Billing Code: 6750-01S

DEPARTMENT OF JUSTICE
Antitrust Division

United States v. Third Point Offshore Fund, Ltd., et al.
Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America v. Third Point Offshore Fund, Ltd., et al.*, Civil Action No. 1:19-cv-02593. On August 28, 2019, the United States filed a Complaint alleging that Third Point Offshore Fund, Ltd., Third Point Ultra Ltd., Third Point Partners Qualified L.P., and Third Point LLC violated the notice and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a ("HSR Act"), with respect to their acquisition of voting securities of DowDuPont Inc. The proposed Final Judgment, filed at the same time as the Complaint, requires the defendants to pay a civil penalty of $609,810 and be subject to an injunction prohibiting the defendants from undertaking similar acquisitions without complying with notification and waiting period requirements of the HSR Act.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at http://www.justice.gov/atr and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the *Federal Register*. Comments should be directed to Kenneth A. Libby, Special Attorney, United States, c/o Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580 (telephone: (202)326-2694; email: klibby@ftc.gov).

Patricia A. Brink,
Director of Civil
Enforcement.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA 450 Fifth Street, NW Washington, DC 20530, Plaintiff, v. THIRD POINT OFFSHORE FUND, LTD. c/o Cayman Corporate Center 27 Hospital Road George Town, Grand Cayman KY1-9008 Cayman Islands, THIRD POINT ULTRA LTD. c/o Maples Corporate Services (BVI) Ltd. Kingston Chambers, P.O. Box 173 Road Town, Tortola British Virgin Islands, THIRD POINT PARTNERS QUALIFIED L.P. Corporation Trust Center 1209 Orange Street Wilmington, Delaware 19801, and THIRD POINT LLC 390 Park Avenue, 19th Floor New York, NY 10022, Defendants.	Civil Action No. 1:19-cv-02593-CJN

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF FOR FAILURE TO COMPLY WITH THE PREMERGER REPORTING AND WAITING REQUIREMENTS OF THE HART-SCOTT RODINO ACT

The United States of America, Plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States and at the request of the Federal Trade Commission, brings this civil antitrust action to obtain monetary relief in the form

of civil penalties and injunctive relief 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"). Plaintiff alleges as follows:

INTRODUCTION

1. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a ("HSR Act" or "Act") is an essential part of modern antitrust enforcement. It requires the buyer and the seller of voting securities or assets in excess of a certain value to notify the Department of Justice and the Federal Trade Commission and to observe a waiting period prior to consummating the acquisition. This waiting period provides the federal antitrust agencies with an opportunity to investigate and to seek an injunction to prevent the consummation of acquisitions that are likely to be anticompetitive.

2. Each Defendant Fund violated the HSR Act's notice and waiting requirements when it acquired voting securities of DowDuPont Inc. ("DowDuPont") on August 31, 2017, as a result of the consolidation of Dow Chemical Company ("Dow") and E.I du Pont de Nemours and Company ("DuPont").

3. The Court should assess an appropriate civil penalty and injunctive relief for these violations of the HSR Act's requirements.

JURISDICTION AND VENUE

4. This Court has jurisdiction over Defendants and over the subject matter of this action pursuant to Section 7A(g) of the Clayton Act, 15 U.S.C. § 18a(g), and pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355, and over Defendants by virtue

of Defendants' consent, in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

5. Venue is properly based in this District by virtue of Defendants' consent, in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

THE DEFENDANTS

6. Defendant Third Point Offshore is an offshore fund organized under the laws of the Cayman Islands with its registered office at Walkers Corporate Limited, Corporate Centre, 27 Hospital Road, George Town, Grand Cayman KY1-9008, Cayman Islands.

7. Defendant Third Point Ultra is an offshore fund organized under the laws of the British Virgin Islands with its registered office at Maples Corporate Services (BVI) Ltd., Kingston Chambers, P.O. Box 173, Road Town, Tortola, British Virgin Islands. The Investment Manager of Defendant Third Point Ultra has its office at 390 Park Avenue, 19th Floor, New York, NY 10022.

