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.

COMPETITIVE IMPACT STATEMENT

The United States of America, under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "APPA" or "Tunney Act"), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On March 5, 2019, Defendant Olympus Growth Fund VI, L.P. ("Olympus"), through its portfolio company Defendant Liqui-Box, Inc. ("Liqui-Box"), agreed to acquire Defendant DS Smith plc's ("DS Smith") Plastics Division ("DS Smith Plastics") for approximately $500 million, making the combined company one of the largest bag-in-box ("BiB") suppliers in the United States. The United States filed a civil antitrust Complaint on February 19, 2020, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen competition for the development, manufacture, and

sale of dairy, post-mix, smoothie, and wine BiBs in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States filed an Asset Preservation Stipulation and Order ("APSO") and proposed Final Judgment, which are designed to address the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, the Defendants are required to divest 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. Under the terms of the APSO, the Defendants must take certain steps to ensure that the divested assets are preserved and operated in such a way as to ensure that the products and services produced by or sold under the divested assets continue to be ongoing, economically viable competitive product lines.

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Olympus, a fund managed by private equity firm Olympus Partners, is a Delaware limited partnership with headquarters in Stamford, Connecticut. In 2018, Olympus Partners had approximately $8.5 billion total capital under management between its different funds, with Olympus comprising approximately $2.3 billion of that total. Liqui-Box, a company owned by Olympus, is a Delaware corporation with headquarters in Richmond, Virginia. Liqui-Box is a global manufacturer of packaging and packaging equipment, including BiBs, with four U.S.

manufacturing facilities, as well as additional facilities across the world. In 2018, Liqui-Box had total sales of $177 million, including approximately $123 million in the United States.

DS Smith is a United Kingdom public limited company with headquarters in London, England. DS Smith is a global manufacturer of packaging, packaging equipment, and recycled paper. DS Smith Plastics manufactures flexible packaging and dispensing solutions, rigid packaging, injection-molded products, and foam products. Among DS Smith Plastics' flexible packaging products are BiBs, which are primarily sold under the Rapak brand name in the United States. DS Smith Plastics has its U.S. headquarters in Romeoville, Illinois, and operates five plants in the United States, as well as additional plants across the world. In 2018, DS Smith Plastics had total sales of $479 million, including approximately $137 million in sales of BiBs and other goods in the United States.

Pursuant to a Stock Purchase Agreement dated March 5, 2019, Liqui-Box agreed to acquire DS Smith Plastics for approximately $500 million.

B. Industry Background

BiBs are used to store and dispense liquids such as milk, post-mix, smoothies, and wine. The components of a BiB include a flexible plastic bag and an attached fitment. BiBs typically hold between one and six gallons of liquid, but they also come in smaller and larger sizes. The attached fitment facilitates the transfer of liquids into and out of the bag.

The flexible plastic bag component of a BiB is typically made up of one to five layers of film. The films are most often made of polyethylene ("PE"), but also can be made with ethylene vinyl alcohol ("EVOH") or other materials, and are bound together using heat sealing. Customers require different numbers and types of layers to meet individual product demands. For example, the most basic bags consist of a single layer of PE that secures the liquid during

transport. More sophisticated bags have additional layers of engineered film that add durability, metallization, and oxygen, moisture, or temperature resistance.

The fitment component of a BiB typically is made from resin using injection molding and attached to the flexible plastic bag component via heat sealing. The design of the fitment is determined by the liquid that will go into the bag and the method that will be used to dispense the liquid out of the bag. For example, if the BiB is used to dispense post-mix into a soda dispenser, the fitment will be designed to attach to a soda dispenser. The simplest fitment is a basic cap, which can be flipped off or unscrewed to pour out the liquid. Highly engineered fitments can have specialized elements such as a built-in push-tap feature or an oxygen barrier to provide resistance to the elements. Fitments are often protected by patents due to the specialized nature and high degree of engineering that can be required in fitment manufacturing.

