UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. THIRD POINT OFFSHORE FUND, LTD., THIRD POINT ULTRA, LTD., THIRD POINT PARTNERS QUALIFIED L.P., and THIRD POINT, LLC, Defendants.	Civil Action No.

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 August 24, 2015, the United States filed a Complaint against Third Point Offshore Fund, Ltd. ("Offshore"), Third Point Ultra, Ltd. ("Ultra"), Third Point Partners Qualified L.P. ("Qualified") (collectively "the Defendant Funds"), and Third Point LLC (together with the Defendant Funds collectively, "Defendants") related to the Defendant Funds' acquisition of voting securities of Yahoo! Inc. ("Yahoo") in 2011.

The Complaint alleges that the Defendant Funds 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 requires certain acquiring and acquired parties to file pre-acquisition Notification and Report Forms with the Department of Justice and the Federal Trade Commission (collectively, the "federal antitrust agencies" or "agencies") and to observe a statutorily mandated waiting period before consummating their acquisition.[1] The fundamental purpose of the notification and waiting period is to allow the agencies an opportunity to conduct an antitrust review of proposed transactions that meet the HSR Act's jurisdictional thresholds before they are consummated. The Complaint alleges that the Defendant Funds each acquired voting securities of Yahoo in excess of the statutory thresholds without making the required filings with the agencies and without observing the waiting period, and that the Defendant Funds and Yahoo each meet the statutory size of person threshold.

The Complaint further alleges that the Defendant Funds could not rely on the HSR Act's exemption for acquisitions made solely for the purpose of investment ("investment-only exemption") because they could not show they had "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer," as the exemption is defined in the rules promulgated under the HSR Act. *See* 16 C.F.R. § 801.1(i)(1). The Complaint alleges that the Defendants and/or their agents engaged in a number of acts that showed an intent inconsistent with the exemption. The Complaint seeks an adjudication that the Defendant Funds' acquisitions of voting securities of Yahoo violated the HSR Act, and asks the Court to issue an appropriate injunction.

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[1] The HSR Act requires that "no person shall acquire, directly or indirectly, any voting securities of any person" exceeding certain thresholds until both have made premerger notification filings and the post-filing waiting period has expired. 15 U.S.C. § 18a(a). The post-filing waiting period is either 30 days after filing or, if the relevant federal antitrust agency requests additional information, 30 days after the parties comply with the agency's request. 15 U.S.C. § 18a(b). The agencies may grant early termination of the waiting period, 15 U.S.C. § 18a(b)(2), and often do so when an acquisition poses no competitive problems.

At the same time the Complaint was filed, the United States also filed a Stipulation and Order and proposed Final Judgment, which are designed to prevent and restrain Defendants' HSR Act violations. Under the proposed Final Judgment, which is explained more fully below, Defendants are prohibited from acquiring voting securities without observing the HSR Act's notification and waiting period requirements in reliance on the investment-only exemption if they have engaged in certain specified acts during the four (4) months prior to an acquisition that is otherwise reportable under the Act, unless they have affirmatively stated that they are not pursuing board or management representation with respect to the issuer of those voting securities.

The United States and the Defendants 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. Entry of this judgment would not constitute evidence against, or an admission by, any party with respect to any issue of fact or law involved in the case and is conditioned upon the Court's finding that entry is in the public interest.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS OF THE ANTITRUST LAWS

A. The Defendants and the Acquisitions of Yahoo Voting Securities

Offshore is an offshore fund organized under the laws of the Cayman Islands, with offices at c/o Walkers, 190 Elgin Avenue, George Town, Grand Cayman KY1-9001, Cayman Islands. Offshore invests in securities and other investments on behalf of its investors.

Ultra is an offshore fund organized under the laws of the British Virgin Islands, with offices at c/o Walkers Chambers, 171 Main Street, Road Town, Tortola, British Virgin Islands.

Ultra invests in securities and other investments on behalf of its investors.

Partners is a limited partnership organized under the laws of the State of Delaware, with offices at 390 Park Avenue, 19th Floor, New York, NY 10022. Partners invests in securities and other investments on behalf of its partners.

