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. 1:19-cv-02593-CJN

MOTION AND MEMORANDUM OF THE UNITED STATES IN SUPPORT OF ENTRY OF FINAL JUDGMENT

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), plaintiff United States of America ("United States") moves for entry of the proposed Final Judgment filed on August 28, 2019 (Document 1-3). The proposed Final Judgment may be entered at this time without further proceedings if the Court determines that entry is in the public interest. 15 U.S.C. § 16(e). The Competitive Impact Statement ("CIS") filed by the United States on August 28, 2019 (Document 1-4), explains why entry of the proposed Final Judgment is in the public interest. The United States is filing simultaneously with this Motion and Memorandum a Certificate of Compliance (attached as Exhibit 1) setting forth the steps taken by the parties to comply with the applicable provisions of the APPA and certifying that the sixty-

day statutory public comment period has expired, and no public comments have been received.[1]

I. BACKGROUND

On August 28, 2019, the United States filed a Complaint against Defendants Third Point Offshore Fund, Ltd., Third Point Ultra Ltd., Third Point Partners Qualified L.P. (collectively, "Defendant Funds"), and Third Point LLC (collectively with Defendant Funds, "Defendants") related to Defendant Funds' acquisition of voting securities of DowDuPont Inc. ("DowDuPont") on August 31, 2017.

The Complaint alleges that the 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 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.[2] A 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.

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

[1] The United States received one email from an individual not connected to the matter who requested that a percentage of the settlement penalty be sent to him. The United States does not consider this email to be a comment that requires a response as a part of the Court's Tunney Act review. *See* 15 U.S.C. § 16(d).

[2] 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 raises no competitive questions.

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, each Defendant Fund acquired voting securities of DowDuPont without making the required pre-acquisition HSR Act filings with the agencies and without observing the waiting period. As a result of the consolidation of the Dow Chemical Company ("Dow") and E.I. du Pont de Nemours and Company ("DuPont"), the Dow stock each Defendant Fund held ceased being publicly traded and was reissued by the newly formed DowDuPont Inc. as DowDuPont stock. Each Defendant Fund acquired voting securities of DowDuPont in excess of the then-applicable statutory threshold ($80.8 million at the time of acquisition) and each Defendant Fund and DowDuPont met the applicable statutory size of person thresholds. The Complaint seeks an adjudication that the Defendant Funds' acquisition of DowDuPont voting securities violated the HSR Act, and asks the Court to award an appropriate civil penalty and other equitable relief.

At the same time the Complaint was filed, the United States also filed a Stipulation and

proposed Final Judgment. The terms of the proposed Final Judgment are designed to deter Defendants' future HSR Act violations by imposing a civil penalty of $609,810 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.

Unless it is extended, the Final Judgment will remain in effect for three years from the date of its entry if the Defendants pays the civil penalty.

II. COMPLIANCE WITH THE APPA

The APPA requires a sixty-day period for the submission of written comments relating to the proposed Final Judgment, 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed the proposed Final Judgment and CIS with the Court on August 28, 2019, and published the proposed Final Judgment and CIS in the *Federal Register* on September 16, 2019, *see* 84 Fed. Reg. 48639-47 (2019). Summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, were published in *The Washington Post* for seven days during the period from September 12, 2019, through September 18, 2019. The sixty-day period for public comments ended on November 18, 2019. The United States received no written comments relating to the proposed Final Judgment.

The Certificate of Compliance filed with this Motion and Memorandum states that all the requirements of the APPA have been satisfied. It is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the Proposed Final Judgment.

III. STANDARD OF JUDICIAL REVIEW

Before entering the proposed Final Judgment, the APPA requires the Court to determine

whether the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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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 the CIS filed with the Court on August 28, 2019, the United States explained the meaning and proper application of the public interest standard under the APPA and now incorporates those portions of the CIS by reference.

IV. CONCLUSION

For the reasons set forth in this Motion and Memorandum and the CIS, the Court should find that the proposed Final Judgment is in the public interest and should enter the proposed Final Judgment without further proceedings. The United States respectfully requests that the Final Judgment, attached hereto as Exhibit 2, be entered at this time.

Dated: November 26, 2019

Respectfully Submitted,

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