

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

Commissioners: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya
 Melissa Holyoak
 Andrew Ferguson

In the Matter of

**Exxon Mobil Corporation,
a corporation.**

**Docket No. 2024-10731
File No. 241 0004**

COMMENT ON BEHALF OF SCOTT SHEFFIELD

This comment is respectfully submitted by undersigned counsel on behalf of Mr. Scott Sheffield. Mr. Sheffield has been harmed by untrue allegations and disparaging statements in this proceeding, and he is being deprived without due process of his right to be appointed by Exxon to a seat on its Board of Directors. Mr. Sheffield therefore requests that the FTC withdraw the Complaint and vacate the Proposed Consent Order without further action. The ordered restriction on Mr. Sheffield's right to be appointed to Exxon's Board is arbitrary, capricious, an abuse of discretion, beyond the FTC's lawful authority, and not in the public interest.

The information set forth in this comment is known to the FTC or could easily have been learned during its six-month merger investigation.

Executive Summary

The FTC plays a long-standing, well-established and vital role in protecting American consumers and businesses from anticompetitive corporate behavior. But in straining to find a reason to criticize the merger of Exxon and Pioneer, the FTC stepped well beyond its proper mandate and unjustly smeared Mr. Sheffield.

The FTC alleges that putting Mr. Sheffield on the Exxon Board would substantially lessen competition in the global market for crude oil because of Mr. Sheffield's prior public and private statements about the industry. The Complaint cites six news articles with public statements and nine text threads. Its case is built on a false narrative about these statements and a farfetched interpretation of the applicable statutes.

The FTC conducted a six-month investigation of the Exxon/Pioneer merger and yet did almost nothing to understand the context, meaning, or even the subject of Mr. Sheffield's statements at issue in this case. Remarkably, the FTC examined Mr. Sheffield under oath for four hours on April 9, 2024, but did not ask questions about his communications and gave him no opportunity to explain them.

The FTC's Press Release says Mr. Sheffield "exchanged hundreds of text messages with OPEC representatives and officials discussing crude oil market dynamics, pricing and output." This is dead wrong. There was one instance in which Mr. Sheffield initiated a text exchange with a representative or official of OPEC, and that was to put Secretary General Mohammed Barkindo in contact with the Texas Railroad Commission as part of an official government proceeding. The other text messages were initiated by a government minister and almost all of these were blast text messages containing public information like news articles that went to many recipients without any response or "exchange."

There were four occasions when a government official asked Mr. Sheffield to provide something in response, and these requests were for public information such as a copy of a news article or a presentation from a widely-attended conference. At no time did government officials and Mr. Sheffield exchange competitively sensitive information.

Likewise, the Chair's statement accompanying the FTC's Press Release says "Staff's investigation here uncovered troubling evidence of Pioneer CEO Scott Sheffield's actions and communications, which make clear that he believed and acted as if he could persuade his rivals to join him in colluding to restrict output and raise prices." This also is untrue. The Complaint cites a grand total of two communications over seven years between Mr. Sheffield and an executive of another U.S. producer. One was with his son and one was with a small producer who wished Mr. Sheffield well upon his return as CEO of Pioneer in 2019. Neither supports the allegation Mr. Sheffield was trying to persuade anyone to collude.

The FTC faults Mr. Sheffield for participating in an effort to petition the Texas Railroad Commission, which regulates Texas oil and gas production, for government action during the COVID pandemic. Oil prices reached negative 37 dollars per barrel at one point and the domestic industry was being devastated, with over 100 companies in the sector filing for bankruptcy. The fact that the FTC has attacked Mr. Sheffield personally for exercising his right

under the First Amendment to the U.S. Constitution to petition the government for official action in a time of national crisis is deeply troubling.

The FTC alleges that widespread discussion in the industry about “capital discipline” was a way of signaling industry members to collude in restricting production. Again, not true. “Capital discipline” is a well-understood financial concept, and shareholders began raising concerns about it in the oil sector around 2017. Mr. Sheffield’s comments were addressing shareholder demands made by prominent fund managers who represent trillions of dollars of investments for pension/retirement funds and who were concerned about returns. Contrary to the FTC’s allegation, this was not an attempt to signal about output in the oil market. Mr. Sheffield’s statements were made in public interviews and speeches involving matters of investor and public interest. These statements were perfectly legitimate and also protected by the First Amendment.

While attacking Mr. Sheffield for certain statements, the FTC ignores Mr. Sheffield’s role in expanding U.S. oil production over the last few decades and ignores the times when he said that OPEC should increase production, that the oil shale revolution saved the United States and the world from \$150 per barrel of oil, and that the Administration should lift restrictions on U.S. drilling activity to allow for increased production. In fact, during the relevant period Pioneer doubled its production and became the largest producer in the Permian Basin. The United States is now producing more oil than any country ever has, and Mr. Sheffield is one of the people most responsible for this extraordinary accomplishment.

The end result is that the FTC has wrongly attacked Mr. Sheffield and deprived him of his right to take a seat on the Exxon Board in violation of fundamental tenets of administrative law. No American citizen should be subjected to this kind of relentless and baseless personal attack by a government agency in a proceeding where nothing is proven and the individual has no opportunity to be heard. The FTC should now take the opportunity to correct a dangerous course, vacate the Proposed Consent Order, and dismiss this proceeding without further action.

Introduction

Exxon announced its agreement to acquire Pioneer on October 11, 2023. The acquisition raised no legitimate issue under the antitrust laws. In the global crude oil market alleged by the FTC, Pioneer had a market share of less than one half of a percentage point. Even in a narrower possible market comprised of the Permian Basin where Pioneer operated, the parties' combined share of oil production was at most 11%. Under the 2023 Horizontal Merger Guidelines and every court case in the modern era of merger enforcement, the market concentration levels and shares in this transaction fell well below any level of concern. The transaction should therefore have been cleared without a lengthy and expensive investigation.

Nevertheless, the FTC issued a second request and dragged the parties through six months of an in-depth investigation involving burdensome document and information requests, as well as investigational hearings of witnesses. Predictably, the investigation confirmed that there was no competition concern relating to the combination of the parties' small shares in the relevant market. Instead, the FTC trained its sights on Mr. Sheffield and his contractual right to be appointed to a seat on Exxon's Board after the acquisition. This right was an integral part of the overall bargain reached in the Exxon merger agreement approved by Pioneer's Board of Directors.

The FTC asked appropriate questions about whether taking a seat on the Exxon Board would violate Section 8 of the Clayton Act because Mr. Sheffield also sits on the Board of Williams Companies, Inc. The parties provided information showing that there would be no such violation and this issue was easily resolved. Having failed to find a violation under Section 8, the FTC pivoted to an unprecedented and meritless theory that giving Mr. Sheffield one of the 15 seats on the Exxon Board would substantially lessen competition in the global crude oil market due to his prior statements about the industry, many of which were constitutionally protected.

One would expect that before the FTC makes such an extraordinary claim it would thoroughly study the context and meaning of Mr. Sheffield's prior statements. It did not. Instead, the FTC remained willfully ignorant. This is best illustrated by the fact that during a 4-hour investigational hearing of Mr. Sheffield on April 9, 2024, the FTC did not inquire about these prior statements. Indeed, none of the quotes and text messages cited in the Complaint were even marked as exhibits, despite the fact that counsel for Pioneer had invited the FTC to ask Mr. Sheffield questions about these documents. One wonders as well whether the FTC spoke to any of the other parties to Mr. Sheffield's communications cited in the Complaint. We suspect not. The result, as discussed below, is a Complaint based on exaggeration and mischaracterization rather than fact.

By way of example, paragraph 41 of the Complaint wrongly alleges that Mr. Sheffield "served as a conduit for OPEC officials to express their disappointment with individual Permian producers who dare make independent competitive decisions." The Complaint cites a single text in June 2020 in which Mr. Sheffield told his son, "Just got off phone with UAE oil minister.

Opec plus is upset with Parsley and EOG public statements about bringing on production.”¹ Had the FTC asked Mr. Sheffield about this, it would have learned that the phone call at issue was a Zoom seminar with the oil minister organized by IHS Markit/CERA and attended by numerous other listeners from the private sector.² Mr. Sheffield in fact has only met the UAE oil minister once, at a widely attended industry conference in 2018. Mr. Sheffield does not have the minister’s contact information and does not recall communicating with him by text or otherwise since that conference six years ago. He certainly was not acting as some kind of “conduit” as alleged in the Complaint. We also know that the FTC never bothered to ask Mr. Sheffield’s son about it.

