United States District Judge

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Mitchell P. Rales; 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. *Mitchell P. Rales,* Civil Action No. 1:17–cv–00103. On January 17, 2017, the United States filed a Complaint alleging that Mitchell P. Rales violated the notice and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a, with respect to his acquisitions of voting securities of Colfax Corporation and Danaher Corporation. The proposed Final Judgment, filed at the same time as the Complaint, requires Mitchell P. Rales to pay a civil penalty of $720,000.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's Web site 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 Web site, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Daniel P. Ducore, Special Attorney, United States, c/o Federal Trade Commission, 600 Pennsylvania Avenue NW., CC–8416, Washington, DC 20580 (telephone: 202–326–2526; email: *dducore@ftc.gov*).

Patricia A. Brink,

Director of Civil Enforcement.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, c/o Department of Justice, Washington, D.C. 20530, Plaintiff, v. *Mitchell P. Rales, 2200 Pennsylvania Ave., N.W., Suite 800W, Washington, D.C. 20037*, Defendant.

Case No.: 1:17–cv–00103, Judge: Christopher R. Cooper, Filed: 01/17/2017

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, Plaintiff, by its attorneys, 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 Mitchell P. Rales (''Rales''). Plaintiff alleges as follows:

NATURE OF THE ACTION

1. Rales violated the notice and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a (''HSR Act'' or ''Act''), with respect to the acquisitions of voting securities of Colfax Corporation (''Colfax'') and Danaher Corporation (''Danaher'').

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 pursuant to 28 U.S.C. 1331, 1337(a), 1345, and 1355, and over the 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 properly based in this District by virtue of Defendant's principal office and place of business and 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. Defendant Rales is a natural person with his principal office and place of business at 2200 Pennsylvania Avenue, N.W., Suite 800W, Washington, D.C. 20037. Rales 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, Rales had sales or assets in excess of $15.6 million.

OTHER ENTITIES

5. Colfax is a corporation organized under the laws of Delaware with its principal place of business at 420 National Business Parkway, 5th Floor, Annapolis Junction, MD 20701. Colfax 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, Colfax had sales or assets in excess of $156.3 million.

6. Danaher is a corporation organized under the laws of Delaware with its principal place of business at 2200 Pennsylvania Avenue, N.W., Suite 800W, Washington, D.C. 20037. Danaher 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, Danaher had sales or assets in excess of $156.3 million.

THE HART-SCOTT-RODINO ACT AND RULES

7. The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are acquired to file notifications with 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 thresholds. As of February 1, 2001, the size of transaction threshold was $50 million. In addition, there is a separate filing requirement for transactions in which the acquirer will hold voting securities in excess of $100 million, and for transactions in which the acquirer will hold voting securities in excess of $500 million. One person involved in the transaction had to have sales or assets in excess of $10 million, and the other person had to have sales or assets in excess of $100 million. Since 2004, the size of transaction and size of person thresholds have been adjusted annually.

8. 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 an opportunity to investigate a proposed transaction and to successfully seek an injunction to prevent the consummation of a transaction that may violate the antitrust laws.

9. 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 (the ''HSR Rules''). *See* 16 CFR 801–03. The HSR Rules, among

other things, define terms contained in the HSR Act.

10. Pursuant to section 801.1(c)(2) of the HSR Rules, 16 CFR 801.1(c)(2), the holdings of spouses and their minor children are considered holdings of each of them.

11. 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.

12. 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.

13. 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. From November 20, 1996, through February 9, 2009, the maximum amount of civil penalty was $11,000 per day, pursuant to the Debt Collection Improvement Act of 1996, Pub. L. 104–134, 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note), and Federal Trade Commission Rule 1.98, 16 CFR 1.98, 61 FR 54548 (Oct. 21, 1996). As of February 10, 2009, the maximum amount of civil penalty was increased to $16,000 per day, pursuant to the Debt Collection Improvement Act of 1996, Pub. L. 104–134, 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note), and Federal Trade Commission Rule 1.98, 16 CFR 1.98, 74 FR 857 (Jan. 9, 2009). Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 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, 81 FR 42,476 (June 30, 2016), the maximum amount of civil penalty was increased to $40,000 per day.

