DEPARTMENT OF JUSTICE
Antitrust Division

United States v. Fayez Sarofim

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. Fayez Sarofim, Civil Action No. 1:16-cv-02156. On October 27, 2016, the United States filed a Complaint alleging that Fayez Sarofim violated the premerger notification 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 Kinder Morgan, Inc. and Kemper Corporation. The proposed Final Judgment, filed at the same time as the Complaint, requires Fayez Sarofim 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 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 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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
c/o Department of Justice
Washington, D.C. 20530,
Plaintiff,

v.

FAYEZ SAROFIM
Two Houston Center
Suite 2907
Houston, TX 77010

Defendant.

CASE NO.: 1:16-cv-02156
JUDGE: Rudolph Contreras
FILED: 10/27/2016

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 Fayez Sarofim ("Sarofim"). Plaintiff alleges as follows:

NATURE OF THE ACTION

1. Sarofim 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 acquisition of voting securities of Kinder Morgan, Inc. ("KMI") and Kemper Corporation ("Kemper").

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 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 Sarofim is a natural person with his principal office and place of business at Two Houston Center, Suite 2907, Houston, TX 77010. Sarofim 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, Sarofim had sales or assets in excess of $151.7 million.

OTHER ENTITIES

5. KMI is a corporation organized under the laws of Delaware with its principal place of business at 1001 Louisiana Street, Houston, TX 77002. KMI 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, KMI had sales or assets in excess of $15.3 million.

6. Kemper is a corporation organized under the laws of Delaware with its principal place of business at One Kemper Drive, Long Grove, IL 60049. Kemper 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, Kemper had sales or assets in excess of $15.3 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. Prior to February 1, 2001, the HSR Act's reporting and waiting period requirements applied to most transactions where the acquiring person would hold more than $15 million of the acquired person's voting securities and/or assets, except for certain exempted transactions. As of February 1, 2001, the size of transaction threshold was increased to $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. Since 2004, the size of person and size of transaction 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 determine whether to seek an injunction to prevent the consummation of a transaction that may violate the antitrust laws.

9. Section (c)(9) of the HSR Act, 15 U.S.C. § 18a(c)(9), exempts from the requirements of the HSR Act acquisitions of voting securities solely for the purpose of investment if, as a result of the acquisition, the securities acquired or held do not exceed ten percent of the outstanding voting securities of the issuer.

10. 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 C.F.R. §§ 801-03 ("HSR Rules"). The HSR Rules, among other things, define terms contained in the HSR Act.

11. Pursuant to section 801.13(a)(1) of the HSR Rules, 16 C.F.R. § 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 C.F.R. § 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 801.1(i)(1) of the HSR Rules, 16 C.F.R. § 801.1(i)(1), defines the term "solely for the purpose of investment" as follows:

> Voting securities are held or acquired "solely for the purpose of investment" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.

14. 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 C.F.R. § 1.98, 61 Fed. Reg. 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 C.F.R. § 1.98, 74 Fed. Reg. 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 C.F.R. § 1.98, 81 Fed. Reg. 42,476 (June 30, 2016), the maximum amount of civil penalty was increased to $40,000 per day.

DEFENDANT'S VIOLATIONS OF THE HSR ACT

Failure to File HSR Act Notifications in Connection with Acquisitions of KMI Voting Securities

15. Sarofim was an early investor in KMI and, by August 1999, held KMI shares valued at approximately $50 million. Sarofim's acquisitions of KMI securities up until that time were exempt under the HSR Act because they were covered by the Act's exemption of acquisitions made solely for the purpose of investment.

16. In October 1999, Sarofim became a member of the KMI board, a position that

necessarily caused him to participate in the formulation, determination, or direction of the basic business decisions of KMI. As a result, Sarofim could no longer rely on the exemption for acquisitions made solely for the purpose of investment with regard to KMI. Sarofim continued to be a member of KMI's board through 2014.

17. On January 23, 2001, Sarofim acquired 237,500 shares of KMI on the open market. At the time of the acquisition, Sarofim already held voting securities of KMl. The value of the voting securities held by Sarofim after the acquisition was in excess of the then applicable $15 million size of transaction threshold.

18. Although he was required to do so, Sarofim did not file under the HSR Act prior to acquiring KMI voting securities on January 23, 2001, improperly relying on the exemption for acquisitions made solely for the purpose of investment.

19. Sarofim continued to acquire KMI voting securities, through open market purchases and otherwise.

20. On July 16, 2006, Sarofim acquired an additional 1,600 shares of KMI as compensation for serving on KMI's board. As a result of this acquisition, Sarofim held KMI voting securities valued in excess of $113.4 million, the adjusted $100 million threshold in effect at the time.

21. Although he was required to do so, Sarofim did not file under the HSR Act prior to acquiring KMI voting securities on July 16, 2006.