Despite having no legitimate basis to challenge the combination of Exxon’s and Pioneer’s businesses, and despite having failed to conduct a meaningful investigation of Mr. Sheffield’s prior statements, the FTC made an eleventh-hour threat to delay the transaction and file a novel lawsuit alleging that putting Mr. Sheffield on the Exxon Board would substantially lessen competition in the global crude oil market. There is no chance that this unprecedented and ludicrous theory would have held up in a federal court proceeding, but Exxon readily agreed, without any admission of liability or findings of fact, to a proposed consent order that would keep Mr. Sheffield off its Board and allow the transaction to close. Mr. Sheffield had no opportunity to defend himself to the Exxon Board. Pioneer did not join in the proposed consent order but did not take any steps to block it either, as it was in the best interests of Pioneer’s shareholders to proceed to closing. Having reached an understanding with Exxon and believing that it would never have to prove a single thing, the FTC drafted a Complaint that spun a false narrative about Mr. Sheffield’s public and private statements over the past several years.

While the Proposed Consent Order is the result of an agreement between the FTC and Exxon, there can be no mistake that the sole purpose of this proceeding is to attack Mr. Sheffield and deprive him of his ability to take a seat on Exxon’s Board. The allegations in the Complaint are singularly focused on Mr. Sheffield, the FTC statements accompanying the Proposed Consent Order are singularly focused on Mr. Sheffield, and the proposed relief is focused on Mr. Sheffield.³

¹ At the time of that text, Mr. Sheffield’s son was the CEO of Parsley Energy, Inc., a small operator that Pioneer was considering purchasing and ultimately did purchase.

² The FTC could easily have verified this by looking at Mr. Sheffield’s calendar. On the same date and just before the time of the text exchange between Mr. Sheffield and his son, he has a calendar entry that shows a “CERAWEEK Energy Partners” conversation with the UAE Energy Minister. It has a Zoom link and the sender of the calendar invite is listed as an individual at IHS Markit, which is the organizer of CERAWEEK. This is a widely attended annual energy conference. Of course, June 2020 was at the height of the pandemic and conferences like this were often being held virtually. Even the most basic inquiry by the FTC could have cleared this up in no time.

³ We cannot say the relief is “singularly” focused on Mr. Sheffield because the Proposed Consent Order also prohibits a large universe of Pioneer employees from sitting on Exxon’s Board. There is no allegation in the Complaint relating to those employees and no explanation of why they

After obtaining the proposed consent order, the FTC wasted no time attacking Mr. Sheffield personally. The FTC's Press Release announcing the settlement highlighted the baseless allegation that Mr. Sheffield "has, through public statements and private communications, attempted to collude with the representatives of [OPEC]." There is no evidence in the record of this case that can fairly be characterized as "attempting to collude" with OPEC. A recent appointee at the FTC also issued a defamatory statement that "Mr. Sheffield's past conduct makes it crystal clear that he should be nowhere near Exxon's boardroom."⁴

Mr. Sheffield has 50 years of experience in the industry and is one of the leading energy experts as well as one of the longest tenured CEOs in the United States with a track record of success based on running a business with integrity and mutual respect. He is responsible for developing domestic energy resources over the past decades and is known as one of the key leaders behind the shale revolution in the United States, which led to a significant increase in U.S. production. Indeed, Mr. Sheffield is one of two or three people most responsible for the near tripling of U.S. production since 2008 and making the United States energy independent. Under his leadership, Pioneer shares' value increased by more than 625%. Mr. Sheffield would be a superb Board member.

It also appears that sources within the FTC may have promptly leaked to the press a story that they were preparing to refer the matter to the Justice Department for criminal investigation despite the fact that there is no suggestion even in the FTC's Complaint that Mr. Sheffield ever violated the law, much less committed a crime.⁵ No American citizen should be subjected to this kind of relentless and baseless personal attack by a government agency in a proceeding where nothing is proven and the individual has no opportunity to be heard.

The remainder of this comment is organized as follows. We begin with a brief description of Mr. Sheffield's background. We then discuss the recent history of the shale oil industry and shareholder demands that public companies in this sector provide better returns through "capital discipline." This was not, as the FTC suggests, an attempt to coordinate among producers on output. It was driven by professionally managed mutual and pension funds who expressed to Pioneer that they were not unwilling to invest in companies that are not profitable and do not pay dividends or return capital through stock buy-backs. This was a topic of immense public interest in the oil industry and was often reported in the press and discussed by

should also be subject to the prohibition in the order. It appears simply to be a punitive measure requested by the FTC and agreed to by Exxon because it was sleeves off their vest.

⁴ *FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal* (May, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-order-bans-former-pioneer-ceo-exxon-board-seat-exxon-pioneer-deal>.

⁵ Benoît Morenne et. al., *Former Pioneer CEO is Accused of Trying to Collude with OPEC*, Wall Street Journal (May 2, 2024), <https://www.wsj.com/business/energy-oil/ftc-says-ex-pioneer-ceo-tried-to-collude-with-opec-on-oil-prices-27edf5bd> (reporting that "people familiar with the matter" told the Journal that "Officials at the Federal Trade Commission have decided to refer the allegations against Scott Sheffield to the Justice Department for a potential criminal investigation").

commentators. Mr. Sheffield had every right as an American and as a company CEO and industry leader to discuss this issue publicly. And the reality is that in the period from 2017 through 2024, Pioneer more than doubled its production and became the largest oil producer in Texas, which added to supply, increased competition, and helped to deliver lower prices to American consumers.⁶

Next, we discuss the effort by Mr. Sheffield and others in 2020 to petition (unsuccessfully) the Texas Railroad Commission (“TRRC”) for lawful restrictions on output in response to the COVID pandemic and a geopolitical trade war between Russia, the OPEC nations, and the United States. Those were obviously extraordinary times when government intervention was commonplace. Oil prices had dropped precipitously, at one point to negative 37 dollars per barrel, and there was a very real risk that the U.S. oil industry would be obliterated by world events. Indeed, over 100 U.S. companies in the sector filed for bankruptcy that year, lowering U.S. oil production by hundreds of thousands of barrels of oil per day.⁷ This was indisputably legitimate government petitioning protected by the First Amendment and the Noerr-Pennington doctrine.⁸ It is inappropriate and troubling that the FTC included this constitutionally protected activity as a basis for its Complaint and as a basis for attacking Mr. Sheffield in this proceeding.

We then turn to the most sensational allegations in the Complaint – that Mr. Sheffield had frequent contact with OPEC members and tried to orchestrate coordination between OPEC and U.S. producers.⁹ The narrative in the Complaint is simply untrue. Mr. Sheffield had only

⁶ See Texas Railroad Commission, *Texas Oil & Gas Producers by Rank* (2023), <https://www.rrc.texas.gov/oil-and-gas/research-and-statistics/operator-information/texas-oil-and-gas-producers-by-rank-2023/>; Texas Railroad Commission, *Historical Top 32 Texas Oil & Gas Producers 2017* (2017), <https://www.rrc.texas.gov/oil-and-gas/research-and-statistics/operator-information/top-32-texas-oil-gas-producers/>.

⁷ *Over 100 oil and gas companies went bankrupt in 2020*, OGV Energy, [https://www.ogv.energy/news-item/over-100-oil-and-gas-companies-went-bankrupt-in-2020#:~:text=Multibillion%2Ddollar%20bankruptcy%20cases%20were%20filed%20by%20Cheapeake,Diamond%20Offshore%20Drilling%20\(\\$11.8%20billion\)%20and%20California.](https://www.ogv.energy/news-item/over-100-oil-and-gas-companies-went-bankrupt-in-2020#:~:text=Multibillion%2Ddollar%20bankruptcy%20cases%20were%20filed%20by%20Cheapeake,Diamond%20Offshore%20Drilling%20($11.8%20billion)%20and%20California.)