DEFENDANT'S PRIOR VIOLATION OF THE HSR ACT

14. On May 18, 1988, Equity Group Holdings (''Equity Group'') acquired sufficient voting securities of Interco Incorporated (''Interco'') so that its holdings exceeded the $15 million threshold then in effect under the HSR Act. Equity Group continued to acquire Interco voting securities through July 27, 1988. At that time, Rales was an ''ultimate parent entity'' of Equity Group within the meaning of the HSR Rules and controlled Equity Group for purposes of the HSR Act. *See* 16 CFR 801.1(a)(3). Accordingly, Equity Group's violations of the HSR Act are attributed to Rales.

15. Although it was required to do so, Equity Group did not file under the HSR Act prior to acquiring Interco voting securities on May 18, 1988.

16. On January 25, 1991, the United States filed a complaint for civil penalties alleging that Equity Group's acquisitions of Interco voting securities violated the HSR Act. At the same time, the United States filed a Stipulation signed by Equity Group and a proposed Final Judgment that would require Equity Group to pay a civil penalty of $850,000. The Final Judgment was entered by the court on January 30, 1991.

DEFENDANT'S VIOLATIONS OF THE HSR ACT

A. Failure to File HSR Act Notifications in Connection with Acquisitions of Colfax Voting Securities

17. Prior to May 7, 2008, Rales held approximately 57.9% of the voting securities of Colfax. Under the HSR Rules, because Rales held 50% or more of the voting securities of Colfax, any acquisitions he made of Colfax voting securities were exempt from the requirements of the HSR Act. *See* 16 CFR 802.30.

18. On May 7, 2008, Colfax made an Initial Public Offering of voting securities. As a result of the Initial Public Offering, Rales's holdings in Colfax decreased to approximately 20.8%. Because Rales no longer held over 50% of the voting securities of Colfax, Rales's subsequent acquisitions of Colfax voting securities were not exempt from the requirements of the HSR Act.

19. On October 31, 2011, Rales's wife acquired 25,000 shares of voting securities of Colfax on the open market. Pursuant to the HSR Rules, this acquisition was attributed to Rales. *See* 16 CFR 801.1(c)(2). As a result of this acquisition, Rales held voting securities of Colfax valued in excess of the $100 million threshold, as adjusted ($131.9 million).

20. Although he was required to do so, Rales did not file under the HSR Act prior to acquiring Colfax voting securities on October 31, 2011.

21. Rales continued to acquire voting securities of Colfax through August 5, 2015, but did not exceed the next highest HSR filing threshold.

22. On February 25, 2016, Rales made a corrective filing under the HSR Act for the 2011 acquisition of Colfax voting securities. The waiting period on the corrective filing expired on March 28, 2016.

28. Rales was in continuous violation of the HSR Act from October 31, 2011, when he acquired the Colfax voting securities valued in excess of the HSR Act's $100 million size-of-transaction threshold, as adjusted ($131.9 million), through March 28, 2016, when the waiting period expired.

B. Failure to File HSR Act Notifications in Connection with Acquisitions of Danaher Voting Securities

29. On January 31, 2008, Rales acquired 6,000 shares of voting securities of Danaher on the open market. As a result of this transaction, Rales held voting securities of Danaher valued at approximately $2.3 billion, in excess of the HSR Act's $500 million size-of-transaction threshold, as adjusted ($597.9 million).

30. Although he was required to do so, Rales did not file under the HSR Act prior to acquiring Danaher voting securities on January 31, 2008.

31. On February 25, 2016, Rales made a corrective filing under the HSR Act for the acquisition of Danaher voting securities. The waiting period on the corrective filing expired on March 28, 2016.