BiBs are shipped to the customer, who fills the BiB with liquid using a filler machine that the customer typically purchases or leases from the BiB supplier. The customer then ships the filled BiB to a store, restaurant, or other food processor. For example, a post-mix manufacturer seeking to distribute its post-mix to a convenience store would purchase BiBs and a filler machine from a BiB supplier, fill the BiBs with the post-mix at its own facility, and then ship the filled BiBs to the convenience store for use in the convenience store's dispensing machine.

BiBs are distinct from and have numerous advantages over other forms of packaging. For example, compared to rigid containers (e.g., jugs and bottles) and cartons, which are the other primary forms of packaging used for storing and transporting liquids, BiBs are smaller and thus reduce storage space and shelf space, both when empty and filled. In addition, BiBs can be a more hygienic form of dispensing liquids because they can reduce user contact and thus contamination. Further, BiBs can keep their contents fresher for longer than other types of

packaging by allowing for minimal contact with air. Finally, BiBs can be more economical because they have features that allow the user to get all the liquid out of bag and result in less packaging waste when they are empty and disposed of.

C. Relevant Markets

1. Product Markets

a. Dairy BiBs

BiBs for dairy products hold liquids such as ice cream mix, yogurt, milk, and cream. Dairy BiBs are typically durable bags made from PE and often have a flip-cap or screw-off cap fitment. Dairy BiBs are designed to reduce the risk of contamination and extend shelf life.

As alleged in the Complaint, there are no substitutes for dairy BiBs. Dairy BiBs provide dairy liquids to customers in an easy to use, inexpensive format that other packaging does not offer. For example, rigid containers require more storage space, may not keep the dairy liquid as fresh, and may have a higher risk of contamination. BiBs for other end uses cannot be substituted for dairy BiBs due to the unique specifications for dairy BiBs.

The Complaint alleges that in the event of a small but significant non-transitory price increase for dairy BiBs, customers would not substitute away from dairy BiBs in a sufficient volume to make the price increase unprofitable. Therefore, the Complaint alleges that the development, manufacture, and sale of dairy BiBs is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

b. Post-Mix BiBs

Post-mix BiBs hold concentrated drink mixes such as soda syrup and juice concentrates. These concentrates are often mixed with carbonated or non-carbonated water before being served. Post-mix BiBs are typically made with layers of PE or EVOH and a fitment that attaches

to a drink dispensing machine. Bags used for post-mix must be very strong to accommodate high filling flow rates required by post-mix manufacturers. Post-mix BiBs are designed to maintain freshness and ensure all liquid is dispensed from the bag while minimizing leaks and spills and accurately dispensing the product.

The Complaint alleges that there are no substitutes for post-mix BiBs. Post-mix BiBs must attach to a dispensing machine, which a rigid container cannot do. Moreover, BiBs for other end uses cannot be substituted for post-mix BiBs due to the unique fitments and bag design required for post-mix BiBs.

As further alleged in the Complaint, in the event of a small but significant non-transitory price increase for post-mix BiBs, customers would not substitute away from post-mix BiBs in a sufficient volume to make the price increase unprofitable. Therefore, the Complaint alleges that the development, manufacture, and sale of post-mix BiBs is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

c. Smoothie BiBs

Smoothie BiBs hold mixes and other ingredients for smoothies and other drinks. Smoothie BiBs are typically made with layers of PE that offer low oxygen permeability. Like post-mix BiBs, most fitments on smoothie BiBs are designed to be attached to dispensing machines and are highly specialized for the particular types of machines they attach to. A smoothie BiB typically has a special cap into which a probe is inserted in order to dispense the liquid. Smoothie BiBs are designed to maintain the safety and freshness of the liquid, protect the taste and quality of these flavor-sensitive liquids, and reduce the risk of contamination.