⁸ See *E. R.R. Presidents’ Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

⁹ OPEC ministers are themselves government officials, and therefore communications with them are likewise protected by Noerr-Pennington. U.S. Department of Justice & FTC, *Antitrust Guidelines for International Enforcement and Cooperation* at 36 (Jan. 13, 2017), <https://www.justice.gov/atr/internationalguidelines/dl> (“Under the Noerr-Pennington doctrine, a genuine effort to obtain or influence action by governmental entities in the United States falls outside the scope of the Sherman Act, even if the intent or effect of that effort is to restrain or monopolize trade. It is the view of the Agencies that the principles undergirding this doctrine apply to the petitioning of foreign governments. The Agencies, therefore, will not challenge under the antitrust laws genuine efforts to obtain or influence action by foreign government entities.”)

sporadic interaction with OPEC or ministers of foreign governments, did not exchange confidential or non-public information, and did not attempt to coordinate competitive decisions with them. He simply took the opportunity to learn from foreign ministers about government actions that might impact the global market in which Pioneer had a *de minimis* share of production. The Complaint also conveniently omits any reference to the times Mr. Sheffield has been critical of OPEC, like in 2018 when he publicly expressed his personal hope that OPEC would increase production and bring oil prices down.¹⁰

We conclude with a discussion of the process used by the FTC in this case and how it deprived Mr. Sheffield of his right to an Exxon Board seat without giving him an opportunity to defend himself or even explain the communications at issue in the Complaint. We also explain why there was no legal basis under either Section 7 of the Clayton Act or Section 5 of the FTC Act to bring this case in the first place or coerce a settlement from Exxon that caused both reputational and business injury to Mr. Sheffield. The FTC has acted arbitrarily and capriciously, has abused its discretion, and has exceeded its legal authority in this matter. The proposed consent order should be vacated and the Complaint should be withdrawn.

Mr. Sheffield's Professional Background

Mr. Sheffield ran Pioneer for decades, growing it to become the largest independent oil exploration and production (“E&P”) company in the Permian Basin.¹¹ He was the CEO of Pioneer from 1997 to 2016 and of its predecessor since 1985. He stepped down and was elected Chairman in 2016, with the intention of eventually retiring. Mr. Sheffield returned as CEO in early 2019 to run the company while the Board identified a long-term successor. Soon after Mr. Sheffield returned, however, the COVID pandemic introduced extreme volatility into the oil market. He ultimately stayed on as CEO until the end of 2023, after the announcement of the Exxon merger.

Mr. Sheffield is highly regarded for everything that he and his thousands of colleagues at Pioneer accomplished. In 1979, after graduating from college, Mr. Sheffield started working as a petroleum engineer at Pioneer's predecessor, a small oil producer in Texas called Parker & Parsley Petroleum Company. He was promoted over the next decade and was eventually presented with the opportunity to purchase a significant stake in Parker & Parsley in the 1980s. Under his leadership, Parker & Parsley merged with another company in 1997 and went public as Pioneer Natural Resources Company. Mr. Sheffield served as Pioneer's CEO or Chairman for more than 25 years.

Mr. Sheffield has been a vocal advocate for U.S. oil exploration and production. He is among a small group of entrepreneurs most responsible for the U.S. shale revolution that now

¹⁰ Ernest Scheyder, U.S. Shale Executive Pushes OPEC to Gradually Boost Output, Reuters (June 20, 2018), <https://www.reuters.com/article/idUSKBN1JG2OA/>.

¹¹ Rextag, *TOP 2022 vs 2023 Permian Producers Overview* (Feb. 28, 2024), <https://rextag.com/blog/TOP-2022-vs-2023-Permian-Producers-Overview-by-Rextag>.

allows the United States to produce more oil than any other nation, ever.¹² About 15 years ago, Pioneer focused its attention on the Permian Basin when other companies were still investing overseas. The company funded an extensive study of its hundreds of thousands of acres of land in Texas and found some of the largest oil fields in the world.¹³

Under Mr. Sheffield's leadership, Pioneer learned how to extract that oil using horizontal fracking technology, which was then still relatively nascent and which had not yet been used at scale in the Permian. Mr. Sheffield went on to become one of the leading voices in legislative efforts to lift the oil export ban, which has allowed the United States to become the largest oil producing nation and has provided the United States with longer-term energy security.¹⁴ These efforts created thousands of good-paying jobs for American workers. Mr. Sheffield has also championed important environmental causes, including reining in excessive flaring and reducing greenhouse gas emissions associated with shale development.¹⁵

As the longest serving public independent oil CEO in the country, Mr. Sheffield has lived through more OPEC-driven downturns than any other executive in the industry. This is why Mr. Sheffield has publicly stated that he has "followed OPEC closer than almost any CEO in the history of our industry." Compl. ¶ 33. OPEC has at times devastated independent oil producers, leading to financial ruin for small independents and their employees. Pioneer and other producers have been forced to lay off thousands of oil field workers at times because of OPEC. This is not an accident, but rather OPEC's goal. Mr. Sheffield does not support OPEC. He has never colluded or attempted to collude with OPEC or any company to lower oil output.

Long-Term Challenges and Investor Demands

When Mr. Sheffield was appointed Pioneer's CEO again in 2019, he returned to a rapidly changing landscape. For most of his career, Mr. Sheffield's focus at Pioneer was on achieving the highest rate of year-over-year oil production growth. By 2019, Pioneer shareholders were

¹² Erik Kreil, *United States Produces More Crude Oil Than Any Country, Ever*, Energy Information Administration (Mar. 11, 2024), <https://www.eia.gov/todayinenergy/detail.php?id=61545>.

¹³ Dan Yergin, *The New Map, Energy, Climate, and the Clash of Nations* at 22-23 (2020)

¹⁴ *Scott Sheffield, CEO of Irving-based Pioneer and a leader in Texas fracking, to retire*, Dallas News (May 19, 2016) <https://www.dallasnews.com/business/2016/05/19/scott-sheffield-ceo-of-irving-based-pioneer-and-a-leader-in-texas-fracking-to-retire/> ("The American shale revolution that Sheffield was part of is responsible for relatively low oil and gas prices across the globe. Sheffield was also one of the most visible industry leaders who pushed successfully for an end to the U.S. ban on oil exports in 2015.").

¹⁵ *Pioneer CEO Scott Sheffield Calls for Private Oil Firms to 'Rein In' Flaring*, Hart Energy (May 24, 2024), <https://www.hartenergy.com/exclusives/pioneer-ceo-scott-sheffield-calls-private-oil-firms-rein-flaring-198828>. Pioneer was among the first independent E&P companies to join the Oil and Gas Methane Partnership, a globally recognized organization sponsored by the United Nations to reduce methane emissions in the production of oil and gas.

increasingly concerned about the prospect that global oil demand would peak in the medium to long term. Concerns about “peak oil” demand, combined with past practices of overspending cash flow and poor returns, led E&P companies like Pioneer to underperform other major industries in the S&P 500 from a shareholder perspective, even when oil prices were increasing.

When Mr. Sheffield was reappointed as Pioneer’s CEO, the Board had already recognized that Pioneer was struggling to react quickly enough to these changes. In 2017 and 2018, Pioneer overspent its capital budget.¹⁶ The Board reappointed Mr. Sheffield with a mandate to ensure that Pioneer adhered to its annual budget and reduce the cost structure of the company. As part of that effort and in response to specific shareholder feedback, Pioneer reduced its operating and capital costs and changed its capital framework in 2019 so that it would return free cash flow to shareholders in the form of buybacks and dividends, which are themselves important differentiators in evaluating companies in capital markets, while still continuing to grow oil production. This is what is known as “capital discipline.”