32. Rales was in continuous violation of the HSR Act from January 31, 2008, when he acquired the Danaher voting securities valued in excess of the HSR Act's $500 million size-of-transaction threshold, as adjusted ($597.9 million), through March 28, 2016, when the waiting period expired.

REQUESTED RELIEF

WHEREFORE, Plaintiff requests:

a. That the Court adjudge and decree that Defendant Rales's acquisition of Colfax voting securities on October 31, 2011, was a violation of the HSR Act, 15 U.S.C. 18a; and that Defendant Rales was in violation of the HSR Act each day from October 31, 2011, through March 28, 2016;

b. That the Court adjudge and decree that Defendant Rales's acquisition of Danaher voting securities on January 31, 2008, was a violation of the HSR Act, 15 U.S.C. 18a; and that Defendant Rales was in violation of the HSR Act each day from January 31, 2008, through March 28, 2016;

c. That the Court order Defendant Rales to pay to the United States an appropriate civil penalty as provided by the HSR Act. 15 U.S.C. 18a(g)(1), the Debt Collection Improvement Act of

1996, Pub. L. 104–134, 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note), and Federal Trade Commission Rule 1.98, 16 CFR 1.98, 61 FR 54548 (Oct. 21, 1996), 74 FR 857 (Jan. 9, 2009), and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 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, 81 FR 42,476 (June 30, 2016);

d. That the Court order such other and further relief as the Court may deem just and proper; and

e. That the Court award Plaintiff its costs of this suit.

FOR THE PLAINTIFF:

/s/

Renata B. Hesse, D.C. Bar No. 466107
Acting Assistant Attorney General, Department of Justice, Antitrust Division,
Washington, D.C. 20530

/s/

Daniel P. Ducore, D.C. Bar No. 933721
Special Attorney

/s/

Roberta S. Baruch, D.C. Bar No. 269266
Special Attorney

/s/

Kenneth A. Libby
Special Attorney

/s/

Jennifer Lee
Special Attorney, Federal Trade Commission
Washington, DC 20580
(202) 326–2694

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. *Mitchell P. Rales*, Defendant.

Case No.: 1:17–cv–00103, Judge: Christopher R. Cooper, Filed: 01/17/2017

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to the Antitrust Procedures and Penalties Act (''APPA''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement to set forth the information necessary to enable the Court and the public to evaluate the proposed Final Judgment that would terminate this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THIS PROCEEDING

On January 17, 2017, the United States filed a Complaint against Defendant Mitchell Rales (''Rales''), related to Rales's acquisitions of voting securities of Colfax Corporation (''Colfax'') and Danaher Corporation (''Danaher'') between January 2008 and August 2015. The Complaint alleges that Rales 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 provides that ''no person shall acquire, directly or indirectly, any voting securities of any person'' exceeding certain thresholds until that person has filed pre-acquisition notification and report forms with the Department of Justice and the Federal Trade Commission (collectively, the ''federal antitrust agencies'' or ''agencies'') and the post-filing waiting period has expired. 15 U.S.C. 18a(a). A key purpose of the notification and waiting period is to protect consumers and competition from potentially anticompetitive transactions by providing the agencies an opportunity to conduct an antitrust review of proposed transactions before they are consummated.

The Complaint alleges that Rales acquired voting securities of Colfax and Danaher in excess of then-applicable statutory thresholds without making the required pre-acquisition HSR filings with the agencies and without observing the waiting period, and that Rales and each of Colfax and Danaher met the applicable statutory size of person thresholds.

At the same time the Complaint was filed in the present action, the United States also filed a Stipulation and proposed Final Judgment that eliminates the need for a trial in this case. The proposed Final Judgment is designed to deter Rales' HSR Act violations. Under the proposed Final Judgment, Rales must pay a civil penalty to the United States in the amount of $720,000.

