UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA c/o Department of Justice, Plaintiff, v. THIRD POINT OFFSHORE FUND, LTD. c/o Cayman Corporate Center, THIRD POINT ULTRA LTD. c/o Maples Corporate Services (BVI) Ltd., THIRD POINT PARTNERS QUALIFIED L.P. Corporation Trust Center, and THIRD POINT LLC, Defendants.	Civil Action No.

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), 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 August 28, 2019, the United States filed a Complaint against Defendants Third Point Offshore Fund, Ltd. ("Third Point Offshore"), Third Point Ultra, Ltd. ("Third Point Ultra"), Third Point Partners Qualified L.P. ("Third Point Partners") (collectively, "Defendant Funds")

and Third Point LLC (collectively with Defendant Funds, "Defendants"), related to Defendant Funds' acquisitions of voting securities of DowDuPont Inc. ("DowDuPont") on August 31, 2017. The Complaint alleges that Defendants violated Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The HSR Act provides that "no person shall acquire, directly or indirectly, any voting securities or assets of any person" exceeding certain thresholds until that person has filed pre-acquisition notification and report forms with the Department of Justice and the Federal Trade Commission (collectively, the "federal antitrust agencies" or "agencies") and the post-filing waiting period has expired. 15 U.S.C. § 18a(a). A key purpose of the notification and waiting period requirements is to protect consumers and competition from potentially anticompetitive transactions by providing the agencies an opportunity to conduct an antitrust review of proposed transactions before they are consummated.

The Complaint alleges that each Defendant Fund acquired voting securities of DowDuPont in excess of the then-applicable statutory threshold ($80.8 million at the time of acquisition) without making the required pre-acquisition HSR Act filings with the agencies and without observing the waiting period, and that each Defendant Fund and DowDuPont met the applicable statutory size of person thresholds.

At the same time the Complaint was filed in the present action, the United States also filed a Stipulation and proposed Final Judgment that eliminates the need for a trial in this case. The proposed Final Judgment is designed to address the violation alleged in the Complaint and deter Defendants' HSR Act violations and deter violations by similarly situated entities in the future. Under the proposed Final Judgment, Defendants must pay a civil penalty to the United States in the amount of $609,810 and are subject to an injunction against future violations.

The United States and 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.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

Third Point LLC is a New York-based financial investment firm managed by Daniel S. Loeb.[1] Started in 1995 with approximately $3.3 million, Third Point LLC has grown quickly over the years and, in 2014, managed approximately $16 billion through a variety of funds, including Third Point Offshore, Third Point Ultra, and Third Point Partners, all of which are managed centrally by Mr. Loeb. At all times relevant to the Complaint, each Defendant Fund had assets in excess of $16.2 million. At all times relevant to the Complaint, DowDuPont had sales in excess of $161.5 million.

On December 11, 2015, the Dow Chemical Company ("Dow") and E.I. du Pont de Nemours and Company ("DuPont") entered into a Merger Agreement pursuant to which Dow and DuPont would consolidate into a single company, to be called DowDuPont Inc. On June 10, 2106, Dow and DuPont issued their Final Proxy Statement/Prospectus for the consolidation. That document disclosed that, upon completion of the transaction, Dow and DuPont would cease to have their common stock publicly traded and that shareholders would own shares in DowDuPont and would not directly own any shares of Dow and/or DuPont. On June 15, 2017,

[1] Mr. Loeb closely controls Third Point LLC and its funds. He is not, however, the ultimate parent entity ("UPE") within the meaning of the HSR Rules of any of the Third Point funds that made the relevant acquisitions of DowDuPont.

Dow and DuPont issued a joint press release stating that they had received antitrust clearance from the U.S. Department of Justice and that the transaction was on track to close in August 2017. On August 4, 2017, Dow and DuPont issued a joint press release setting the closing date of August 31, 2017 for the transaction. The press release also stated that shares of Dow and DuPont would cease trading at the close of the New York Stock Exchange on August 31, and shares of DowDuPont will begin trading on September 1, 2017.

As of August 31, 2017, Defendant Third Point Offshore held 6,446,300 voting securities of Dow; Defendant Third Point Ultra held 4,376,813 voting securities of Dow; and Defendant Third Point Partners held 2,540,700 voting securities of Dow. On August 31, 2017, Dow and DuPont completed the consolidation pursuant to a Merger Agreement dated December 11, 2015, as amended on March 31, 2017. As a result of the consolidation, all holders of Dow and DuPont voting securities received voting securities of DowDuPont.