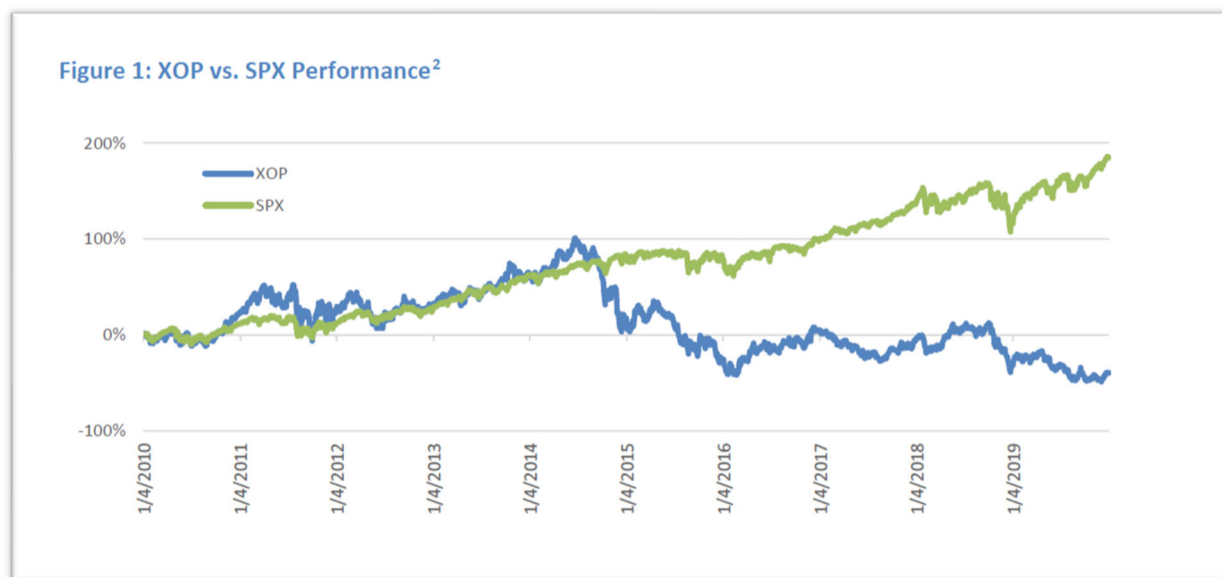
Pioneer’s new capital framework was informed by discussions with shareholders and Pioneer’s Investor Relations Department, which tracked shareholder and analyst feedback and other public reports. Within the first month of returning as CEO, Mr. Sheffield traveled the country speaking with nearly three dozen of Pioneer’s largest shareholders (comprising more than one-third of the outstanding shares at the time), including major investment managers like Fidelity, TIAA/Nuveen, Capital World Investors, and Blackrock. These firms were managing trillions of dollars for pension and retirement funds and others.

Nearly all of the shareholders with whom Mr. Sheffield spoke expressed support for moderating growth to improve Pioneer’s free cash flow, strengthen its balance sheet, and lower costs and execution risk. Pioneer and Mr. Sheffield frequently received questions from shareholders on these topics during road shows and conferences. The decision to return more free cash flow to shareholders was undertaken to provide shareholders the level of returns that they expected regardless of oil prices, not to impact oil prices or output. These issues became even more critical when COVID hit.

¹⁶ See, e.g., Bradley Olson and Lynn Cook, *Wall Street Tells Frackers to Stop Counting Barrels, Start Making Profits*, Wall Street Journal (Dec. 13, 2017), <https://www.wsj.com/articles/wall-streets-fracking-frenzy-runs-dry-as-profits-fail-to-materialize-1512577420?st=wsgpu09ifhw9fqv> (“Pioneer Natural Resources Inc., one of the biggest operators in West Texas, said in 2016 that its production costs at some wells were \$2.25 a barrel, a level that would rival Saudi Arabia’s. It didn’t include costs for taxes, overhead and finding and developing new wells. That year, Pioneer reported \$556 million in losses—spending \$1.24 for every \$1 it took in from operations, according to a Journal analysis of numbers from FactSet.”); Carolyn Davis, *Capital Discipline, Mergers, Permian Natural Gas at Center Stage for 1Q Calls*, Natural Gas Intelligence (April 22, 2019), <https://www.naturalgasintel.com/capital-discipline-mergers-permian-natural-gas-at-center-stage-for-1q-calls/> (“E&Ps have outspent cash flow on average by 25% over the last decade” and that as a result, “[a]nalysts encouraged operators to adopt a pledge to disciplined spending even if oil prices rise, with surplus capital distributed to shareholders”).

There are numerous industry reports documenting the shift in how analysts and shareholders were thinking about the oil industry around the time of Mr. Sheffield’s return as CEO. One report published by Wolfe Research in 2017 explains that “[s]hareholders are demanding cash return.”¹⁷ The analyst firm says, “We implore companies to exert capital discipline and temper growth targets in the pursuit of cash returns. We will resolutely oppose aggressive growth targets and strategies, in general.”¹⁸ The report explains that “oil stocks dramatically underperformed the market” because of concerns about the “End of the Oil Age.”¹⁹ These demands were not hidden from the public or government authorities. Major news organizations covered them.²⁰ Mr. Sheffield regularly discussed his views on Pioneer’s capital framework given shareholder interest in it.

These reports continued for years. For example, one asset management firm focused on energy investments explained in a 2020 report that E&P companies were the “worst performing sector in the market over the past decade.”²¹ The report shows E&P company underperformance versus the S&P500, with the blue line showing an index of E&P companies (XOP) dropping below the S&P500 (SPX) from 2014 to 2020:



¹⁷ Wolfe Research, *Global Oil & Gas US E&P: The Renaissance* at 2 (2017).

¹⁸ *Id.* at 3.

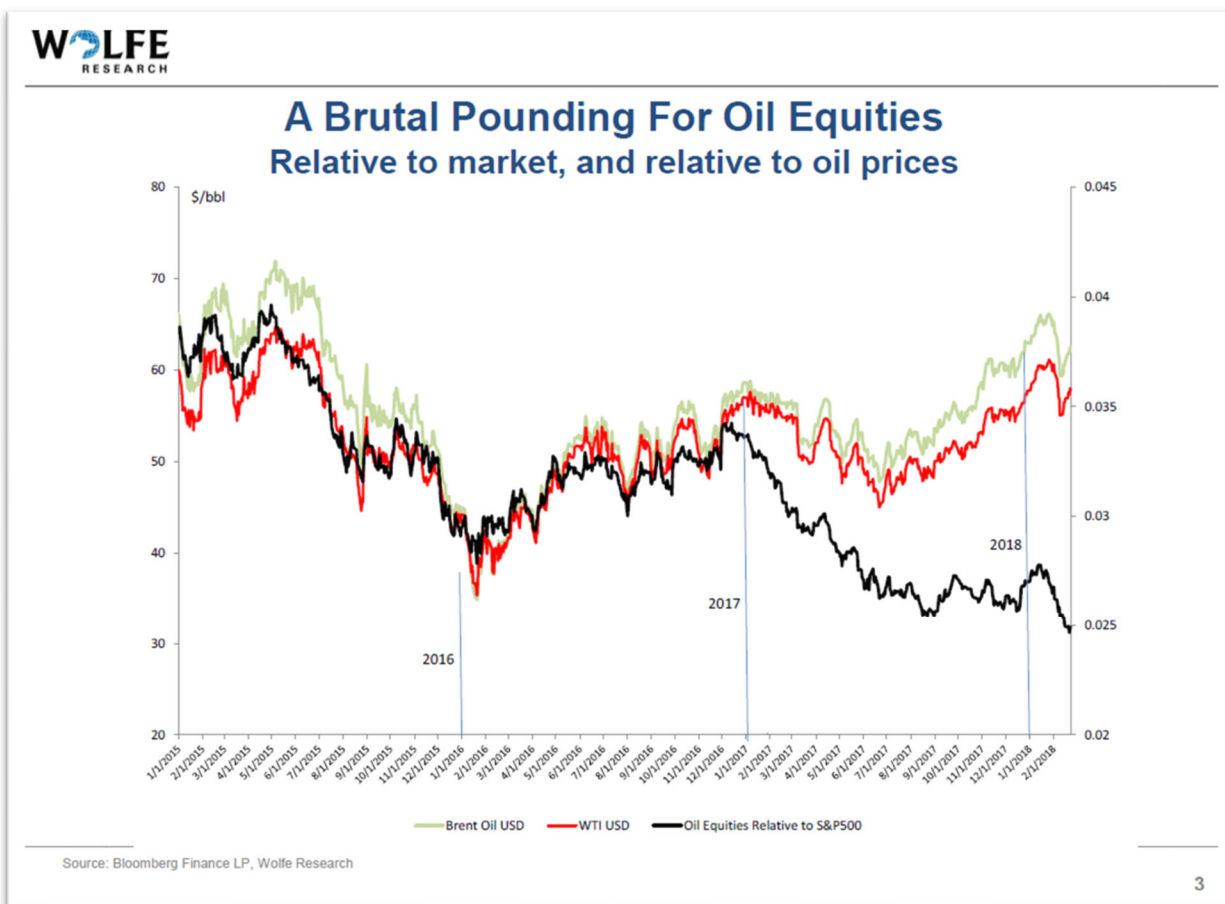
¹⁹ *Id.* at 3.