According to the Complaint, there are no substitutes for smoothie BiBs. Rigid containers cannot be attached to the dispensing machines smoothie BiBs are used in. Further, rigid

containers are more expensive and bulkier to transport, may not keep the liquid as fresh, and may have a higher risk of contamination. Moreover, BiBs for other end uses cannot be substituted for smoothie BiBs due to the unique specifications required for smoothie BiBs. Fitments for smoothie BiBs, for example, often are designed to specifically interact with the dispensing machines.

The Complaint alleges that in the event of a small but significant non-transitory price increase for smoothie BiBs, customers would not substitute away from smoothie BiBs in a sufficient volume to make the price increase unprofitable. Therefore, the Complaint alleges that the development, manufacture, and sale of smoothie BiBs is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

d. Wine BiBs

Wine BiBs hold the wine inside of boxed wines, which are often sold in retail outlets. The bag component of wine BiBs is typically made from PE and EVOH and is designed to protect against oxidation and UV light. The fitment for wine BiBs is typically a push, pull, or twist tap that is specifically designed to avoid allowing oxygen into the bag when the wine is dispensed. This provides a longer shelf life for wine once opened as compared to traditional bottles. Because the fitments for wine BiBs are operated directly by individuals, they must be simple to operate and user friendly.

As alleged in the Complaint, there are no substitutes for wine BiBs. BiBs for other end uses cannot be substituted for wine BiBs due to the unique specifications for wine BiBs. Both the bag and fitment are specially engineered to provide an oxygen barrier for the product that other BiBs typically do not provide. Bags and fitments that lack this specialized oxygen barrier would allow oxygen to seep in and degrade the wine, making it unsuitable for consumption after

only a short time. Wine bottles are not adequate substitutes for wine BiBs. A wine BiB can keep wine fresh for up to four weeks after it is opened, significantly longer than a wine bottle can. Also, wine BiBs provide faster and more sanitary pouring for food service operators than bottles do, with no risk of broken glass.

According to the Complaint, in the event of a small but significant non-transitory price increase for wine BiBs, customers would not substitute away from wine BiBs in a sufficient volume to make the price increase unprofitable. Therefore, the Complaint alleges that the development manufacture, and sale of wine BiBs is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. Geographic Market

The Complaint alleges that customers in the United States do not purchase dairy, post-mix, smoothie, and wine BiBs (collectively, the "Relevant BiB Products") from suppliers located outside the United States. Shipping these products from outside the United States generally would not be economical because the shipping costs are too large relative to the cost of the BiB itself. In addition, BiBs manufactured and sold outside the United States often have different specifications than those manufactured and sold in the United States due to, for example, differences in the liquids stored in the BiBs or differences in dispensing machines. Further, according to the Complaint, it is important for a supplier of BiBs in the United States to be able to timely provide service to its customers who have issues with the BiBs, such as leakage or breakage of the bags or problems with the attachment of the BiBs to the filler machines. Suppliers located outside the United States do not have employees located in the United States to timely service BiB customers in the United States.

The Complaint alleges that, in the event of a small but significant non-transitory increase in the price of the Relevant BiB Products, customers in the United States would not procure these products from suppliers located outside the United States in a sufficient volume to make such a price increase unprofitable. Accordingly, the Complaint alleges that the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

D. Anticompetitive Effects

The Complaint alleges that Liqui-Box, DS Smith, and one other company are the only significant suppliers of dairy, post-mix, and smoothie BiBs to customers located in the United States. It also alleges that Liqui-Box and DS Smith are two of only four suppliers of wine BiBs to customers located in the United States.

According to the Complaint, Liqui-Box and DS Smith compete vigorously with one another on the basis of price, quality, and service in the markets for the Relevant BiB Products in the United States. Competition between Liqui-Box and DS Smith has fostered innovation and led to the development of new types of BiBs and product features. The proposed acquisition would eliminate the substantial head-to-head competition between Liqui-Box and DS Smith and the benefits that customers have realized from that competition in the form of lower prices, better quality and service, and innovation. By eliminating DS Smith as a competitor in the development, manufacture, and sale of the Relevant BiB Products in the United States, the proposed acquisition of DS Smith Plastics would substantially increase the likelihood that Liqui-

Box would increase prices, reduce quality and service, and diminish investment in research and development below what it would have been absent the acquisition.