Third Point LLC is a limited liability company organized under the laws of the State of Delaware, with its principal place of business at 390 Park Avenue, 19th Floor, New York, NY 10022. Third Point LLC makes all the investment decisions for each of the Defendant Funds, including decisions to nominate a candidate to the board of directors of a company in which Defendants have invested, or to launch a proxy fight to obtain board representation on behalf of Defendants.

On August 8, 2011, Third Point LLC began acquiring voting securities of Yahoo on behalf of the Defendant Funds. In general, the voting securities were allocated to each Defendant Fund, as well as to other investment funds managed by Third Point LLC, in proportion to such fund's total capital. Other than the Defendant Funds, no fund managed by Third Point LLC held Yahoo voting securities in excess of the HSR threshold.

On August 10, 2011, the value of Offshore's holdings of Yahoo voting securities exceeded the HSR Act's $66 million size-of-transaction threshold then in effect. On August 17, 2011, the value of Ultra's holdings of Yahoo voting securities exceeded $66 million. On August 30, 2011, the value of Partners' holdings of Yahoo voting securities exceeded $66 million. Third Point LLC continued to acquire voting securities of Yahoo on behalf of the Defendant Funds through September 8, 2011, when Third Point LLC filed a Schedule 13D with the Securities and Exchange Commission publicly disclosing the Defendant Funds' holdings in Yahoo.

On September 16, 2011, the Defendant Funds each filed a Notification and Report Form

under the HSR Act with the federal antitrust agencies to acquire voting securities of Yahoo. The waiting period on the Notification and Report Forms expired on October 17, 2011.

B. The Defendant Funds' Unlawful Conduct

Compliance with the HSR Act is critical to the federal antitrust agencies' ability to investigate large acquisitions before they are consummated, prevent acquisitions determined to be unlawful under Section 7 of the Clayton Act (15 U.S.C. §18), and design effective divestiture relief when appropriate. Before Congress enacted the HSR Act, the federal antitrust agencies often were forced to investigate anticompetitive acquisitions that had already been consummated without public notice. In those situations, the agencies' only recourse was to sue to unwind the parties' merger. The combined entity usually had the incentive to delay litigation, and years often passed before the case was adjudicated and relief was pursued or obtained. During this extended time, consumers were harmed by the reduction in competition between the merging parties and, even after the court's adjudication, effective relief was often impossible to achieve. Congress enacted the HSR Act to address these problems and to strengthen and improve antitrust enforcement by giving the agencies an opportunity to investigate certain large acquisitions before they are consummated.

As alleged in the Complaint, the Defendant Funds each acquired in excess of $66 million in voting securities of Yahoo without complying with the pre-merger notification and waiting period requirements of the HSR Act. Defendants' failure to comply undermined the statutory scheme and the purpose of the HSR Act by precluding the agencies' timely review of the Defendants' acquisitions.

The Complaint further alleges that the Defendant Funds could not rely on the HSR Act's investment-only exemption because, at the time of the acquisitions, they were engaging in

activities that evidenced an intent inconsistent with the exemption. Namely, the Defendants and/or their agents contacted certain individuals to gauge their interest and willingness to become the CEO of Yahoo or a potential board candidate of Yahoo; took other steps to assemble an alternate slate of board of directors for Yahoo; drafted correspondence to Yahoo to announce that Third Point LLC was prepared to join the board of Yahoo (*i.e.*, propose Third Point people as candidates for the board of Yahoo); internally deliberated the possible launch of a proxy battle for directors of Yahoo; and made public statements that they were prepared to propose a slate of directors at Yahoo's next annual meeting. These actions were inconsistent with the exemption's requirement that an acquiring person have "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." *See* 16 C.F.R. § 801.1(i)(1).

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment contains injunctive relief designed to prevent future violations of the HSR Act. The proposed Final Judgment sets forth specific prohibited conduct, requires that the Defendants maintain a compliance program, and provides access and inspection procedures to enable the United States to determine and ensure compliance with the Final Judgment. The acts that are prohibited by the proposed Final Judgment are not the only activities that might show an intention inconsistent with the investment-only exemption; they are, however, the actions in which the Defendants engaged in this particular case and are therefore appropriately prohibited by the resolution of this case.