22. On May 30, 2007, Sarofim's KMI voting securities were converted into shares of Knight Holdco, LLC, later named Kinder Morgan Holdco, LLC. This transaction was exempt

from the HSR premerger notification and waiting period requirements. After this transaction, Sarofim no longer held any voting securities of KMI.

23. On November 11, 2011, Sarofim's shares of Kinder Morgan Holdco, LLC were converted into voting securities of KMI. This transaction was exempt from the HSR premerger notification and waiting period requirements.

24. On October 25, 2012, Sarofim acquired 300,000 shares of KMI on the open market. As a result of this acquisition, Sarofim held KMI voting securities valued in excess of $682.1 million, the adjusted $500 million threshold in effect at the time.

25. Although he was required to do so, Sarofim did not file under the HSR Act prior to acquiring KMI voting securities on October 25, 2012.

26. Sarofim continued to acquire KMI voting securities, on the open market and otherwise, through at least June 4, 2014.

27. On November 21, 2014, Sarofim made three corrective filings under the HSR Act, for the three notification thresholds he crossed through the 2001, 2006, and 2012 acquisitions. The waiting period on the corrective filings expired on December 22, 2014.

28. Sarofim was in continuous violation of the HSR Act from January 23, 2001, when he acquired the KMI voting securities valued in excess of the HSR Act's then applicable $15 million size-of-transaction threshold, through May 30, 2007, when he no longer held voting securities of KMI.

29. Sarofim was again in continuous violation of the HSR Act from October 25, 2012, when he acquired the KMI voting securities valued in excess of the then $682.1 million

threshold then in effect, through December 22, 2014, when the waiting period expired.

Failure to File HSR Act Notification in Connection with Acquisition of Kemper Voting Securities

30. Sarofim was an investor in Teledyne, Inc., an industrial conglomerate that owned Unitrin Inc., the predecessor company to Kemper. In 1990, Unitrin was spun off from Teledyne, and investors in Teledyne, including Sarofim, received pro-rata shares of Unitrin as a result. Sarofim joined the Unitrin board shortly after the spinoff.

31. On May 10, 2007, Sarofim acquired 10,000 shares of Unitrin Inc., the predecessor to Kemper, on the open market. At the time of the acquisition, Sarofim already held voting securities of Unitrin. The value of the voting securities held by Sarofim after the acquisition was in excess of the then applicable size-of-the-transaction threshold of $59.8 million.

32. At the time of the May 10, 2007 acquisition, Sarofim was a member of Unitrin's board of directors, and Sarofim continued to be a member of Kemper's board through 2014.

33. Because he was on the Unitrin board, Sarofim could not rely on the exemption for acquisitions solely for the purpose of investment.

34. Although he was required to do so, Sarofim did not file under the HSR Act prior to acquiring Unitrin voting securities on May 10, 2007.

35. Sarofim continued to acquire Unitrin/Kemper voting securities, through open market purchases and otherwise, through at least September 10, 2008.

36. On or about august 19, 2011, Unitrin changed its name to Kemper.

37. On November 21, 2014, Sarofim made a corrective filing under the HSR Act for the acquisition of Unitrin/Kemper voting securities. The waiting period on the corrective filings

expired on December 22, 2014.

38. Sarofim was in continuous violation of the HSR Act from May 10, 2007, when he acquired the Unitrin voting securities valued in excess of the HSR Act's then applicable $59.8 million size-of-transaction threshold, through December 22, 2014, when the waiting period expired.

REQUESTED RELIEF

WHEREFORE, Plaintiff requests:

a. That the Court adjudge and decree that Defendant Sarofim's acquisitions of KMI voting securities on January 23, 2001, July 16, 2006, and October 25, 2012, were violations of the HSR Act, 15 U.S.C. § 18a; and that Defendant Sarofim was in violation of the HSR Act each day from January 23, 2001, through May 30, 2007, and from October 25, 2012, through December 22, 2014;

b. That the Court adjudge and decree that Defendant Sarofim's acquisition of Kemper voting securities on May 10, 2007, was a violation of the HSR Act, 15 U.S.C. § 18a; and that Defendant Sarofim was in violation of the HSR Act each day from May 10, 2007, through December 22, 2014;

c. That the Court order Defendant Sarofim 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 C.F.R. § 1.98, 74 Fed. Reg. 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 C.F.R. 1.98, 81 Fed. Reg. 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 the Plaintiff its costs of this suit.

Dated: __October 27, 2016____

FOR THE PLAINTIFF UNITED STATES
OF AMERICA:

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

_____/s/_____
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_____/s/_____
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_____/s/_____
Kenneth A. Libby
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_____/s/_____
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(202) 326-2694

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. FAYEZ SAROFIM, Defendant.	CASE NO.: 1:16-cv-02156 JUDGE: Rudolph Contreras FILED: 10/27/2016

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 October 27, 2017, the United States filed a Complaint against Defendant Fayez Sarofim ("Sarofim"), related to Sarofim's acquisitions of voting securities of Kinder Morgan, Inc. ("KMI") and Kemper Corporation ("Kemper") between January 2001 and December 2014. The Complaint alleges that Sarofim 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 Sarofim acquired voting securities of KMI and Kemper 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 Sarofim and each of KMI and Kemper 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 Sarofim's HSR Act violations. Under the proposed Final Judgment, Sarofim 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. Sarofim's 2001, 2006, and 2012 Acquisitions of KMI Voting Securities

Sarofim is an investor. Sarofim is the second-largest shareholder in KMI. At all times relevant to the Complaint, Sarofim had sales or assets in excess of $151.7 million.

