012, Biglari sought to re-characterize its August 2011 filing as a corrective filing for its June 2011 acquisitions of Cracker Barrel voting securities. In the explanatory letter submitted at that time, Biglari committed to seeking advice from HSR counsel prior to making future acquisitions of any issuer's voting securities that could result in its aggregated holdings crossing the $50 million (as adjusted) threshold.

15. On September 25, 2012, the Department of Justice, acting at the request of the Federal Trade Commission, filed a complaint for civil penalties 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). The complaint alleged that Biglari did not qualify for the exemption for acquisitions made solely for the purpose of investment, 15 U.S.C. 18a(c)(9) and 16 CFR 802.9, because Biglari's intent was inconsistent with this exemption. This inconsistent intent was evidenced by, among other things, a request by Biglari's CEO for two seats on Cracker Barrel's board of directors within days after making the June 2011 acquisitions.

16. At the same time as the complaint was filed, the Department of Justice filed a stipulation signed by Biglari and a proposed final judgment settling the case. The final judgment required Biglari to pay a civil penalty of $850,000 for the violations alleged in the complaint. On May 30, 2013, the court entered the final judgment.

Defendant's Current Violation of the HSR Act

17. Prior to March 16, 2020, Biglari indirectly held 2,000,000 Cracker Barrel voting securities, valued at 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 $50 million 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.

18. 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. Biglari and Cracker Barrel each met the HSR Act's size of person test; the acquisitions met the HSR Act's size of transaction test; and no exemption applied.

19. Although required to do so, Biglari did not file under the HSR Act or observe the HSR Act's waiting period

prior to completing the March 16, 2020, acquisitions.

20. Biglari's HSR Act violation was not discovered by Biglari itself. Rather, on June 9, 2020, the Premerger Notification Office of the Federal Trade Commission emailed counsel for Biglari to ask why no filing had been made under the HSR Act prior to Biglari's March 16, 2020 acquisitions of Cracker Barrel voting securities.

21. On June 19, 2020, Biglari made a corrective filing under the HSR Act. In the explanatory letter that accompanied Biglari's corrective filing, Biglari acknowledged the violation that began on March 16, 2020. Biglari also admitted in the explanatory letter that Biglari had not sought advice from HSR counsel prior to the March 16, 2020 acquisitions, contrary to the commitment it made in connection with its 2011 HSR Act violation.

22. The HSR waiting period on the corrective filing expired on July 20, 2020. Biglari was in continuous violation of the HSR Act from March 16, 2020, when it acquired the Cracker Barrel voting securities valued in excess of the HSR Act's then applicable $94 million filing threshold through July 20, 2020, when the waiting period expired on its corrective filing.

Requested Relief

Wherefore, the United States requests:

a. That the Court adjudge and decree that Defendant's acquisitions of Cracker Barrel voting securities on March 16, 2020 were violations of the HSR Act, 15 U.S.C. 18a; and that Defendant was in violation of the HSR Act each day from March 16, 2020 through July 20, 2020;

b. that the Court order Defendant to pay to the United States an appropriate civil penalty as provided by Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1), the Debt Collection Improvement Act of 1996, Public Law 104–134 § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461), and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, 701 (further amending the Federal Civil Penalties Inflation Adjustment Act of 1990), and Federal Trade Commission Rule 1.98, 16 CFR 1.98, 85 FR 2014 (January 14, 2020);

c. that the Court order such other and further relief as the Court may deem just and proper; and

d. that the Court award the United States its costs of this suit.

Dated:

FOR THE PLAINTIFF UNITED STATES OF AMERICA:

Jonathan S. Kanter,

Assistant Attorney General, Department of Justice, Antitrust Division, Washington, DC 20530.

Maribeth Petrizzi,

D.C. Bar No. 435204, Special Attorney.

Kenneth A. Libby,

Special Attorney.

Kelly Horne,

Special Attorney, Federal Trade Commission, Washington, DC 20580, (202) 326–2564.

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Biglari Holding Inc.*, Defendant.