²⁰ Bradley Olson and Lynn Cook, *Wall Street Tells Frackers to Stop Counting Barrels, Start Making Profits*, Wall Street Journal (Dec. 13, 2017), https://www.wsj.com/articles/wall-streets-fracking-frenzy-runs-dry-as-profits-fail-to-materialize-1512577420?mod=article_inlin.

²¹ Kimmeridge Energy Management Company, LLC, *Preparing the E&P Sector for the Energy Transition: A New Business Model* at 1 (Feb. 27, 2020).

This same firm pointed to the “uncertainty around the trajectory of long-term demand growth” due to energy transition as the reason for this underperformance. Its recommendation was that E&P companies “return[] capital to shareholders at an accelerating pace” and cut costs to make investment in the industry more attractive.²²

The difficulties facing the E&P industry did not turn on the price of oil at a given moment. A 2018 report from a well-known equities analyst shows that oil E&P equities underperformed the S&P500 even when oil prices (Brent and WTI) were rising.²³



Pioneer’s commitment to a capital framework that prioritized consistent shareholder returns therefore did not depend on a specific oil price, nor did it seek to impact the price of oil. The new framework made economic sense for Pioneer and its shareholders, regardless of market conditions.

²² *Id.*

²³ Paul Sankey, *Financial Appetite for Investors? New Business Model for Producers?*, Wolfe Research (Feb. 2018).

The Complaint notes that Mr. Sheffield said in public remarks that “all the shareholders that I’ve talked to said that if anybody goes back to growth, they will punish those companies,” and alleges that this was some kind of “threat” to other producers. Compl. ¶¶ 4, 27. Consistent with its pattern of alleging that documents have sinister meanings without conducting even a rudimentary investigation, the FTC did not ask Mr. Sheffield if this was his intent, nor does it cite any evidence that the statement was perceived by anyone as a threat. It was nothing more than an observation about what shareholders might do based on a multitude of public statements by the investment community.

Mr. Sheffield was explaining his views based on Pioneer’s own experience and what investors were asking and saying. His comment that “everybody’s going to be disciplined” was not a reference to nor an attempt at coordination. Compl. ¶ 27. Mr. Sheffield’s comment was a recognition that Pioneer adopted a capital strategy in response to the factors described above – Pioneer’s investors’ concerns about peak oil and the need to return capital to shareholders. Mr. Sheffield was expressing his own view that Pioneer had made the right choice in shifting its capital framework and that other public companies in the Permian Basin were likely experiencing similar pressure and independently coming to the same conclusion as Pioneer.²⁴ He had every right to express these views publicly.

The Complaint suggests without explanation that there is something suspicious about Mr. Sheffield’s public comments that \$75 or \$100 oil would not cause Pioneer to produce more in 2022 or that \$200 oil would not cause Pioneer to produce more in 2024. Compl. ¶¶ 27, 30. Again, the FTC appears to have conducted no investigation of what was intended by these statements or how they were understood. In fact, they reflect nothing more than Mr. Sheffield’s belief, learned through decades of experience, that high oil prices are short lived, and increasing

²⁴ See, e.g., Russell Gold, *\$100 Oil Is Back! Why Isn’t Texas Drilling?*, Texas Monthly (March 11, 2022) <https://www.texasmonthly.com/news-politics/100-dollar-oil-permian-not-drilling/> (explaining that “the oil industry in Texas has been browbeaten by investors” into capital discipline so that shareholder value does not drop with oil prices); Colin Eaton, *Oil Prices Are Up, but Frackers Stay on the Sidelines—for Now*, Wall Street Journal (Feb. 17, 2021), <https://www.wsj.com/articles/oil-prices-are-up-but-frackers-stay-on-the-sidelines-for-now-11613597968> (“In earnings calls this week, shale executives said they are sticking to capital discipline, which has become a mantra of the industry following a yearslong push by investors.”); Christopher M. Matthews, *Fracking Buzzwords Evolve, From ‘Ramp Up’ to ‘Capital Discipline’*, Wall Street Journal (Sep. 9, 2019), <https://www.wsj.com/articles/frackers-change-their-tune-focus-on-discipline-11568034098> (“But as financing dries up, and returns become more valued than growth, many companies are retreating to the sweetest spots in the best basins and shutting down drilling rigs elsewhere, a shift reflected in the geography executives mention on earnings calls.”); Ryan Dezember, *Why Shale Drillers Are Pumping Out Dividends Instead of More Oil and Gas*, Wall Street Journal (May 23, 2022), <https://www.wsj.com/articles/why-shale-drillers-are-pumping-out-dividends-instead-of-more-oil-and-gas-11653274423> (“After years of losses, investors demanded changes to how bonuses are formulated, pushing for more emphasis on profitability. Now, executives who were paid to pump are rewarded more for keeping costs down and returning cash to shareholders, securities filings show.”).

production takes time and is more costly when oil prices are high because E&P activities are more expensive.²⁵ If Pioneer were to attempt to ramp up production in response to \$100 or \$200 oil, it would require the drilling and completion of new wells, and it would take a year before the new wells were productive. By that time, the combination of depressed demand and increased supply may have driven the price down and Pioneer would have to sell its oil at a lower price. There are many past examples of this outcome, including the outcome in the five-year period before the pandemic.

The Complaint also misleadingly quotes a fragment of remarks by Mr. Sheffield in 2024. The Complaint alleges that on April 16, 2024, Mr. Sheffield said, “Even if oil gets to \$200/bl, the independent producers are going to be disciplined.” Compl. ¶ 30. The complete quote, however, makes clear that Mr. Sheffield was referring only to public companies.²⁶ He held that belief because of his experience responding to shareholders as the CEO of a *public* independent producer.²⁷ Public producers at that time were facing the same pressure from their significant shareholders. Mr. Sheffield said nothing about private producers who may have a different shareholder base. The Complaint also omits Mr. Sheffield’s remarks on that same panel that Pioneer and U.S. shale production had “saved us from \$150 oil today.”²⁸

None of the quoted remarks show that Mr. Sheffield has ever attempted to coordinate with another producer to decrease output. Indeed, it is telling that the Complaint depends on statements that Mr. Sheffield made publicly to the press. The only message cited with another U.S. producer (other than with his son) is more than five years old with an individual from a

²⁵ Mr. Sheffield publicly explained these comments at the time: “[White House energy advisor] was criticizing the majors and independents for not growing more. He doesn’t realize if we wanted to grow more than 5 per cent, I’d have to call up all the service contractors; they’re going to charge me 30 to 40 per cent more; it’s going to take a year to build new equipment; it’s going to take two years to start showing results. By that time, you may go through an oil price collapse.” See Irina Slave, *Shale Giant Pioneer Explains Why U.S. Drillers Won’t Drill More*, Oilprice.com (Dec. 21, 2022), <https://oilprice.com/Energy/Crude-Oil/Shale-Giant-Pioneer-Explains-Why-US-Drillers-Wont-Drill-More.html>.

²⁶ “Even if oil gets to \$200, I’ll say it again, and I said it a year and a half ago, during ‘22, the independent producers are going to be disciplined, the public ones, it is different from the privates, but the public producer is going to be very disciplined, regardless. They were ‘22, when oil prices got up to \$120, \$125, and if something happens today with geopolitics, they are going to be very disciplined.” Video of *Columbia Global Energy Summit 2024* at 6:09:15, Columbia University SIPA (April 16, 2024), https://www.youtube.com/live/aA9oSPudZ_4?t=22155s.

²⁷ This was the same belief that Mr. Sheffield held in 2022 when he made similar remarks quoted in the Complaint: “In regard to the industry, it’s been interesting watching some of the announcements so far, the *public independents* are staying in line . . . I’m confident they will continue to stay in line.” Compl. ¶ 29 (emphasis added).

²⁸ Video of *Columbia Global Energy Summit 2024* at 6:07:52, Columbia University SIPA (April 16, 2024), https://www.youtube.com/live/aA9oSPudZ_4?t=22072s.

small producer called Laredo Oil, which was about one-tenth the size of Pioneer at the time. The Complaint says that Mr. Sheffield “urged producers to limit domestic production,” citing this message, but the text shows that he did no such thing.