8. Defendant Third Point Partners is a limited partnership organized under the laws of the State of Delaware, with its principal place of business at Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.

9. Defendant 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. Defendant Third Point LLC makes all the investment decisions on behalf of the Defendant Funds, including deciding whether to

file notifications pursuant to the HSR Act and preparing the notification forms on behalf of each of the Defendant Funds.

10. Defendants are engaged in commence, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. §18a(a)(1). At all times relevant to this Complaint, each Defendant had total assets in excess of $16.2 million.

OTHER ENTITIES

11. DowDupont is a corporation organized under the laws of the State of Delaware with its principal place of business at 2030 Dow Center, Midland, MI 48674. DowDuPont is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. §18a(a)(1). At all times relevant to this Complaint, DowDuPont had annual net sales in excess of $161.5 million.

THE HART-SCOTT-RODINO ACT AND RULES

12. The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are acquired to file notifications with the federal antitrust agencies and to observe a waiting period before consummating certain acquisitions of voting securities or assets. 15 U.S.C. § 18a(a) and (b). The HSR Act's notification and waiting period requirements are intended to give the federal antitrust agencies prior notice of, and information about, proposed transactions. The waiting period is intended to provide the federal antitrust agencies with an opportunity to investigate a proposed transaction and to determine whether to seek an injunction to prevent the consummation of a transaction that may violate the antitrust laws.

13. The HSR Act's notification and waiting period requirements apply to acquisitions that meet the HSR Act's thresholds, which are adjusted annually. During the period of 2017 relevant to this Complaint, the HSR Act's reporting and waiting period requirements applied to transactions that would result in the acquiring person holding more than $80.8 million of voting securities, non-corporate interests, or assets, if certain size of person tests were met, except for certain exempted transactions.

14. Pursuant to Section 7A(d)(2) of the HSR Act, 15 U.S.C. § 18a(d)(2), the Federal Trade Commission promulgated rules to carry out the purpose of the HSR Act. 16 C.F.R. §§ 801-03 ("HSR Rules"). The HSR Rules, among other things, define terms contained in the HSR Act.

15. Section 801.2(a) of the HSR Rules, 16 C.F.R. § 801.2(a), provides that "[a]ny person which, as a result of an acquisition, will hold voting securities" is deemed an "acquiring person."

16. Section 801.1(a)(1) of the HSR Rules, 16 C.F.R. § 801.1(a)(1), provides that the term "person" means "an ultimate parent entity and all entities which it controls directly or indirectly."

17. Section 801.1(a)(3) of the HSR Rules, 16 C.F.R. § 801.1(a)(3), provides that the term "ultimate parent entity" means "an entity which is not controlled by any other entity."

18. Section 801.2(d)(1)(i) of the HSR Rules, 16 C.F.R. § 801.2(d)(1)(i), provides that "mergers and consolidations are transactions subject to the act and shall be treated as acquisitions of voting securities."

19. Section 801.13(a) of the HSR Rules, 16 C.F.R. § 801.13(a), provides that "all voting securities of the issuer which will be held by the acquiring person after the consummation of an acquisition shall be deemed voting securities held as a result of the acquisition."

20. Section 802.21 of the HSR Rules, 16 C.F.R. § 802.21, provides that, when a person files under the HSR Act to acquire voting securities from an issuer and observes the waiting period, that person may acquire additional voting securities of the same issuer for five years after the end of the waiting period so long as it does not exceed any higher threshold as a result of the combined purchases.

21. Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), provides that any person, or any officer, director, or partner thereof, who fails to comply with any provision of the HSR Act is liable to the United States for a civil penalty for each day during which such person is in violation. For violations occurring on or after November 2, 2015, and assessed after August 1, 2016, the maximum amount of civil penalty is $40,000 per day, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, § 701 (further amending the Federal Civil Penalty Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 81 Fed. Reg. 42,476 (June 30, 2016). As of January 22, 2018, the maximum penalty amount was further increased to $41,484 per day for civil penalties assessed after that date. 83 Fed. Reg. 2903 (Jan. 22, 2018).

22. Section 7A(g)(2) of the Clayton Act, 15 U.S.C. § 18a(g)(2), provides that if any person fails substantially to comply with the notification requirement under the HSR Act, a district court may grant such equitable relief as the court in its discretion

determines necessary or appropriate, upon application of the Federal Trade Commission or the Assistant Attorney General.

VIOLATIONS ALLEGED

23. Plaintiff alleges and incorporates paragraphs 1 through 22 as if set forth fully herein.

24. On December 11, 2015, Dow and DuPont entered into a Merger Agreement pursuant to which Dow and DuPont would consolidate into a single company, to be called DowDuPont.

25. 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 or DuPont.

26. On June 15, 2017, 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.

27. On August 4, 2017, Dow and DuPont issued a joint press release setting a 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.

28. 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.

29. On August 31, 2017, Dow and DuPont completed the consolidation pursuant to the Merger Agreement of 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.

30. 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.

31. Each Defendant Fund is its own ultimate parent entity 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.

32. The transactions described in Paragraph 30 were subject to the notification and waiting periods of the HSR Act and the HSR Rules. The HSR Act and HSR Rules 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.

33. 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. Section 802.21 of the HSR Rules does not exempt the 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, for example, DowDuPont competes in additional lines of business from those in which Dow competed.

34. Although required to do so, each Defendant Fund failed to file and observe the waiting period prior to acquiring DowDuPont voting securities.

35. Defendant Third Point LLC had the power and authority to file a notification under the HSR Act on behalf of each of the Defendant Funds.

36. 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 reflecting their acquisitions of DowDuPont voting securities. The waiting period relating to these filings expired on December 8, 2017.

37. 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.

38. Defendants are currently under a court decree, also in the District Court of the District of Columbia, 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 of 2011 violated the HSR Act. At the same time, the United States filed a Stipulation signed by Defendants and a proposed Final Judgment that included provisions

imposing certain injunctive relief against Defendants, including the requirement that Defendants maintain a compliance program. That Final Judgment was entered by that court on December 18, 2015. *U.S. v. Third Point Offshore Fund, Ltd., et al.,* Case 1:15-CV-01366.

REQUEST FOR RELIEF

Wherefore, the Plaintiff requests:

1. That the Court adjudge and decree that each Defendant Fund violated the HSR Act, 15 U.S.C. § 18a, as alleged in this Complaint and that each Defendant Fund was in violation of the Act on each day of the period from August 31, 2017, through December 8, 2017;

2. That the Court order each Defendant Fund to pay to the United States an appropriate civil penalty as provided by the HSR Act, 15 U.S.C. § 18a(g)(1), the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, § 701 (further amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 84 FR 3980 (Feb. 14, 2019);

3. That the Court adjudge and decree that Defendant Third Point LLC had the power and authority to prevent the violations by the Defendant Funds and that relief against Third Point LLC is necessary and appropriate in order to ensure future compliance with the HSR Act by the Defendant Funds;

4. That the Court issue an appropriate injunction preventing future violations by Defendants as provided by the HSR Act, 15 U.S.C. § 18a(g)(2);

5. That the Court order such other and further relief as the Court may deem just and proper; and

6. That the Court award the Plaintiff its costs of this suit.

Dated: 8/28/19

FOR THE PLAINTIFF UNITED STATES OF AMERICA:

Makan Delrahim
Assistant Attorney General
Department of Justice
Antitrust Division
Washington, DC 20530

