UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. XCL RESOURCES HOLDINGS, LLC, VERDUN OIL COMPANY II LLC, and EP ENERGY LLC *Defendants.*	Civil Action No.

COMPETITIVE IMPACT STATEMENT

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "APPA" or "Tunney Act"), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment filed in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF PROCEEDINGS

On January 7, 2025, the United States filed a Complaint against Defendants XCL Resources Holdings, LLC ("XCL"), Verdun Oil Company II LLC ("Verdun"), and EP Energy LLC ("EP") (together, "Defendants"), related to XCL and Verdun's acquisition of EP. 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 Complaint alleges that XCL and Verdun acquired EP, through a transaction in excess of the then-applicable statutory thresholds, without observing the required HSR Act waiting period. The HSR Act provides that "no person shall acquire, directly or indirectly, any voting securities 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 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.

At the same time the Complaint was filed, the United States also filed a Stipulation and proposed Final Judgment. Under the proposed Final Judgment, which is explained more fully below, Defendants are prohibited from engaging in specified conduct during the term of the order and are required to pay a civil penalty to the United States in the amount of $5,684,377. The proposed Final Judgment is designed to deter HSR Act violations by XCL, Verdun, and similarly situated acquirers.

The United States and 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 punish violations thereof.

II. DESCRIPTION OF THE EVENTS

A. XCL and Verdun's acquisition of EP

On July 26, 2021, XCL and Verdun agreed to acquire EP for approximately $1.4 billion. Defendants are engaged, among other things, in the development, production, and sale of crude oil in the United States. XCL operates in the Uinta Basin of Utah. Verdun operates in the Eagle Ford area of Texas. EP operates in both the Uinta Basis and the Eagle Ford area. Shortly thereafter, Defendants' parent entities filed the pre-acquisition Notification and Report forms required by Section 7A of the Clayton Act. After reviewing the parties' filings, the Federal Trade Commission ("FTC") opened an investigation into the competitive effects of the proposed transaction. XCL and EP were two of four significant oil and gas development and production companies in northeast Utah's Uinta Basin. The FTC alleged in its complaint that, after the acquisition of EP, if XCL reduced the volume of crude oil that it supplied to Salt Lake City, Salt Lake City area refiners would be forced to pay more for Uinta Basin waxy crude oil. Ultimately, the FTC obtained a consent agreement resolving its concerns about the impact of the transaction on competition in the market for the development, production, and sale of waxy crude oil in the Uinta Basin area of Utah. The consent agreement required Defendants to divest all of EP's Utah operations to a qualified third-party operator, Crescent Energy. Entry of the consent agreement terminated the HSR Act waiting period on March 25, 2022. XCL and Verdun consummated the transaction on March 30, 2022, and EP is now a wholly owned subsidiary of Verdun.

B. Defendants' alleged violation of Section 7A

The HSR Act requirements apply to a transaction if, as a result of the transaction, the acquirer will "hold" assets or voting securities valued above the thresholds. Under HSR Rule 801.1(c), to "hold" assets or voting securities means "beneficial ownership, whether direct, or

indirect through fiduciaries, agents, controlled entities or other means." 16 C.F.R 801.1(c). Thus, under the Act, parties must make an HSR Act filing and observe a waiting period before transferring beneficial ownership of the assets or voting securities to be acquired. The Statement of Basis and Purpose accompanying the Rules explains that beneficial ownership is determined on a case-by-case basis, based on the indicia of beneficial ownership which include, among others, the right to obtain the benefit of any increase in value or dividends and the risk of loss of value. 43 Fed. Reg. 33,449 (July 31, 1978). A firm may also gain beneficial ownership by obtaining "operational control" of an asset.

The combination of XCL and Verdun's agreement to purchase EP and their assumption of key ordinary-course functions transferred beneficial ownership of EP's business to XCL and Verdun before they had fulfilled their obligations under the HSR Act. Specifically, the July 26, 2021 Purchase Agreement provided for the immediate transfer of control over key aspects of EP's business to XCL and Verdun, including granting XCL and Verdun approval rights over EP's ongoing and planned crude oil development and production activities and many of EP's ordinary-course expenditures. XCL put an immediate halt to EP's new well-drilling activities, so that XCL—not EP—could control the development and production plans for EP's drilling assets moving forward. Even though XCL and Verdun allowed EP to resume its own well-drilling and planning activities after Defendants realized that the FTC would investigate the transaction, the temporary halts resulted in EP having crude oil supply shortages in the following months. Defendants predicted these shortages and specifically provided in the Purchase Agreement that XCL and Verdun—not EP—would bear all costs associated with EP's supply shortages.

XCL and Verdun also exercised operational control over EP by, *inter alia*, working directly with EP's customers on EP's behalf; requiring EP to provide competitively sensitive

information to XCL and Verdun businesspeople; requiring approval of ordinary-course expenditures; and coordinating with EP on EP's contract negotiations with certain customers in the Eagle Ford production area. The illegal conduct lasted through October 27, 2021, when the Defendants executed an amendment to the Purchase Agreement which allowed EP to operate independently once again and in the ordinary course of business, without XCL's or Verdun's control over its day-to-day operations. The Defendants were in violation of the HSR Act for a period of 94 days, from when the Purchase Agreement was signed, on July 26, 2021, until the Purchase Agreement was amended, on October 27, 2021. Among other things, XCL's temporary halting of EP's development activities contributed to EP having crude oil supply shortages in September and October 2021 at a time when the United States was experiencing significant supply shortages and spiking crude oil prices due to sudden demand increases as COVID-19 restrictions eased. XCL and EP—direct competitors in the marketplace—then worked in concert to supply EP's customers to satisfy EP's customer supply commitments. Verdun also coordinated with EP on EP's contract negotiations with certain customers in the Eagle Ford production area. Specifically, Verdun observed that certain EP contracts included below-market prices and directed EP to raise them in the next contracting period. EP complied.