The exchange at issue occurred immediately after Mr. Sheffield returned as CEO of Pioneer in 2019. The Chairman of Laredo, Randy Foutch, asked Mr. Sheffield if he was “going to have fun going back to work.” Mr. Sheffield did not know Mr. Foutch particularly well and initially did not even recognize who the message was from. During the exchange, Mr. Foutch asked Mr. Sheffield for his views on whether shareholders would be “consistent over time on what they want,” which was a reference to the public debate going on about the need to return capital to shareholders. Mr. Sheffield told Mr. Foutch his views based on what Mr. Sheffield had heard and seen but he did not urge Mr. Foutch to limit production or take any other course of action.

The Complaint also ignores public comments by Mr. Sheffield over the years that undermine the false narrative that he has attempted to coordinate to keep oil output low. In fact, Mr. Sheffield supports policies that would allow U.S. producers to produce more oil. In a 2021 article quoted in the Complaint at Paragraph 28, for example, Mr. Sheffield criticized President Biden’s policies limiting the ability of U.S. oil producers to access public land for drilling.²⁹ Mr. Sheffield argued that President Biden’s domestic energy policy left control of global oil in OPEC’s hands by hamstringing U.S. producers.

Texas Railroad Commission

In 2020, Russia and Saudi Arabia started a price war after failing to reach a deal for Russia to cut production.³⁰ The COVID pandemic exacerbated the effects of the price war by creating a once-in-a-lifetime demand shock resulting from an unprecedented closure of businesses around the world. Oil at one point reached negative 37 dollars a barrel with about 1.2 billion barrels of oil in excess of demand over the first half of 2020,³¹ which threatened to

²⁹ Derek Bower and David Sheppard, *US shale drillers cannot contain oil price rise, Pioneer boss says*, Financial Times (Oct. 3, 2021), <https://www.ft.com/content/c21eb656-8d09-45ce-a13a-7d8419426b05> (“Sheffield said that while the Biden administration was calling on Opec to increase supplies, it was trying ‘to slow down U.S. drilling in any way they can’ through moves such as a moratorium on leasing federal lands for drilling. ‘They’d rather import crude oil from Opec,’ he said.”)

³⁰ Goldman Sachs, *The Revenge of the New Oil Order* (Mar. 8, 2020) (“We believe the OPEC and Russia oil price war unequivocally started this weekend when Saudi Arabia aggressively cut the relative price at which it sells its crude by the most in at least 20 years.”)

³¹ IHS Markit, *Light-speed oil surplus: Emergency conditions for the oil industry* (Apr. 7, 2020) (submitted to the TRRC by IHS Markit), <https://portalvhdskszlf8q9lqr9.blob.core.windows.net/media/57211/cmts-recvd-apr14-conf-ihsmarkit.pdf>; Alex Dryden, *Why are oil prices negative?* JP Morgan Asset Management (Apr. 21, 2020), <https://am.jpmorgan.com/us/en/asset-management/liq/insights/market-insights/market-updates/on-the-minds-of-investors/why-are-oil-prices-negative/>.

bankrupt hundreds of independent oil producers in the United States. In fact, over 100 companies in the sector did declare bankruptcy that year.³² In order to protect the health of the U.S. oil industry, Pioneer retained legal counsel in early 2020 to petition the TRRC to take unneeded barrels off the market to avoid harmful waste, a role (based on Texas statutes) that the TRRC has historically performed. Mr. Sheffield's hope in advancing the TRRC petition was that it would jumpstart a broader government solution among the United States, Russia, and OPEC and avoid the destruction of the domestic industry.³³

The TRRC regulates oil and natural gas production in Texas. It is the oldest state regulatory agency in Texas, established over 130 years ago. The TRRC has authority to regulate and limit production for the prevention of waste.³⁴ Waste is "production of oil in excess of . . . reasonable market demand."³⁵ The TRRC is comprised of three commissioners, who serve for six-year, staggered terms, with one commissioner position up for election every two years.³⁶ Texas law permits any person to request that the TRRC hold a hearing to determine whether "any rule or order should be adopted . . . to correct, prevent, or lessen the waste."³⁷ The TRRC is obligated to "make and enforce rules" to prevent waste "[w]hen necessary."³⁸

On March 30, 2020, Pioneer and Parsley Energy, Inc. ("Parsley") filed a motion with the TRRC requesting a market demand hearing and market demand order.³⁹ Invoking the TRRC's statutory authority, the motion requested that the TRRC "conduct a hearing to determine whether

³² *Over 100 oil and gas companies went bankrupt in 2020*, OGV Energy, [https://www.ogv.energy/news-item/over-100-oil-and-gas-companies-went-bankrupt-in-2020#:~:text=Multibillion%2Ddollar%20bankruptcy%20cases%20were%20filed%20by%20Cheapeake,Diamond%20Offshore%20Drilling%20\(\\$11.8%20billion\)%20and%20California.](https://www.ogv.energy/news-item/over-100-oil-and-gas-companies-went-bankrupt-in-2020#:~:text=Multibillion%2Ddollar%20bankruptcy%20cases%20were%20filed%20by%20Cheapeake,Diamond%20Offshore%20Drilling%20($11.8%20billion)%20and%20California.)

³³ This is reflected in the public statement Mr. Sheffield made to the press, quoted in the Complaint at Paragraph at 32: "If Texas leads the way, maybe we can get OPEC to cut production." Jeffrey Ball, *The "Mother Fracker" Reckons with the Mother of All Oil Busts*, Texas Monthly (July 2020), <https://www.texasmonthly.com/news-politics/scott-sheffield-pioneer-oil-bust/>.

³⁴ 3 Tex. Nat. Res. Code 85.042(b) ("When necessary, the commission shall make and enforce rules either general in their nature or applicable to particular fields for the prevention of actual waste of oil or operations in the field dangerous to life or property.")

³⁵ 3 Tex. Nat. Res. Code 85.046(a)(1).

³⁶ Texas Railroad Commission, Commissioners, <https://www.rrc.texas.gov/about-us/commissioners/>.

³⁷ 3 Tex. Nat. Res. Code 85.049(a).

³⁸ *Id.* at 85.042(b).

³⁹ Pioneer & Parsley Motion to Determine Reasonable Market Demand, Case No. 00003167 (March 30, 2020), <https://portalvhdskzlf8q9lqr9.blob.core.windows.net/media/57295/apr14-conf-pioneer-motion.pdf>.

the waste of oil and gas” was taking place in Texas and, if so, adopt a rule to “correct, prevent, or lessen the waste.” The motion also requested that the TRRC “inquire as to the reasonable market demand for oil” and “issue any rule or order, effective for May 2020 production” as may be appropriate. The motion noted that global conditions and limited supply resources meant Texas oil producers might be “forced to abandon current and planned production” and “may not survive,” which would threaten American’s energy independence. Pioneer was concerned that during such a chaotic time, producers would shut down production in “an *ad hoc* and haphazard manner that [would] heighten industry disruption and cause economic waste.” Pioneer therefore called on the TRRC “to bring fairness and uniformity to any curtailment of production.”

Pioneer’s motion to the TRRC was supported by small independent oil producers who faced possible bankruptcy as a result of the 2020 oil crisis.⁴⁰ Independent oil producers and private citizens wrote in support of Pioneer’s motion.⁴¹ Mr. Sheffield also spoke with others in the industry about supporting the motion, and he spoke about the petition publicly. In yet another example of mischaracterization, the FTC’s Press Release and Complaint wrongly imply that some of these public comments were private messages with foreign officials.⁴² And Texas was not alone in considering these measures. Other states with large oil and gas fields, such as Oklahoma, similarly considered measures to avoid wasted production.⁴³

⁴⁰ Letter from Assoc. of Workers, Professionals and Wildcatters to the TRRC (Mar 30, 2020), <https://portalvhdszkzlf8q9lqr9.blob.core.windows.net/media/57092/cmts-recvd-april14-conf-awpw.pdf> (on behalf of group “formed to speak out on behalf of the rank and file of smaller scale entrepreneurs and those who work in the oil industry”).

⁴¹ Letter from Continental Resources to the TRRC (Apr. 8, 2020), <https://portalvhdszkzlf8q9lqr9.blob.core.windows.net/media/57222/cmts-recvd-apr14-conf-continental.pdf>; Letter from the Honorable Elizabeth Ames Coleman and Jack Coleman to the TRRC (Apr. 13, 2020), <https://portalvhdszkzlf8q9lqr9.blob.core.windows.net/media/57317/cmts-recvd-apr14-conf-coleman.pdf>.