Headquartered in Houston, Texas, KMI is the largest energy infrastructure company in North America. At all times relevant to the Complaint, KMI had sales or assets in excess of $15.3 million.

Sarofim was an early investor in KMI and, by August 1999, held KMI shares valued at approximately $50 million. Sarofim's acquisitions of KMI securities up until that time were exempt under the HSR Act because they were covered by the Act's investment-only exemption, which exempts "acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer." 15 U.S.C. § 18a(c)(9). The HSR Rules provide that securities are held "solely for the purpose of investment" if the person holding or acquiring the securities has "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 C.F.R. §801.1(i)(1).

In October 1999, Sarofim became a member of the KMI board, a position that necessarily caused him to participate in the formulation, determination, or direction of the basic business decisions of KMI. On January 23, 2001, Sarofim, while still a KMI board member, acquired 237,000 shares of KMI on the open market. As a result of this acquisition, Sarofim held KMI voting securities valued at over the $15 million HSR threshold that was then in place. Sarofim improperly relied on the investment-only exemption and did not make an HSR filing in connection with the 2001 acquisition.

Sarofim again failed to make HSR filings when he crossed the two subsequent filing thresholds related to his holdings in KMI. On July 16, 2006, Sarofim acquired 1,600 shares of KMI as compensation for serving on the KMI board. As a result of this acquisition, Sarofim held KMI voting securities valued over the $113.4 million filing threshold. On May 30, 2007,

Sarofim's KMI voting securities were converted into shares of Knight Holdco, LLC, later named Kinder Morgan Holdco, LLC. This transaction was exempt from the HSR premerger notification and waiting period requirements. After this transaction, Sarofim no longer held any voting securities of KMI. On November 11, 2011, Sarofim's shares of Kinder Morgan Holdco, LLC were converted into voting securities of KMI. This transaction was exempt from the HSR premerger notification and waiting period requirements. Later, on October 25, 2012, Sarofim purchased 300,000 shares of KMI on the open market. As a result of that acquisition, Sarofim held KMI voting securities valued in excess of the $682.1 million filing threshold.

Sarofim made corrective HSR Act filings on November 21, 2014, after learning that he had improperly relied on the investment-only exemption and was obligated to file. The waiting period expired on December 22, 2014.

B. Sarofim's Acquisitions of Kemper Voting Securities

Kemper Corporation is an insurance holding company, with subsidiaries that provide automobile, homeowners, life, health, and other insurance products to individuals and businesses. At all times relevant to the Complaint, Kemper had sales or assets in excess of $15.3 million.

Sarofim was an investor in Teledyne, Inc., an industrial conglomerate that owned Unitrin Inc., the predecessor company to Kemper. In 1990, Unitrin was spun off from Teledyne, and investors in Teledyne, including Sarofim, received pro-rata shares of Unitrin as a result. Sarofim joined the Unitrin board shortly after the spinoff.

On May 10, 2007, Sarofim, while still a Unitrin board member, acquired 10,000 shares of Unitrin on the open market. As a result of the acquisition, Sarofim held Unitrin voting securities valued over $59.8 million, the threshold that was then in place. Sarofim again improperly relied

on the investment-only exemption and did not make an HSR Act filing. Sarofim could not rely on the investment-only exemption because of his status as a Unitrin board member. Through at least September 10, 2008, Sarofim made numerous purchases of Unitrin voting securities on the open market without making HSR Act filings. On or about August 19, 2011, Unitrin changed its name to Kemper.

Sarofim made a corrective HSR Act filing on November 21, 2014, after learning that he had improperly relied on the investment-only exemption and was obligated to file. The waiting period expired on December 22, 2014.

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 website 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 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.

[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).

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*

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[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'").

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.

[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.").

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: October 27, 2016

Respectfully Submitted,

/s/ Kenneth A. Libby
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff,* v. FAYEZ SAROFIM *Defendant*.	CASE NO.: 1:16-cv-02156 JUDGE: Rudolph Contreras FILED: 10/27/2016

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 Fayez Sarofim, 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 United States of America 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 C.F.R. § 1.98, 61 Fed. Reg. 54549 (Oct. 21, 1996), and 74 Fed. Reg. 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 C.F.R. § 1.98, 81 Fed. Reg. 42,476 (June 30, 2016), Defendant Fayez Sarofim 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, D.C. 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.

The 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. 2016-26782 Filed: 11/4/2016 8:45 am; Publication Date: 11/7/2016]