The United States and the Defendant 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 would terminate this case, except that the Court would 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 VIOLATIONS OF THE ANTITRUST LAWS

A. Rales's Acquisitions of Colfax Voting Securities

Rales is an investor. At all times relevant to the Complaint, Rales had sales or assets in excess of $15.6 million. At all times relevant to the Complaint, Colfax had sales or assets in excess of $156.3 million.

Prior to May 7, 2008, Rales held approximately 57.9% of the voting securities of Colfax. Because he held 50% or more of the voting securities, pursuant to the HSR Rules he was able to acquire additional voting securities of Colfax without complying with the notification and waiting period requirements of the HSR Act. After Colfax completed its Initial Public Offering on May 7, 2008, Rales held approximately 20.8% of the voting securities of Colfax. Because he no longer held 50% or more of the voting securities of Colfax, subsequent acquisitions of Colfax voting securities were subject to the notification and waiting period requirements of the HSR Act. Further, under the HSR Rules, acquisitions of voting securities by spouses and minor children are attributed to each other.

On October 31, 2011, Rales's wife acquired 25,000 shares of voting securities of Colfax. As a result of this acquisition, Rales held voting securities of Colfax in excess of the $100 million filing threshold, as adjusted. Although Rales was required to file under the HSR Act prior to the October 31 transaction, he did not do so. Rales continued to acquire Colfax voting securities through August 5, 2015, without filing notification under the HSR Act.

Rales made a corrective HSR Act filing on February 25, 2016, after learning that his acquisitions were subject to the HSR Act's requirements and that he was obligated to file. The waiting period expired on March 28, 2016.

B. Rales's Acquisition of Danaher Voting Securities

Rales is a long-time investor in Danaher. Danaher is a manufacturer of tools and equipment. At all times relevant to the Complaint, Danaher had sales or assets in excess of $156.3 million.

On January 31, 2008, Rales acquired 6,000 shares of Danaher voting securities. As a result of the acquisition, Rales held Danaher voting securities valued over the $500 million threshold, as adjusted.

Rales made a corrective HSR Act filing on February 25, 2016, after learning that he was obligated to file. The waiting period expired on March 28, 2016.

The Complaint further alleges that Rales previously violated the HSR Act's notification requirements. In 1988, Equity Group Holdings (''Equity Group'') acquired voting securities of Interco Incorporated (''Interco'') without

filing under HSR and observing the waiting period. On January 25, 1991, the Department of Justice filed a complaint for civil penalties alleging that Equity Group's acquisitions of Interco voting securities violated the HSR Act. At the same time, the Department of Justice filed a Stipulation and proposed Final Judgment whereby Equity Group agreed to pay $850,000 in civil penalties. The Final Judgment was entered by the court on January 30, 1991. At the time of the acquisitions of Interco voting securities, Rales controlled Equity Group within the meaning of the HSR Rules and was an Ultimate Parent Entity of Equity Group. Accordingly, the violations by Equity Group were attributable to Rales.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment imposes a $720,000 civil penalty designed to deter the Defendant and others from violating the HSR Act. The United States adjusted the penalty downward from the maximum permitted under the HSR Act because the violations were inadvertent, the Defendant promptly self-reported the violations after discovery, and the Defendant is willing to resolve the matter by consent decree and avoid prolonged investigation and litigation. The relief will have a beneficial effect on competition because the agencies will be properly notified of future acquisitions, in accordance with the law. At the same time, the penalty will not have any adverse effect on competition.

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 this Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon this Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (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 prior to entry. The comments and the response of the United States will be filed with this Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet Web site and, under certain circumstances, published in the **Federal Register**. Written comments should be submitted to:

Daniel P. Ducore, Special Attorney, United States, c/o Federal Trade Commission, 600 Pennsylvania Avenue NW, CC–8416, Washington, DC 20580, Email: *dducore@ftc.gov*

The proposed Final Judgment provides that this Court retains jurisdiction over this action, and the parties may apply to this Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered pursuing 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 violation 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

The APPA requires proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (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.