Civil Action No. 1:21–cv–03331

[Proposed] Judge: Tanya S. Chutkan

Final Judgment

Whereas, the United States of America filed its Complaint on December 22, 2021, alleging that Defendant Biglari Holding Inc. 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'')):

And whereas, the United States and Defendant have consented to the entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

Now, therefore, it is

Ordered, adjudged, and decreed:

I. Jurisdiction

The Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendant under Section 7A of the Clayton Act, 15 U.S.C. 18a.

II. Civil Penalty

Judgment is hereby entered in this matter in favor of the United States and against Defendant, and, pursuant to Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1), the Debt Collection Improvement Act of 1996, Public Law 104–134 § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461), the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74 § 701 (further amending the Federal Civil Penalties Inflation Adjustment Act of 1990), and Federal Trade Commission Rule 1.98, 16 CFR 1.98, 86 FR 2541 (January 13, 2021), Defendant is hereby ordered to pay a civil penalty in the amount of one million, three hundred seventy four thousand, one hundred ninety dollars ($1,374,190). Payment of the civil penalty ordered hereby must be made by wire transfer of funds or cashier's check. If the payment is to be made by wire transfer, prior to making the transfer, Defendant will contact the Budget and Fiscal Section of the Antitrust Division's Executive Office at *ATR.EXO-Fiscal-Inquiries@usdoj.gov* for instructions. If the payment is made by cashier's check, the check must be made payable to the United States Department of Justice and delivered to: Chief, Budget & Fiscal Section, Executive Office, Antitrust Division, United States Department of Justice, Liberty Square Building, 450 5th Street NW, Room 3016, Washington, DC 20530.

Defendant must pay the full amount of the civil penalty within thirty (30) days of entry of this Final Judgment. In the event of a default or delay in payment, interest at the rate of eighteen percent (18%) per annum will accrue thereon from the date of the default or delay to the date of payment.

III. Costs

Each party will bear its own costs of this action, except as otherwise provided in Paragraph IV.C.

IV. Enforcement of Final Judgment

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendant agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendant waives any argument that a different standard of proof should apply.

B. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. The terms of this Final Judgment should not be construed against either party as the drafter.

C. In connection with a successful effort by the United States to enforce this Final Judgment against Defendant, whether litigated or resolved before litigation, Defendant agrees to reimburse the United States for the fees and

expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

V. Expiration of Final Judgment

This Final Judgment will expire upon payment in full by the Defendant of the civil penalty required by Section II of this Final Judgment.

VI. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated: _____

[Court approval subject to the procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16]

_____

United States District Judge

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

Judge: Tanya S. Chutkan

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 related 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 Biglari Holdings Inc. (''Biglari'' or ''Defendant''), related to Biglari's acquisitions of voting securities of Cracker Barrel Old Country Store, Inc. (''Cracker Barrel'') in March 2020. The Complaint alleges that Biglari 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 applies if one person involved has sales or assets in excess of $10 million, as adjusted ($18.8 million in 2020), and the other person has 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 the opportunity to conduct an antitrust review of proposed transactions before they are consummated.

The Complaint alleges that Biglari acquired voting securities of Cracker Barrel without filing the required pre-acquisition HSR Act notifications with the federal antitrust agencies and without observing the waiting period. Biglari's acquisition of Cracker Barrel voting securities exceeded the $50-million statutory threshold, as adjusted, ($94 million at the time of the acquisition) and Biglari and Cracker Barrel met the then-applicable statutory size of person thresholds (which were $18.8 and $188 million, respectively).

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 to penalize Biglari's HSR Act violations. Under the proposed Final Judgment, Biglari must pay a civil penalty to the United States in the amount of $1,374,190.

The United States and Biglari 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 Biglari's violation is that it failed to submit an HSR Act notification even though its acquisition of Cracker Barrel voting securities satisfied the HSR Act filing requirements. At all times relevant to the Complaint, Biglari had sales or assets in excess of $18.8 million. At all times relevant to the Complaint, Cracker Barrel had sales or assets in excess of $188 million.

