de: 4410-11

DEPARTMENT OF JUSTICE

Antitrust Division

***United States v. ASSA ABLOY AB, et al.;* Response of the United States to Public Comments on the Proposed Final Judgment**

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that the Response of the United States to Public Comments on the Proposed Final Judgment in *United States of America v. ASSA ABLOY AB, et al.*, Civil Action No. 22-2791-ACR, has been filed in the United States District Court for the District of Columbia, together with the response of the United States to the comment.

Copies of the public comment and the United States' Response are available for inspection on the Antitrust Division's website at http://www.justice.gov/atr.

Suzanne Morris,
Deputy Director Civil Enforcement Operations,
Antitrust Division.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. ASSA ABLOY AB, *et al.*, *Defendants*.	Civil Case No. 22-2791-ACR

RESPONSE OF PLAINTIFF UNITED STATES OF AMERICA
TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

As required by the Antitrust Procedures and Penalties Act (the "Tunney Act"), 15 U.S.C. §§ 16(b)–(h), Plaintiff United States of America hereby responds to the public comment received about the Proposed Final Judgment, ECF No. 128-4. After careful consideration of the comment received, the United States will move the Court for entry of the Proposed Final Judgment after the public comment and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d), and believes that the Court will conclude that the Proposed Final Judgment is in the public interest under the Tunney Act.

I. Procedural History

On September 8, 2021, Defendant ASSA ABLOY AB ("ASSA ABLOY") agreed to acquire the Hardware and Home Improvement division of Defendant Spectrum Brands Holdings, Inc. ("Spectrum") for approximately $4.3 billion. On September 15, 2022, the United States filed an antitrust lawsuit to stop the proposed acquisition from being consummated. The United States' Complaint alleged that the proposed acquisition may substantially lessen competition in the markets for two types of residential door hardware

(premium mechanical door hardware and smart locks) in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The parties vigorously litigated the case for more than seven months, culminating in a bench trial that began on April 24, 2023. On May 5, 2023, while the trial was ongoing, the United States filed a Proposed Final Judgment, Competitive Impact Statement, ECF No. 129, and Asset Preservation Stipulation and Order ("Stipulation"), ECF No. 128-1. The Competitive Impact Statement described the transaction and the Proposed Final Judgment. Through the Stipulation, which the Court entered on May 5, 2023, the parties and non-party divestiture buyer Fortune Brands Innovations, Inc. ("Fortune"), consented to the entry of the Proposed Final Judgment after compliance with the requirements of the Tunney Act. Under the Stipulation, Defendants and Fortune also agreed to abide by and comply with all the terms of the Proposed Final Judgment until it is entered by the Court.

The United States caused the Complaint, the Proposed Final Judgment, the Competitive Impact Statement, and directions for the submission of written comments relating to the Proposed Final Judgment, to be published in the *Federal Register* on May 15, 2023. *See* 88 Fed. Reg. 31007 (May 15, 2023). The United States also caused notice of the same, together with directions for submission of comments, to be published in *The Washington Post* for seven days, from May 12–18, 2023. The 60-day period for public comments has ended. During the public comment period, the United States received one comment, which is described below in Section IV and attached in Appendix A.

II. Standard of Judicial Review

Under the Clayton Act, as amended by the Tunney Act, proposed final judgments, or "consent decrees," in antitrust cases brought by the United States are subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed final judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that

determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

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

Id. In considering these statutory factors, the Court's inquiry is necessarily a limited one because 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. US Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) ("court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (similar).

Under the Tunney Act a court considers, among other things, the relationship between the remedy secured and the specific allegations in the United States' 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, 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); *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 decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577. "The court should also 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 the 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; *see also United States v. Deutsche Telekom AG*, 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id*. The 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 Tunney Act 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 US Airways*, 38 F. Supp. 3d at 75 ("[A] 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 Tunney Act, Congress made clear its intent to preserve the practical benefits of using 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 US Airways*, 38 F. Supp. 3d at 76 (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." *US Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

III. The Complaint and the Proposed Final Judgment

The Proposed Final Judgment is the culmination of approximately twenty-one months of thorough investigation and vigorous litigation by the Antitrust Division of the U.S. Department of Justice concerning ASSA ABLOY's proposed acquisition of Spectrum's Hardware and Home Improvement division ("Spectrum HHI"). As alleged in the Complaint, ASSA ABLOY and Spectrum HHI were, at the time the Complaint was filed, close competitors with enormous market shares. Significant head-to-head competition between Defendants to sell residential door hardware historically generated lower prices, higher quality, exciting innovations, and superior customer service. The Complaint alleged that the combination of ASSA ABLOY and Spectrum HHI would have eliminated those benefits.

