

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

OLYMPUS GROWTH FUND VI, L.P.,

LIQUI-BOX, INC.,

and

DS SMITH PLC,

Defendants.

Civil Action No.: 1:20-cv-00464

Hon. Christopher R. Cooper

**UNITED STATES' UNOPPOSED MOTION AND MEMORANDUM IN
SUPPORT OF ENTRY OF MODIFIED PROPOSED FINAL JUDGMENT**

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (“APPA”), the United States of America (“United States”) moves the Court to enter the modified proposed Final Judgment attached hereto as Exhibit A. The modified proposed Final Judgment is identical in all respects to the original proposed Final Judgment filed in this civil antitrust proceeding on February 19, 2020, except that it incorporates a timing extension to Paragraph IV(J), which was previously agreed to by all parties and memorialized in the Stipulation for Extension of Time filed on August 26, 2020 (Dkt. No. 15).

The modified proposed Final Judgment may be entered at this time without further proceedings if the Court determines that entry is in the public interest. 15 U.S.C. § 16(e). The Competitive Impact Statement (“CIS”) filed in this matter on February 19, 2020 (Dkt. No. 3) explains why entry of the modified proposed Final Judgment is in the public interest. The

United States is also filing a Certificate of Compliance (attached hereto as Exhibit B) showing that the parties have complied with all applicable provisions of the APPA and certifying that the 60-day statutory public comment period has expired. Defendants consent to be bound by the terms of the modified proposed Final Judgment.

I. BACKGROUND

On February 19, 2020, the United States filed a civil antitrust Complaint against Defendants Olympus Growth Fund VI, L.P. (“Olympus”), Liqui-Box, Inc. (“Liqui-Box”), and DS Smith plc (“DS Smith”) seeking to enjoin Olympus’s proposed acquisition of DS Smith’s Plastics Division (“DS Smith Plastics”), through Liqui-Box, a portfolio company of Olympus. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen competition for the development, manufacture, and sale of bag-in-box (“BiB”) used for dairy, post-mix, smoothie, and wine in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would lead to increased prices, lower quality and service, and less innovation.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment, an Asset Preservation Stipulation and Order, and a CIS describing the events giving rise to the alleged violation and the proposed Final Judgment. The Asset Preservation Stipulation and Order, which was agreed to by the parties and entered by the Court on February 25, 2020 (Dkt. No. 9), provides that the proposed Final Judgment may be entered by the Court once the requirements of the APPA have been met. The proposed Final Judgment requires Defendants to divest all of DS Smith’s product lines that overlapped with product lines offered by Liqui-Box in the United States, including its dairy, post-mix, smoothie, and wine BiB product lines.

On August 26, 2020, the United States and Defendants filed a Stipulation for Extension of Time that modified Paragraph IV(J) of the proposed Final Judgment to allow an additional one-hundred and twenty (120) days for Defendants to relocate the Divested Fitment Equipment (as defined in Paragraph II(H)(3)) (Dkt No. 15) (“August 26 Stipulation”). The modified proposed Final Judgment is identical in all respects to the proposed Final Judgment originally filed with the Court, except it reflects the additional time agreed to in the August 26 Stipulation. Entry of the modified proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

II. COMPLIANCE WITH THE APPA

The Certificate of Compliance filed with this Motion and Memorandum states that all the requirements of the APPA have been satisfied. In particular, the APPA requires a 60-day period for the submission of written comments relating to the proposed Final Judgment. 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed the proposed Final Judgment and the CIS with the Court on February 19, 2020; published the proposed Final Judgment and CIS in the *Federal Register* on February 28, 2020 (85 Fed. Reg. 12017 (2020)); and caused a summary of the terms of the proposed Final Judgment and CIS, along with directions for the submission of written comments, to be published in *The Washington Post* for seven days during the period February 26, 2020, to March 3, 2020. The public comment period concluded on May 4, 2020, and the United States did not receive any comments. The public has had the opportunity to comment on the remedy in the modified proposed Final Judgment because the substance of the remedy contained in the original proposed Final Judgment is unchanged.

III. STANDARD OF JUDICIAL REVIEW

Before entering the modified proposed Final Judgment, the APPA requires the Court to determine whether the modified 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, “shall consider”:

- A. the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
- B. the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A), (B). Section 16(e)(2) of the APPA states that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. § 16(e)(2). In its CIS, the United States explained the meaning and the proper application of the public interest standard under the APPA to this case and now incorporates those statements by reference.

IV. ENTRY OF THE MODIFIED PROPOSED FINAL JUDGMENT IS IN THE PUBLIC INTEREST

The United States alleged in its Complaint that the acquisition of DS Smith Plastics by Liqui-Box likely would substantially lessen competition in the United States for the design, manufacture, and sale of BiBs used for dairy, post-mix, smoothie, and wine in violation of Section 7 of the Clayton Act. As explained in the CIS, the divestiture remedy contained in the modified proposed Final Judgment is designed to eliminate the likely anticompetitive effects of

the acquisition alleged by the United States by requiring the divestiture of all of DS Smith's product lines that overlap with product lines offered by Liqui-Box in the United States, including its dairy, post-mix, smoothie, and wine BiB product lines. Prior to the filing of the proposed Final Judgment, Defendants proposed, and the United States approved, TriMas as the acquirer of the divestiture assets.

The public, including affected competitors and customers, has had the opportunity to comment on the terms of the settlement contained in the modified proposed Final Judgment, and no comments were submitted. As explained in the CIS, entry of the modified proposed Final Judgment is in the public interest.

V. CONCLUSION

For the reasons set forth in this Motion and Memorandum and in the CIS, the United States respectfully requests that the Court find that the modified proposed Final Judgment is in the public interest and enter the modified proposed Final Judgment.

Dated: June 17, 2021

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

/s/

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