Kenneth A. Libby
Jennifer Lee
Kelly Horne
Special Attorneys

IN THE 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

[PROPOSED] FINAL JUDGMENT

WHEREAS, the United States of America filed its Complaint on August 28, 2019, alleging that Defendants Third Point Offshore Fund, Ltd., Third Point Ultra Ltd., and Third Point Partners Qualified L.P. (collectively, "Third Point Funds" or "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")), and the United States and Defendants Third Point Funds and Third Point LLC (collectively, "Defendants"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against, or any admission by, any party regarding any such issue of fact or law;

AND WHEREAS Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

NOW, THEREFORE, before any testimony is taken, and without trial or adjudication of any issue of fact or law, and upon the consent of the parties, it is ORDERED, ADJUDGED AND DECREED;

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action. The Defendants consent solely for the purpose of this action and the entry of this Final Judgment that this Court has jurisdiction over each of the parties to this action and that the Complaint states a claim upon which relief may be granted against Defendants under Section 7A of the Clayton Act, as amended (15 U.S.C. § 18a).

II. DEFINITIONS

As used in this Final Judgment:

(A) "Consolidation" shall have the meaning of "consolidation" as used in 16 C.F.R. § 801.2.

(B) "Consolidated Issuer" means an Issuer that is formed by a Consolidation.

(C) "*De Minimis* Exemption" means a modification to the HSR Act or any Regulation thereunder that exempts from the reporting and waiting requirements of the HSR Act the acquisition of Voting Securities of an Issuer by any Acquiring Person, or by an Acquiring Person that is not a competitor of the Issuer or that otherwise meets specified criteria, on the basis that the acquisition results in the Acquiring Person's

holding not more than, or less than, a specified percentage of the outstanding Voting Securities of the Issuer.

(D) "Issuer" means a legal entity that issues Voting Securities.

(E) "Person" means any natural person.

(F) "Regulation" shall mean any rule, regulation, statement, or interpretation under the HSR Act that has legal effect with respect to the implementation or application of the HSR Act or any section within 16 C.F.R. §§ 801-803.

(G) "Third Point LLC" means Defendant Third Point LLC, 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; its successors and assigns; and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

(H) "Third Point Offshore Fund, Ltd." means Defendant Third Point Offshore Fund, Ltd., an exempted company organized under the laws of the Cayman Islands, with its registered office at Walkers Corporate Limited, Corporate Centre, 27 Hospital Road, George Town, Grand Cayman KY1-9008, Cayman Islands; its successors and assigns; and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

(I) "Third Point Partners Qualified L.P." means Defendant Third Point Partners Qualified L.P., a limited partnership organized under the laws of the State of Delaware, with its registered address at Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801; its successors and assigns; and its subsidiaries, divisions,

groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

(J) "Third Point Ultra Ltd." means Defendant Third Point Ultra Ltd., an international business company organized under the laws of the British Virgin Islands, with its registered office at Maples Corporate Services (BVI) Ltd., Kingston Chambers, P.O. Box 173, Road Town, Tortola, British Virgin Islands; its successors and assigns; and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

(K) Other capitalized terms have the meanings as defined in the HSR Act and Regulations promulgated thereunder, 16 C.F.R. §§ 801-803.

III. APPLICABILITY

(A) This Final Judgment applies to all Defendants, as defined above, and to all other Persons and entities who are in active concert or participation with any of the foregoing with respect to conduct prohibited in Paragraph IV when the relevant Persons or entities have received actual notice of this Final Judgment by personal service or otherwise.

(B) Pursuant to Rule 506(d)(2)(iii), 17 C.F.R. § 230.506(d)(2)(iii), as promulgated under the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*, disqualification under paragraph (d)(1) of Rule 506, 17 C.F.R. § 230.506(d)(1), shall not arise as a consequence of the entry of this Final Judgment or of the entry of any other order or judgment in this action.