⁴² The quoted language at the end of the following paragraph from the FTC’s press release is from an interview with Texas Monthly, not a “text message[.]” with an “OPEC representative” or “official”: “Sheffield, for example, exchanged hundreds of text messages with OPEC representatives and officials discussing crude oil market dynamics, pricing and output. In discussing his efforts to coordinate with Texas producers under a production cut mandated by the Railroad Commission of Texas, Sheffield said, ‘If Texas leads the way, maybe we can get OPEC to cut production. Maybe Saudi and Russia will follow. That was our plan,’ he said, adding: ‘I was using the tactics of OPEC+ to get a bigger OPEC+ done.’” The interview was conducted by Jeffrey Ball, *The “Mother Fracker” Reckons with the Mother of All Oil Busts*, Texas Monthly (July 2020), <https://www.texasmonthly.com/news-politics/scott-sheffield-pioneer-oil-bust/>. Paragraphs 31 and 32 of the Complaint are misleadingly drafted to create the same misimpression.

⁴³ Will Englund, *Texas and Oklahoma weigh production quotas for oil*, Washington Post (Apr. 13, 2020), <https://www.washingtonpost.com/business/2020/04/13/oil-texas-oklahoma/> (“The Texas Railroad Commission regulated the quantity of oil production from the early 1930s to

Of course, not everyone supported Pioneer’s motion. Some in the industry may have actually favored the bankruptcy of numerous smaller suppliers. Some in the industry were ideologically opposed to inviting government intervention or believed that free market forces would sort out the supply and demand imbalance fast enough to avert disaster. In one text message cited in the Complaint, Mr. Sheffield discussed the views of another producer who did not support the petition because of the belief that the free market would correct any imbalance. Mr. Sheffield commented on those views by writing internally to two executives at Pioneer, “We can only get to \$50 if we all cooperate to bring inventories down.” Compl. ¶ 31. Mr. Sheffield was *not* advocating for producers to cooperate outside of the lawful TRRC process, and there is no evidence that he was.

The TRRC evaluated Pioneer’s motion and ultimately denied it, with one of the three appointed commissioners supporting the motion. Pioneer and Parsley had a right to appeal the denial but opted not to because in the interim, the highest levels of the U.S. Government brokered a deal for OPEC+, the United States, Canada, Brazil, and Norway to cut oil production by about 9.7 million barrels of oil per day.⁴⁴ There is no doubt that Pioneer’s motion to the TRRC brought necessary attention to a perilous threat facing the U.S. oil and gas industry at the depths of the pandemic.

Mr. Sheffield stands by his decision to advocate that duly appointed commissioners take legally authorized measures to correct the severe imbalance at that time between oil supply and demand. The U.S. Government’s actions did exactly that, demonstrating that political intervention of some kind was the right solution to preserve American energy production. It should be a matter of great public concern that the FTC would cite what is clearly protected government petitioning in support of the false claim that Mr. Sheffield is a purported advocate for collusion between oil producers and OPEC. There is nothing unlawful about advocating for the Government to take legally mandated action in response to a global health and economic crisis, just as there was nothing wrong with a different industry lobbying the current Administration to impose high duties on imports of Chinese electric vehicles even though this will result in higher prices to America consumers. Petitioning government agencies for official

1972, and on Tuesday it will consider a petition brought by two Texas producers to ‘prorate’ oil production in the state once again. A similar appeal was filed with the Oklahoma Corporation Commission on Friday. Last month, North Dakota, another major oil-producing state, suspended a regulation that limited the amount of time wells could be inactive, in hopes production would fall without imposing quotas.”)

⁴⁴ Daniel Yergin, *The New Map: Energy, Climate, and the Clash of Nations* at 320 (2020) (“The total OPEC+ deal was for 9.7 million barrels a day reduction, of which Russia and Saudi Arabia would each contribute 2.5 million barrels . . . The other twenty-one members of OPEC-Plus agreed to their own cutbacks. So did other major non-OPEC producers that were not part of OPEC-Plus—Brazil, Canada, and Norway. . . . The deal itself was historic, both for the number of participants and the sheer complexity. It was the largest oil supply cut in history.”).

action is a core constitutional right found in the First Amendment and embodied in the Noerr-Pennington doctrine.⁴⁵

False Allegations of Foreign Attempts to Collude

The FTC's Complaint falsely alleges that Mr. Sheffield engaged in a "sustained and long-running strategy to coordinate output reductions" with "various high-ranking OPEC representatives." Compl. ¶ 6. The accompanying Press Release claims that Mr. Sheffield "exchanged hundreds of text messages with OPEC representatives and officials discussing crude oil market dynamics, pricing and output."⁴⁶ The FTC grossly mischaracterizes Mr. Sheffield's interactions with OPEC and ministers of foreign governments.

As an initial matter, we recognize that OPEC is a controversial and rightly criticized intragovernmental organization.⁴⁷ Mr. Sheffield himself has been critical of the organization. Be that as it may, it plays a significant role in global oil markets and the communications at issue here were with government ministers relating to matters of legitimate interest. Pioneer was a tiny producer in this global market, with well under a 1% share. Mr. Sheffield was within his rights to have discussions, read messages from these government ministers and occasionally reply to them. These contacts did not involve anything close to attempted "collusion."

The first and only conference hosted by OPEC that Mr. Sheffield attended was in 2018, when he was not serving as Pioneer's CEO. He was invited to speak on a panel with several CEOs from major oil corporations, including BP, TotalEnergies, and Eni. The conference was widely attended by the press, and at the time Mr. Sheffield actually advocated for OPEC to *increase* output, which would drive prices down.⁴⁸

The Complaint alleges that Mr. Sheffield has had "voluminous" contacts with: (a) the current oil minister for the United Arab Emirates, (b) the former OPEC Secretary General Mohammed Barkindo, (c) a current government energy minister identified in the Complaint, and (d) other unidentified purported OPEC and Saudi contacts. If the FTC had conducted a fair and

⁴⁵ See *E. R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

⁴⁶ *FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal* (May, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-order-bans-former-pioneer-ceo-exxon-board-seat-exxon-pioneer-deal>.

⁴⁷ The courts have consistently held that OPEC actions are official acts of state and are immune from antitrust challenge. See *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981) (affirming dismissal under act of state doctrine); *Spectrum Stores v. Citgo Petroleum Corp.*, 632 F.3d 938, 948-49 (9th Cir. 2011) (same).

⁴⁸ Ernest Scheyder, *U.S. shale executive pushes OPEC to gradually boost output*, Reuters (June 20, 2018), <https://www.reuters.com/article/idUSKBN1JG2OA/>.

complete investigation, it would know that this assertion is completely untrue. Mr. Sheffield has not had voluminous contacts with any of these individuals.

United Arab Emirates Oil Minister. Mr. Sheffield met the UAE oil minister once when he attended the OPEC conference in 2018 referenced above, but Mr. Sheffield does not have the UAE oil minister's contact information nor have they ever exchanged messages to Mr. Sheffield's recollection. The Complaint cites one text message that references the UAE oil minister. Compl. ¶ 41. Mr. Sheffield texted his son on June 3, 2020 that he "Just got off the phone with the UAE oil minister. Opec plus is upset with Parsley and EOG public statements about bringing on production." *Id.* This was not a private, one-on-one phone call. As confirmed by Mr. Sheffield's own calendar, IHS Markit/CERA organized a group Zoom seminar with numerous others in attendance during the COVID pandemic in 2020, when many panels that would have usually taken place in-person were moved online.

Mr. Sheffield is not the "conduit for OPEC officials to express their disappointment with individual Permian producers who dare make independent competitive decisions" alleged in the Complaint in Paragraph 41.⁴⁹ He texted his son as an FYI because his son's company was mentioned on the Zoom conference. No one asked him to do it and it was a nonevent, distorted and blown completely out of proportion in the Complaint. The son's reaction was dismissive and the thread quickly turned to other topics not relevant here.

This is the sum total of evidence about the UAE.

Mohammed Barkindo. The Complaint makes several references to former OPEC Secretary General Mohammed Barkindo, a man with whom Mr. Sheffield had barely any contact. Mr. Sheffield met Mr. Barkindo in 2017 at a dinner that was organized by a former U.S. politician after Mr. Sheffield had stepped down as CEO of Pioneer.⁵⁰ Numerous independent producers and service companies also attended. A U.S. lawyer provided antitrust guidance at the beginning of the dinner and other attorneys were present.