The Proposed Final Judgment is designed to mitigate as many risks to competition alleged in the Complaint as possible. Principally, the Proposed Final Judgment requires ASSA ABLOY divest to Fortune, or to another entity approved by the United States in its sole discretion, assets that the Defendants previously used to compete against each other

in the United States. In connection with those divestitures, the Proposed Final Judgment mandates a specific transition period for entanglements between ASSA ABLOY and Fortune. It also subjects ASSA ABLOY to significant financial penalties if ASSA ABLOY fails to transfer the divestiture assets by December 31, 2023. Additionally, the Proposed Final Judgment provides for the appointment of a monitoring trustee to oversee Defendants' compliance with the terms of the Proposed Final Judgment. Importantly, the Proposed Final Judgment also provides that the monitoring trustee can investigate whether the divestiture buyer will have replicated the competitive intensity in the residential smart locks market that existed pre-divestiture. If the monitoring trustee determines at least three years following the divestiture that the divested smart lock assets have diminished in competitive intensity and that such diminishment is in material part due to limitations on the acquirer's right to use the Yale brand name or trademarks in the United States and Canada, then the United States may seek divestiture of additional ASSA ABLOY Yale-related assets.

IV. Summary of Public Comment and the United States' Response

During the 60-day public comment period, the United States received one comment from an individual. After reviewing this comment, the United States continues to believe that the Court will conclude that the Proposed Final Judgment is in the public interest under the Tunney Act.

A. Summary of Public Comment

The commenter states that he believes the two transactions contemplated by the Proposed Final Judgment—ASSA ABLOY's divestiture of assets to Fortune and ASSA ABLOY's acquisition of Spectrum HHI—would violate the antitrust laws and harm both consumers and "the industry as a whole." The commenter states that Fortune "has a track record of moving in a direction that is not always in the best interest of consumers and end users," and that "Fortune's business model relies less and less on small business

relationships." Based on these views, the commenter states that the divestiture of the EMTEK brand to Fortune "could result in reduced competition and innovation." He also posits that Fortune could obtain a "one sided market position" with respect to padlocks if ASSA ABLOY's "Yale Mechanical hardware" is included in the divestiture. And, more generally, the commenter states that the transactions "could give" ASSA ABLOY and Fortune "a dominant market position," apparently based on his belief that the transactions would bring Yale, Kwikset, Baldwin, and other brands under "common ownership."

B. Response of the United States

Nothing in the comment casts doubt on the United States' determination that the Court will conclude that the Proposed Final Judgment is in the public interest under the Tunney Act. The commenter's comment raises concerns that (1) misapprehend the nature of the Proposed Final Judgment, (2) reach beyond the scope of the harms alleged in the Complaint, and (3) are abstract and speculative.

First, some aspects of the comment appear to misapprehend the nature of the Proposed Final Judgment. In particular, the commenter's concern that the two transactions contemplated by the Proposed Final Judgment would result in Yale, Kwikset, and Baldwin "shar[ing] common ownership" misunderstands which assets are being sold and retained by ASSA ABLOY. Under the Proposed Final Judgment, ASSA ABLOY is divesting the Yale brand in the United States and Canada to Fortune for all current and future residential and multifamily uses, and it requires ASSA ABLOY to stop using the Yale brand entirely in the United States and Canada following a transitional, wind-down period. Therefore, in the United States and Canada, contrary to the commenter's statements, Baldwin, Yale, and Kwikset would not be under the control of the same company.