Agreements that transfer some indicia of beneficial ownership, even if common in an industry, may violate Section 7A if entered into while the buyer intends to acquire the asset. Entering into such agreements before the HSR Act waiting period expires defeats the purpose of the HSR Act by enabling the acquiring person to direct the acquired person's business to bring about the effects of an acquisition prior to completion of the agencies' antitrust review.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief required by the proposed Final Judgment will prevent future violations of Section 7A of the Clayton Act of the type Defendants committed and secures a monetary civil penalty for XCL's, Verdun's, and EP's violation of Section 7A. The proposed Final Judgment sets forth prohibited and permitted conduct, a compliance program the Defendants must follow, and procedures available to the United States to determine and ensure compliance with the Final Judgment. Section XI provides that these conditions will expire ten years after the entry of the Final Judgment.

A. Prohibited Conduct

Section V of the proposed Final Judgment is designed to prevent future HSR Act violations of the sort alleged in the Complaint. During the "pre-consummation period" of any future HSR-reportable transaction—after executing an agreement or letter of intent for a transaction subject to the reporting requirements of the HSR Act and until the expiration of the statutory waiting period or abandonment of the transaction—the Defendants are prohibited from entering into any agreement with the other contracting party or parties to combine, merge, or transfer, in whole or in part, any operational or decision-making control over businesses, assets, or interests to be acquired. This injunction applies to all transactions subject to the reporting requirements of the HSR Act, regardless of the particular products involved or whether any other party to the transaction competes with the Defendants. The injunction also prevents an acquirer from obtaining approval rights or authority over ordinary-course decisions of the to-be-acquired entity or unrestricted access to certain categories of non-public information. To be clear, the injunction is not intended to cover all means of transferring beneficial ownership—which is

assessed on a case-by-case basis depending on a variety of factors—but to broadly cover the Defendants' conduct in this matter and prevent recurrence.

B. Permitted Conduct

Section VI of the proposed Final Judgment identifies certain agreements and conduct that are permitted by the Judgment. Paragraphs VI(A) and VI(B) ensure that the decree will not be interpreted to forbid specified "conduct of business" covenants that are typically found in merger agreements. These are customary provisions found in most merger agreements and are intended to protect the value of the transaction and prevent a to-be-acquired person from wasting assets. Paragraph VI(C) ensures that the decree does not prevent certain ordinary-course agreements in the oil and gas industry. Paragraph VI(D) recognizes narrow exceptions to the restrictions on access to non-public information in Paragraph V(A)(4) for certain activities, such as participating in litigation.

C. Compliance

Sections VII and VIII of the proposed Final Judgment set forth various compliance procedures. Section VII sets up an affirmative compliance program directed toward ensuring compliance with the limitations imposed by the proposed Final Judgment and with the federal antitrust laws. The compliance program includes the designation of a qualified antitrust compliance officer who is required to ensure that the relevant Defendant distributes a copy of the Final Judgment to each current and succeeding director, office, employee, agent, or other person with the responsibility over sales, marketing, strategic planning, exploration and development, or mergers and acquisitions; briefs each such person regarding compliance with the Final Judgment and the antitrust laws as they apply to Defendants' activities; and obtains certification annually from each such person that he or she understands his or her obligations under the Final Judgment

and agrees to abide by its terms. In addition, Defendants must provide a copy of the Final Judgment to certain parties entering a merger or acquisition with a Defendant prior to signing the definitive agreement. Section VII of the proposed Final Judgment further requires the compliance officer to certify to the United States that Defendant is in compliance and to report any violations of the Final Judgment.

To facilitate monitoring of Defendants' compliance with the Final Judgment, Section VIII grants 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 request, prepare written reports relating to matter contained in the Final Judgment.

D. Civil Penalties

The proposed Final Judgment imposes a $5,684,377 civil penalty for Defendants' violation of the HSR Act. The United States adjusted the penalty downward from the maximum permitted under the HSR Act in part because the Defendants were willing to resolve the matter by consent decree and avoid a prolonged investigation and litigation. The relief will have a beneficial effect on competition because it will deter future instances in which parties seek to immediately acquire control of an independent competitive presence before filing the required pre-acquisition notifications with the agencies and observing the required waiting period. At the same time, the penalty will not 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 the 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 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 within sixty (60) days of the first 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 this 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:

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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. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the violation alleged in the Complaint and deter violations by similarly situated entities in the future. 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.

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

Under the Clayton Act and APPA, proposed Final Judgments, or "consent decrees," in antitrust cases brought by the United States are 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
>
> (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. § 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 Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting the government 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.").

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 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 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 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 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 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 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 (concluding that "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 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." 489 F. Supp. 2d at 15.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States 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

enacted the Tunney Act in 1974. As Senator Tunney explained: "The 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.

Date: January 7, 2025

Respectfully Submitted,

/s/ Kenneth A. Libby

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