IV. PROHIBITED CONDUCT

Each Defendant is enjoined from acquiring Voting Securities of a Consolidated Issuer in exchange for Voting Securities of any Issuer that was a party to the Consolidation when:

(A) The acquisition of the Voting Securities of the Consolidated Issuer would meet the notification requirements of the HSR Act;

(B) Defendant's acquisition of such Voting Securities would not be exempt from the reporting and waiting requirements of the HSR Act; and

(C) Defendant has not fulfilled the reporting and waiting requirements of the HSR Act with respect to the acquisition of such Voting Securities.

V. CIVIL PENALTY

(A) Judgment is hereby entered in this matter in favor of Plaintiff and against the Defendants and, pursuant to Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74 § 701, codified at 28 U.S.C. § 1 (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410 (codified at 28 U.S.C. § 2461 note)), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 81 Fed. Reg. 42, 476 (June 30, 2016), Defendant Funds are hereby ordered, jointly and severally, to pay a single civil penalty in the amount of six hundred nine thousand, eight hundred ten dollars and no cents ($609,810.00). Payment of the civil penalty ordered hereby shall be made by wire transfer of funds or cashier's check. If the payment is made by wire transfer, Defendant Funds shall contact Janie Ingalls of the Antitrust Division's Antitrust Documents Group at (202) 514-2481 for instructions before making the transfer. If the

payment is made by cashier's check, the check shall be made payable to the United States Department of Justice and delivered to:

Janie Ingalls
United States Department of Justice
Antitrust Division, Antitrust Documents Group
450 5th Street, NW
Suite 1024
Washington, D.C. 20530

(B) Defendant Funds shall pay the full amount of the civil penalty within thirty (30) days of entry of this Final Judgment. In the event of a default or delay in payment, interest at the rate of 18 percent per annum shall accrue thereon from the date of the default or delay to the date of payment.

VI. COMPLIANCE INSPECTION

(A) For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege, duly authorized representatives of the United States, including agents and consultants retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' directors, officers, employees, agents, or other Persons, who may have

their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

(B) Upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

(C) No information or documents obtained by the means provided in this Final Judgment shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States or of the Federal Trade Commission, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If, at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1) of the Federal Rules of Civil Procedure," then the United States shall give Defendants ten (10) calendar days' notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish any violations of its provisions.

VIII. ENFORCEMENT OF FINAL JUDGMENT

(A) The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from this Court. Defendants agree that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged civil violation of this Final Judgment, the United States may establish a civil violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and Defendants waive any argument that a different standard of proof should apply.

(B) The Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws, including the HSR Act and Regulations promulgated thereunder. Defendants agree that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

(C) In any enforcement proceeding in which the Court finds that the Defendants have violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with such other relief as may be

appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against a Defendant, whether litigated or resolved prior to litigation, that Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

IX. EXPIRATION OF FINAL JUDGMENT

Unless the Court grants an extension, this Final Judgment shall expire five (5) years from the date of its entry, except that:

(A) after three (3) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the civil penalty has been paid and that the continuation of the Final Judgment no longer is necessary or in the public interest; or

(B) if, during any part of the term of this Final Judgment, a *De Minimis* Exemption becomes legally effective, then this Final Judgment may be terminated only upon notice by the United States to the Court that the continuation of the Final Judgment no longer is necessary or in the public interest. It shall be in the sole discretion of the United States whether to seek such termination after receiving a request to do so from Defendants.

X. COSTS

Each party shall bear its own costs.

XI. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16,

including making available to the public copies of this Final Judgment, the Competitive Impact Statement, any comments thereon, and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

DATED: _____

Court approval subject to the
Antitrust Procedures and Penalties Act,
15 U.S.C. § 16

_____

United States District Judge

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. 1:19-cv-02593-CJN

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

[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.

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, 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

[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").

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 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)).

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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[3] Pub. L. 108–237, § 221.

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[FR Doc. 2019-19919 Filed: 9/13/2019 8:45 am; Publication Date: 9/16/2019]