Second, the comment raises concerns that go beyond the harms alleged in the Complaint. For example, the commenter expresses concern about concentration in a

market for padlocks, potential harm from "reliance on overseas manufacturing," and the inability of smaller distributors to "sustain[] healthy business practices," none of which was alleged in the Complaint as a harm arising from the proposed transaction. The Complaint did not allege a product market that included padlocks. Therefore, these concerns extend beyond the permissible scope of Tunney Act review. *See supra* Part II.

Third, the comment provides no specific basis to suggest that the Court will not find the Proposed Final Judgment to be in the public interest under the Tunney Act or any basis for "exceptional confidence that adverse antitrust consequences will result." *Microsoft*, 56 F.3d at 1460. The commenter does not elaborate on his concerns about Fortune's "track record" and "business model." Nor does the comment provide information sufficient to meet the *Microsoft* standard that demonstrates potential harm to competition in the market for premium mechanical door hardware or adverse effects on consumers.

V. Conclusion

After careful consideration of the comment received, the United States continues to believe that the Court will conclude that the Proposed Final Judgment is in the public interest under the Tunney Act. The United States will move the Court for entry of the Proposed Final Judgment after the public comment and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

Dated: September 1, 2023

Respectfully submitted,
/s/ *Matthew R. Huppert*

Matthew R. Huppert (DC Bar #1010997)
Miranda Isaacs

Trial Attorneys
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
450 Fifth Street N.W., Suite 8700
Washington, DC 20530
Telephone: (202) 476-0383
Email: Matthew.Huppert@usdoj.gov

Counsel for Plaintiff United States of America

APPENDIX A

Dear Chief, Defense, Industrials, and Aerospace Section,

I am writing to express my concern not only about the proposed acquisition of Spectrum Brands' Hardware & Home Improvement (HHI) Division by Assa Abloy, but also about the divestiture of Emtek to Fortune Brands. I believe that both of these transactions would violate the antitrust laws of the United States and have a negative impact on consumers and the industry as a whole. There is not sufficient clarity if the Yale business unit (mechanical door hardware) will be included in divestiture or retained by Assa Abloy, either situation begs further consideration.

In the case of Emtek and Schaub, the divestiture to Fortune Brands could result in reduced competition and innovation in the lock and hardware industry. Fortune Brands has a track record of moving in a direction that is not always in the best interest of consumers and end users, which could have a negative impact on the industry as a whole. This could result in fewer options for consumers, lesser quality products that do not have the longevity consumers have come to expect and ultimately harm the industry. Fortune's business model relies less and less on small business relationships, rather they are actively moving away from these smaller companies in favor of larger distributors, big box stores, online retailers, etc. Since it is not clear if Yale Mechanical hardware (different from Smart locks) will be included in the divestiture, please note that the Masterlock Brand along with Yale's padlocks could make for one sided market position. Also of note, Schaub's product offering is not considered Mechanical door hardware.

Furthermore, the combination of Assa Abloy's acquisition of Spectrum Brands' HHI division and Fortune Brands' acquisition of Emtek could give these companies a dominant market position in the residential lock and hardware industry. This could lead to higher prices, reduced innovation, and further reliance on overseas manufacturing where quality is often sacrificed and corporate profits are favored. The harm small and medium-sized businesses could experience is not conducive to sustaining healthy business practices that rely on these companies for their lock and hardware needs. Specifically, regarding the acquisition of Spectrum Brands' HHI division by Assa Abloy, consideration must be given to the reduced intensity of competition that could take place should the following door hardware brands share common ownership: Yale, Kwikset, Baldwin, Weiser, National Hardware, EZset.

I urge the Department of Justice to carefully consider the implications of both the proposed acquisition of Spectrum Brands' HHI division by Assa Abloy and the divestiture of Emtek and Schaub to Fortune Brands. The value of small businesses to our economy, especially in the Residential housing market is not to be taken lightly.

The antitrust laws are in place to protect the American people, and I trust that the Department of Justice will take the necessary steps to ensure fair competition in the market.

I wish to thank Attorney General Merrick Garland and Deputy Attorney General Lisa Monaco for their high level of service to the American People.

Thank you for your time and consideration in this matter.

Sincerely,

Joseph Storrs

[FR Doc. 2023-19530 Filed: 9/8/2023 8:45 am; Publication Date: 9/11/2023]