According to the Complaint, the proposed acquisition, therefore, would likely substantially lessen competition in the development, manufacture, and sale of the Relevant BiB Products in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

E. Entry

The Complaint alleges that entry into the development, manufacture, and sale of the Relevant BiB Products would not be timely, likely, or sufficient to prevent the harm to competition caused by Liqui-Box's proposed acquisition of DS Smith Plastics.

According to the Complaint, entry into the markets for the Relevant BiB Products is costly and time consuming. Significant upfront capital expenditures are required to enter. The machinery to manufacture BiBs, including injection molding machines for the fitments and production lines that seal the bags and attach the fitments, is expensive and highly engineered. Manufacturing BiBs in accordance with customer requirements requires skilled employees and industry know-how that can take years to establish. Further, customers demand that suppliers have a proven ability to supply BiBs with the required specifications so that their BiBs do not leak or break and are able to store the liquids for the required amount of time without spoiling. This reputation for having a quality product takes significant time to build. Finally, a new entrant would need to hire trained technicians capable of providing timely service to customers when BiBs leak, break, or encounter other product quality issues.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor with the scale and scope to compete effectively in the markets for the Relevant BiB Products in the United States. Paragraph IV(A) of the proposed Final Judgment requires the Defendants to divest DS Smith Plastics' Rapak Business within 45 calendar days of the Court's entry of the APSO to TriMas Corporation or another acquirer acceptable to the United States in its sole discretion.[1] The divestiture includes four facilities (production facilities in Indianapolis, Indiana and Union City, California; an office and production facility in Woodbridge, Illinois; and a warehouse in Indianapolis, Indiana); seven production lines that are used to manufacture dairy, post-mix, smoothie, and wine BiBs as well as BiBs for other products; injection-molding and other equipment used to manufacture fitments; at the acquirer's option, all other tangible assets related to or used in connection with the Rapak Business; all intangible assets related to or used in connection with the Rapak Business (including the Rapak brand); and, at the acquirer's option, certain inventory. In order to enhance its viability, the divestiture includes not only DS Smith's dairy, post-mix, smoothie, and wine BiB product lines, but also all other DS Smith BiB product lines that overlap with product lines offered by Liqui-Box in the United States. This includes, for example, BiBs for edible oil, liquid egg, and tomato products. Paragraph IV(N) of the proposed Final Judgment requires that the divestiture assets must be divested in such a way as to

[1] Paragraph II(G) of the proposed Final Judgment defines the "Rapak Business" as "the development, manufacture, and sale of BiB Products and filler machines for BiB Products by the Plastics Division of DS Smith in the United States." Paragraph II(F) defines "BiB Products" as "all components of Bag-in-Box ("BiB") packaging and solutions, including, but not limited to, bags and fitments, whether the bags or fitments are sold as part of a complete BiB solution or individually" but "does not include components used solely for tea or coffee."

satisfy the United States in its sole discretion that they can and will be operated by the purchaser as part of a viable, ongoing business that can compete effectively in the development, manufacture, and sale of dairy, post-mix, smoothie, and wine BiBs.