Mr. Sheffield did not "stay in regular contact" with Mr. Barkindo after the dinner as the Complaint alleges. Compl. ¶ 39. Mr. Barkindo texted Mr. Sheffield for the first time two and a half years after the dinner, to wish Mr. Sheffield a happy Thanksgiving in November 2019. They briefly messaged again the following year about the TRRC proceeding. Mr. Sheffield put Mr. Barkindo in contact with the TRRC. Compl. ¶ 38. After the TRRC petition was denied, Mr. Sheffield did not message with Mr. Barkindo again. Mr. Barkindo passed away in 2022.

Aside from occasional interactions at industry conferences, this is the sum total of communications between Mr. Sheffield and Mr. Barkindo. Hardly "regular contact."

⁴⁹ The only message cited in Paragraph 41 is Mr. Sheffield's text message to his son.

⁵⁰ This was the first time that Mr. Sheffield met an OPEC official. This is why he told the press, "I'm seeing a series of meetings where OPEC is reaching out and spending more time with U.S. independents than I have seen over my entire career." Compl. ¶ 35.

Government Minister Identified in the Complaint. The only time that Mr. Sheffield has spoken with the government minister identified in the Complaint was during a widely-attended energy conference in 2022 where Mr. Sheffield and other industry CEOs were invited to explain shale technology. At that time, the government minister requested Mr. Sheffield's WhatsApp address and also made a passing reference to a price war that had occurred two years earlier. This was initiated by the government minister and no improper discussion was held. Mr. Sheffield has not spoken with this individual since that time.

The Complaint also alleges in Paragraph 43 that this government minister and Mr. Sheffield “have over the past few years exchanged a series of text messages discussing crude oil market dynamics, pricing, and output.”⁵¹ Mr. Sheffield began receiving public information like news articles from the minister over WhatsApp after the minister received Mr. Sheffield's contact information. Almost all of these were blast text messages containing public information like news articles that went to a group of people and involved no back and forth exchange with Mr. Sheffield. Mr. Sheffield is aware that there are many others who receive these messages but does not know who they all are since the messages do not list the other recipients.

Based on Mr. Sheffield's recollection and the materials provided to the FTC in this matter, there were four occasions when this government official asked Mr. Sheffield to provide something in response, and these requests were for public information such as a copy of a news article or a presentation from a widely-attended conference. At no point did Mr. Sheffield attempt to coordinate production with the government minister or share confidential information. These messages were entirely innocuous.

This is the sum total of evidence about the government oil minister referenced in the Complaint.

References to “Saudi Contacts” and “OPEC Contact.” The Complaint says that Mr. Sheffield had “regular contacts” with OPEC through which he learned the “machinations of OPEC, gleaned insight to non-public information regarding the existence of internal OPEC deals.” Compl. ¶ 40. The Complaint cites two communications where Mr. Sheffield says that he spoke with his “Saudi contacts” and his “OPEC contact.” Compl. ¶¶ 39, 40. In each case, these referred to a U.S. analyst who studied the industry, not to Saudi or OPEC officials. Again, the FTC had six months to ask about these contacts and could have asked Mr. Sheffield during his investigational hearing when he was under oath, but it chose not to and instead jumped to a wrong conclusion that resulted in fallacious allegations in the Complaint.

Unfairness of the FTC's Process

The FTC's process has been incomplete and unfair. Despite having over six months to investigate the Exxon/Pioneer merger, the agency did not assert that Mr. Sheffield's communications could make the merger unlawful until late in their review. And rather than conduct a real investigation of these communications, the FTC used a threat of baseless litigation

⁵¹ The allegation that they have exchanged text messages over the “past few years” is plainly incorrect considering that the government minister only obtained Mr. Sheffield's WhatsApp address in 2022.

to coerce Exxon into a hurriedly-prepared consent order that took away Mr. Sheffield's rights and the rights of his colleagues at Pioneer based on allegations that have no merit.⁵²

The FTC questioned Mr. Sheffield under oath on April 9, 2024 as part of their review of the acquisition and had access to his documents in advance of that. In fact, company counsel invited the FTC to ask Mr. Sheffield about these communications if the FTC was interested in them. At no point during the four hours of questioning did they ask Mr. Sheffield about the communications cited in the Complaint.

The FTC shared a draft Complaint with Pioneer for the first time on April 29 and Exxon signed the Consent Order two days later, on May 1. The FTC voted the next day. The FTC did not engage with Mr. Sheffield's counsel on the substance of the allegations in the Complaint or give us an opportunity to provide feedback on the Complaint.

Beyond harming Mr. Sheffield without due process, the FTC's proposed order would also bar any other "Pioneer Representative" (defined as "any person either employed by Pioneer or a Director of Pioneer during the calendar year prior to the Merger Date except those persons identified in Nonpublic Appendix A") from serving on the Exxon Board for the next five years. It is bad enough that the proposed order bars Mr. Sheffield from serving on the Board without basis but at least the agency cites statements by Mr. Sheffield, albeit with completely false and misleading allegations about those statements. The FTC does not cite any evidence relating to these other employees. It is a blatantly overbroad and punitive prohibition that exemplifies just how arbitrary and unlawful the proposed order is.

Finally, regardless of how one views Mr. Sheffield's prior statements, there is no basis to allege that the Exxon/Pioneer transaction would violate Section 7 of the Clayton Act or Section 5 of the FTC Act. As to Section 7, the Dissenting Statement notes correctly that the Complaint fails to articulate how the "effect of [the] transaction may be substantially to lessen competition." It also notes (1) the Complaint "fails to allege that either Exxon or Pioneer represents part of any

⁵² The FTC sent the first term sheet for the settlement to Exxon on April 23. The term sheet was signed on April 24. The FTC sent the first draft of the proposed consent order to Exxon on April 25. Exxon agreed to it on May 1 and the FTC voted to approve it on May 2. This timeline – nine days from draft term sheet to final vote – was much faster than is typical and was inconsistent with published guidance from the FTC: "Parties and their counsel should be aware that it typically takes four weeks to review a consent package after staff and the parties formally submit the settlement package to the Director of the Bureau of Competition. The Director of the Bureau of Competition then will take two weeks to review the consent package. Once the Director agrees that the proposed settlement addresses the competitive risk raised by the merger, the Director will make a recommendation to the Commission that the Commission accept the proposed consent order for public comment. The Bureau of Economics will separately make its own recommendation. The Commission will typically take two weeks to review the Bureau Directors' recommendations before voting on whether to accept the consent." Federal Trade Commission, *It Takes Less Time To Do a Thing Right* (Sep. 4, 2018), <https://www.ftc.gov/enforcement/competition-matters/2018/09/it-takes-less-time-do-thing-right>. The FTC's Analysis to Aid Public Comment provides no information about why the FTC skipped these steps and handled the consent order on such an expedited timeline.

‘substantial share’ of the market, and for good reason: the post-merger firm’s share in the alleged market will not be substantial;” (2) “the Complaint does not address the merging parties’ market shares at all;” and (3) “concentration in this market, and thus, the likelihood of successful coordination post-merger, are virtually unchanged by the proposed acquisition.” “Instead the Commission is leveraging its merger enforcement authority to extract a consent from Exxon.” The Dissenting Commissioners are absolutely correct in their analysis of Section 7 here. We urge all of the Commissioners to take this opportunity to assess the facts of this matter because, as described above, the Complaint is based on falsehoods and a woefully incomplete investigative record.


As to the Section 5 claim, the FTC considered whether Mr. Sheffield taking a seat on the Exxon Board would violate Section 8 of the Clayton Act because Mr. Sheffield also sits on the Board of Williams Companies, Inc. The parties provided information showing that there would be no such violation. Having failed to find a violation under Section 8, the Complaint asserts that this would “facilitate a board interlock among competitors” and concocts a claim that this would violate Section 5 of the FTC Act as an unfair method of competition. This is an unprecedented and meritless expansion of Section 8 through the use of Section 5 and would never stand up in a court of law. Again, this is simply the use of the FTC’s leverage in a merger review to try to inappropriately expand the scope of its authority.

Conclusion

For the foregoing reasons, the FTC should vacate the Proposed Consent Order and dismiss this proceeding without further action.

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Respectfully submitted,



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