On March 16, 2020, two entities controlled by Biglari acquired 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. Although required to do so, Biglari did not file under the HSR Act and observe the HSR Act's waiting period prior to completing the March 16, 2020 acquisitions.

Biglari made a corrective HSR Act filing on June 19, 2020, but Biglari's HSR Act violation was not discovered by Biglari itself. Rather, prior to Biglari's corrective filing, the Premerger Notification Office of the Federal Trade Commission emailed counsel for Biglari and asked why Biglari had not made an HSR filing before the March 16, 2020, acquisitions of Cracker Barrel voting securities. The waiting period for that corrective filing expired on July 20, 2020.

In addition to alleging that Biglari failed to file a required HSR notification, the Complaint further alleges that this was not the first time Biglari had failed to observe the HSR Act's notification and waiting period requirements. In June 2011, Biglari acquired voting securities of Cracker Barrel that resulted in its holdings exceeding the then-applicable HSR Act notification thresholds. In the explanatory letter that accompanied Biglari's corrective filing, Biglari committed to seeking advice from HSR counsel prior to making future acquisitions of any issuer's voting securities that could result in its aggregated holdings crossing the $50 million (as adjusted) threshold.

On September 25, 2012, the Department of Justice, acting at the

request of the Federal Trade Commission, filed a complaint for civil penalties alleging that Biglari's acquisitions of voting securities of Cracker Barrel in June 2011 violated the HSR Act. At the same time as the complaint was filed, the Department of Justice filed a stipulation signed by Biglari and a proposed final judgment settling the case. The final judgment required Biglari to pay a civil penalty of $850,000 for the violations alleged in the complaint. On May 30, 2013, the court entered the final judgment. *See United States.* v. *Biglari Holdings, Inc.,* Civil Action No. 1:12–cv–01586 (D.D.C. 2012).

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment imposes a $1,374,190 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 this is Defendant's second violation of the HSR Act in connection with the same issuer (*i.e.,* Cracker Barrel), that Defendant did not make a corrective filing until the FTC's Premerger Notification Office notified Biglari of its failure to file, and that Defendant did not consult HSR counsel prior to its acquisitions as it had committed to do in connection with its 2011 HSR Act violation. 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 sixty (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, CC–8416, Washington, DC 20580, *bccompliance@ftc.gov*.

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 acknowledgment 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 violation 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
>
> (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, Public Law 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,

/s/ Kenneth A. Libby,

Kenneth A. Libby,

Special Attorney, U.S. Department of Justice, Antitrust Division, c/o Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, Phone: (202) 326–2694, Email: klibby@ftc.gov.

[FR Doc. 2021–28539 Filed 1–4–22; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed First Amendment To Consent Decree Under the Clean Water Act

On December 29, 2021, the Department of Justice lodged a proposed First Amendment to Consent Decree with the United States District Court for the Southern District of Ohio in the lawsuit entitled *United States and the State of Ohio* v. *City of Middletown, Ohio,* Civil Action No. 18–cv–90.

The Complaint in the United States' lawsuit sought civil penalties and injunctive relief for alleged violations of the Clean Water Act (''CWA'') relating to the City of Middletown's sewer system in Middletown, Ohio. The Complaint alleged that: (1) Various discharges from Middletown's wastewater treatment plant violated the CWA by exceeding the effluent limitations in Middletown's permits; (2) Middletown's combined sewer overflow discharges violated the CWA by impairing downstream uses in the Great Miami River; (3) Middletown illegally discharged untreated sewage from its combined sewer overflow outfalls during dry weather; and (4) Middletown violated the CWA by failing to monitor and/or report the monitoring results for its outfalls as required.

A Consent Decree resolving the claims in the Complaint was entered by the Court on April 12, 2018. The Consent Decree requires that Middletown, among other things, implement a Long Term Control Plan to reduce the discharges of combined stormwater and sanitary sewage from the portion of Middletown's sewer system known as