Paragraph IV(B) of the proposed Final Judgment requires that, prior to the divestiture, the Defendants must relocate any divested production lines that are currently located at DS Smith Plastics' Romeoville, Illinois production facility—a facility that is not being divested—to one or more of the production facilities included in the divestiture, with the specific facility to be determined by the acquirer. Defendants have both previously moved production lines for independent business reasons with little to no disruption in production or supply. The Defendants must also ensure that the divested production lines are fully operational in their new locations at the time of the closing of the divestiture. Three of the divested production lines are currently located at DS Smith Plastics' Romeoville facility. These production lines are to be moved to the divested production facilities and divested because they are used primarily for the manufacture of the Relevant BiB Products. In addition, Paragraph IV(J) requires that within 180 days after the Court's entry of the APSO, the Defendants must ensure that the fitment equipment to be divested is relocated to, and fully operational at, a facility or facilities specified by the acquirer.

The proposed Final Judgment contains several provisions to facilitate the immediate use of the divestiture assets by the acquirer. Paragraph IV(K) of the proposed Final Judgment requires the Defendants, at the acquirer's option, to enter into a supply contract for fitments sufficient to meet all or part of the acquirer's needs for a period of up to six months. Upon the acquirer's request, the United States, in its sole discretion, may approve one or more extensions of any such agreement for a total of up to an additional six (6) months. In addition, Paragraph

IV(L) of the proposed Final Judgment requires the Defendants, at the acquirer's option, to enter into a transition services agreement for service and support relating to the Rapak Business for a period of up to twelve months. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions of this transition services agreement for a total of up to an additional six (6) months. Paragraph IV(L) also provides that employees of the Defendants tasked with providing any transition services must not share any competitively sensitive information of the acquirer with any other employee of the Defendants.

The proposed Final Judgment also contains provisions intended to facilitate the acquirer's efforts to hire employees engaged in the Rapak Business. Paragraph IV(D) of the proposed Final Judgment requires the Defendants to provide the acquirer with organization charts and information relating to these employees and to make them available for interviews, and it provides that the Defendants must not interfere with any negotiations by the acquirer to hire them. In addition, Paragraph IV(E) provides that, for employees who elect employment with the acquirer, the Defendants must waive all noncompete and nondisclosure agreements, vest all unvested pension and other equity rights, and provide all benefits that the employees would generally be provided if transferred to a buyer of an ongoing business. This paragraph further provides that, for a period of 12 months from the filing of the Complaint, the Defendants may not solicit to hire or hire any employee engaged in the Rapak Business who was hired by the acquirer, unless that individual is terminated or laid off by the acquirer or the acquirer agrees in writing that the Defendants may solicit or hire that individual.

If the Defendants do not accomplish the divestiture within the period prescribed in the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture

trustee is appointed, the proposed Final Judgment provides that the Defendants will pay all costs and expenses of the trustee. The divestiture trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee will provide periodic reports to the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the divestiture trustee and the United States will make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the trust, including by extending the trust or the term of the divestiture trustee's appointment.

The proposed Final Judgment also contains provisions designed to promote compliance and make the enforcement of the Final Judgment as effective as possible. Paragraph XIII(A) provides that the United States retains and reserves all rights to enforce the provisions of the Final Judgment, including its rights to seek an order of contempt from the Court. Under the terms of this paragraph, the Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that the Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XIII(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore competition the United States alleged would otherwise be harmed by the transaction. The

Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIII(C) of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that the Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XIII(C) provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, that the Defendants will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

Paragraph XIII(D) states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XIV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and the Defendants that the divestiture has been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 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 U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, 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:

Katrina Rouse
Chief, Defense, Industrials, and Aerospace Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 8700
Washington, D.C. 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against the Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Liqui-Box's acquisition of DS Smith Plastics. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the development, manufacture, and sale of dairy, post-mix, smoothie, and wine BiBs in the United States. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

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

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a 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").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron*

Mountain, Inc., 217 F. Supp. 3d 146, 152-53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co.*, 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to

"effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: February 19, 2020

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

I, Christine Hill, hereby certify that on February 19, 2020, I caused a copy of the Competitive Impact Statement to be served on Defendants Olympus Growth Fund VI, L.P., Liqui-Box, Inc., and DS Smith plc by mailing the documents electronically to their duly authorized legal representatives as follows:

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