Id. § 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); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting that the court's ''inquiry is limited'' because the government has ''broad discretion'' to determine the adequacy of the relief secured through a settlement); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the 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 mechanism to enforce the final judgment are clear and manageable.'').[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, a court conducting an inquiry under the APPA may consider, among other things, the relationship between

[1] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[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. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.''' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom., Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also U.S. Airways,* 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft,* 56 F.3d at 1461)); *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

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 (concluding that ''the '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. As this Court confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding 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 codified what Congress intended when it enacted the Tunney Act in 1974, as the author of this legislation, Senator Tunney, explained: ''The 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). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[3] 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.

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: January 17, 2017

Respectfully Submitted,

[2] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'''').

[3] *See also United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* No. 73–CV–681–W–1, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

/s/

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

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. *Mitchell P. Rales*, Defendant.

Case No.: 1:17-cv-00103, Judge: Christopher R. Cooper, Filed: 01/17/2017

FINAL JUDGMENT

Plaintiff, the United States of America, having commenced this action by filing its Complaint herein for violation of Section 7A of the Clayton Act, 15 U.S.C. 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and Plaintiff and Defendant Mitchell P. Rales, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by the Defendant with respect to any such issue:

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby

ORDERED, ADJUDGED, AND DECREED:

I.

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

II.

Judgment is hereby entered in this matter in favor of Plaintiff 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, Pub. L. 104–134 § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461), and Federal Trade Commission Rule 1.98, 16 CFR 1.98, 61 FR 54549 (Oct. 21, 1996), and 74 FR 857 (Jan. 9, 2009), and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 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, 81 FR 42,476 (June 30, 2016), Defendant is hereby ordered to pay a civil penalty in the amount of seven hundred twenty thousand dollars ($720,000). Payment of the civil penalty ordered hereby shall be made by wire transfer of funds or cashier's check. If the payment is made by wire transfer, Defendant shall contact Janie Ingalls of the Antitrust Division's Antitrust Documents Group at (202) 514–2481 for instructions before making the transfer. If the payment is made by cashier's check, the check shall be made payable to the United States Department of Justice and delivered to:

Janie Ingalls, *United States Department of Justice, Antitrust Division, Antitrust Documents Group,* 450 5th Street, NW, Suite 1024, Washington, DC 20530

Defendant shall 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 (18) percent per annum shall accrue thereon from the date of the default or delay to the date of payment.

III.

Each party shall bear its own costs of this action.

IV.

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:

United States District Judge

[FR Doc. 2017–02025 Filed 1–30–17; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Integrated Photonics Institute for Manufacturing Innovation Operating Under the Name of the American Institute for Manufacturing Integrated Photonics

Notice is hereby given that, on December 23, 2016, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), the Integrated Photonics Institute for Manufacturing Innovation operating under the name of the American Institute for Manufacturing Integrated Photonics (''AIM Photonics'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, The Regents of the University of California on behalf of its Berkeley campus, Berkeley, CA; The Regents of the University of California on behalf of its Davis campus, Davis, CA; University of Colorado Boulder, Boulder, CO; European Photonics Industry Consortium (EPIC), Paris, FRANCE; Microcircuit Laboratories LLC, Kennett Square, PA; and Toyota Research Institute of North America, Ann Arbor, MI, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and AIM Photonics intends to file additional written notifications disclosing all changes in membership.

On June 16, 2016, AIM Photonics filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 25, 2016 (81 FR 48450).

The last notification was filed with the Department on September 27, 2016. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on November 3, 2016 (81 FR 76629).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2017–02023 Filed 1–30–17; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—FD.IO Project, Inc.

Notice is hereby given that, on December 21, 2016, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), fd.io Project, Inc. (''fd.io'') has filed written