On August 31, 2017, each Defendant Fund received voting securities of DowDuPont valued in excess of $80.8 million. Defendant Third Point Offshore acquired 6,446,300 voting securities of DowDuPont valued at approximately $429.6 million. Defendant Third Point Ultra acquired 4,376,813 voting securities of DowDuPont valued at approximately $291.7 million. Defendant Third Point Partners acquired 2,540,700 voting securities of DowDuPont valued at approximately $169.3 million. Each Defendant Fund is its own UPE within the meaning of the HSR Rules and had its own obligation to comply with the notification and waiting period requirements of the HSR Act and the HSR Rules.

The transactions described above were subject to the notification and waiting periods of the HSR Act. The HSR Act and the thresholds in effect during the time period relevant to this proceeding required that each Defendant Fund file a notification and report form with the

Department of Justice and the Federal Trade Commission and observe a waiting period before acquiring and holding an aggregate total amount of voting securities of DowDuPont in excess of $80.8 million.

Previously, on April 7, 2014, each Defendant Fund had filed under the HSR Act to acquire voting securities of Dow and had observed the waiting period. Under Section 802.21 of the HSR Rules, Defendants were permitted for the subsequent five years to acquire additional voting securities of Dow without making another HSR Act filing so long as they did not exceed the next-higher threshold. However, Section 802.21 does not exempt Defendant Funds' acquisitions of DowDuPont voting securities because DowDuPont is not the same issuer as Dow within the meaning of the HSR Rules. Among other things, DowDuPont competes in additional lines of business from those in which Dow competed.

Although required to do so, each Defendant Fund failed to file and observe the waiting period prior to acquiring DowDuPont voting securities. Defendant Third Point LLC had the power and authority to file a notification under the HSR Act on behalf of each of Defendant Funds.

On November 8, 2017, each Defendant Fund filed a notification and report form under the HSR Act with the Department of Justice and the Federal Trade Commission to cover their acquisitions of DowDuPont voting securities. The waiting period relating to these filings expired on December 8, 2017. Each Defendant Fund was in violation of the HSR Act each day during the period beginning on August 31, 2017, and ending on December 8, 2017.

The Complaint further alleges that Defendants' August 31, 2017, HSR Act violation was not the first time Defendants had failed to observe the HSR Act's notification and waiting period requirements. Defendants are currently under a court decree resulting from allegations that they

previously violated the HSR Act in connection with acquisitions of voting securities of Yahoo! Inc. ("Yahoo"). Specifically, on August 24, 2015, the United States filed a complaint for equitable relief alleging that Defendants' acquisitions of Yahoo voting securities in August and September 2011 violated the HSR Act. At the same time, the United States filed a Stipulation signed by Defendants and a proposed Final Judgment that would impose certain injunctive relief against Defendants, including the requirement that Defendants maintain a compliance program. The Final Judgment was entered by the court on December 18, 2015.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment imposes a $609,810 civil penalty and an injunction against future violations designed to address the violation alleged in the Complaint and deter Defendants and others from violating the HSR Act. The United States adjusted the penalty downward from the maximum permitted under the HSR Act because the violation was inadvertent, Defendants promptly self-reported the violation after discovery, and Defendants are willing to resolve the matter by consent decree and avoid prolonged investigation and litigation. The relief will have a beneficial effect on competition because the agencies will be properly notified of future acquisitions, in accordance with the law. At the same time, neither the penalty nor the injunctive relief will have any adverse effect on competition.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

There is no private antitrust action for HSR Act violations; therefore, entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust action.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and 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 sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of 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:

Kenneth A. Libby
Special Attorney, United States
c/o Federal Trade Commission
600 Pennsylvania Avenue, NW
CC-8404
Washington, DC 20580
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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

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States is satisfied, however, that the proposed relief is an appropriate remedy in this matter. Given the facts of this case, including Defendants' self-reporting of the violation and willingness to settle this matter, the United States is satisfied that the proposed civil penalty and injunction are sufficient to address the violation alleged in the Complaint and to deter violations by similarly situated entities in the future, without the time, expense, and uncertainty of a full trial on the merits.

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

The 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 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").

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 in the government's complaint, whether the Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether the Final Judgment may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the Final Judgment, 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 (D.D.C. 2001); *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. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2]

The United States' predictions with respect to 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 in 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 United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990)).

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

[2] *See also 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").

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.

In its 2004 amendments to the APPA,[3] Congress made clear its intent to preserve the practical benefits of utilizing consent Final Judgments in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language 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 *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000)).

[3] Pub. L. 108–237, § 221.

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 28, 2019

Respectfully submitted,

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