A. Prohibited Conduct

Section IV of the proposed Final Judgment is designed to prevent future HSR Act violations of the sort alleged in the Complaint. Under this provision, Defendants may not

consummate acquisitions of voting securities that would otherwise be subject to the HSR Act's Notification and Reporting requirements, and not otherwise exempt, in reliance on the investment-only exemption if, at the time of an acquisition of a particular issuer, or in the four (4) months prior to the acquisition, Defendants have engaged in certain specified activities. These activities are: nominating a candidate for the board of directors of the issuer; proposing corporate action requiring shareholder approval; soliciting proxies with respect to such issuer; having a representative serve as an officer or director of the issuer; being a competitor of the issuer; doing any of the above activities with regard to an entity controlled by the issuer; inquiring of a third party as to his or her interest in being a candidate for the board or chief executive officer of the issuer, and not abandoning such efforts; communicating with the issuer about potential candidates for the board or chief executive officer of the issuer, and not abandoning such efforts; or assembling a list of possible candidates for the board or chief executive officer of the issuer, if done through, at the instruction of, or with the knowledge of the chief executive officer of Third Point LLC or a person who has the authority to act for Third Point LLC with respect to finding candidates for the board or management.

B. Compliance

Section V of the proposed Final Judgment sets forth required compliance procedures. Section V sets up an affirmative compliance program directed toward ensuring Defendants' compliance with the limitations imposed by the proposed Final Judgment. The compliance program includes the designation of a compliance officer, who is required to distribute a copy of the Final Judgment to each present and succeeding person who has responsibility for or authority over acquisitions of voting securities by Defendants, and to obtain a certification from each such person that he or she has received a copy of the Final Judgment and understands his or her

obligations under the judgment. Additionally, the compliance officer is tasked with providing written instructions, on an annual basis, to all of Defendants' employees regarding the prohibitions contained in the Final Judgment. Lastly, Defendants must file an annual statement with the United States detailing the manner of their compliance with the Final Judgment, including a list of all acquisitions in which they have relied on the investment-only exemption.

To facilitate monitoring Defendants' compliance with the Final Judgment, Section VI grants duly authorized representatives of the United States Department of Justice ("DOJ") access, upon reasonable notice, to Defendants' records and documents relating to matters contained in the Final Judgment. Defendants must also make its personnel available for interviews or depositions regarding such matters. In addition, Defendants must, upon written request from duly authorized representatives of the Assistant Attorney General in charge of the DOJ's Antitrust Division, submit written reports relating to matters contained in the Final Judgment.

These provisions are designed to prevent recurrence of the type of illegal conduct alleged in the Complaint and ensure that, in future transactions, Defendants do not improperly rely on the HSR Act's investment-only exemption.

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 district court to recover three times the damages the person has suffered, as well as the costs of bringing a lawsuit and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no effect as *prima*

facie evidence in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants 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 injunction contained in the 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. The United States will evaluate and respond to comments. 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 and 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
Washington, DC 20580
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 a full trial on the merits against the Defendants, including an action for civil penalties. In determining not to seek civil penalties, the United States considered a variety of factors. Chief among them were the fact that the Defendants have no previous record of HSR violations, and that they made their HSR filings within just a few weeks after the date on which they should have filed under the appropriate interpretation of the exemption. In these circumstances, the United States is satisfied that the proposed injunctive relief is sufficient to address the violation alleged in the Complaint and has the added advantage that it gives guidance to similarly-situated entities in the future.

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

The APPA requires that injunctions of anticompetitive conduct contained in 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
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> (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); *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 the court has broad discretion of the adequacy of the relief at issue); *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.").[2]

As the United States 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 set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40

[2] 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).

(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).[3] 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 United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting

[3] *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'").

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 ("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 recently 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." *SBC Commc'ns*, 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). The language wrote into the statute what Congress intended when it 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). 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.[4] 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.

[4] *See 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: August 24, 2015

Respectfully Submitted,

/s/ Kenneth A. Libby
Kenneth A. Libby
Special Attorney