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8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 STATE OF CALIFORNIA,
 13
 Plaintiff,
 14 v.
 15 VALERO ENERGY CORPORATION,
 VALERO ENERGY PARTNERS LP,
 16 and
 17 PLAINS ALL AMERICAN
 PIPELINE, L.P.,
 18
 Defendants.
 19

Civil Action No. 17-cv-3786 (WAH)

**PLAINTIFFS’ MOTION FOR AND
MEMORANDUM IN SUPPORT OF
TEMPORARY RESTRAINING ORDER**

**REDACTED VERSION OF DOCUMENT
FILED UNDER SEAL**

MOTION FOR TEMPORARY RESTRAINING ORDER

21 Plaintiff, the State of California, on its own behalf and as *parens patriae* on behalf of its residents, by
 22 and through its Attorney General, Xavier Becerra (“California”), brings this action to obtain equitable and
 23 other relief, maintain the status quo, and enjoin the proposed sale between Valero Energy Corporation,
 24 Valero Energy Partners LP (collectively, “Valero”), and Plains All American Pipeline, L.P.
 25 (“Plains”).

26 By this motion, pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, California moves this
 27 Court for a temporary restraining order enjoining the proposed merger between Valero and Plains. Absent
 28 such provisional relief, Valero and Plains would be free to consummate the Transaction after 5:00

1 p.m. PDT on July 10, 2017. If not enjoined by this Court, the Transaction is likely to
 2 immediately and substantially lessen competition, leading to higher prices in the markets for
 3 gasoline, diesel fuel, and other refined light petroleum products in Northern California.

4 Plaintiff respectfully requests they be enjoined from doing so and that this matter be
 5 calendared for a status conference where the parties may be heard regarding a case management
 6 order to guide the remainder of the litigation and the entry of a protective order governing the
 7 treatment of confidential proprietary documents and testimony.

8 In accordance with Local Rule 65-1(b), Counsel for California delivered notice of this motion
 9 to counsel for Defendants. The disposition of this motion is time sensitive and we respectfully
 10 request that the Court rule on this motion as quickly as possible. A proposed order is attached.

11 **MEMORANDUM IN SUPPORT OF MOTION FOR**
 12 **TEMPORARY RESTRAINING ORDER**

13 **I. THE STATE OF CALIFORNIA HAS STANDING TO SEEK INJUNCTIVE**
 14 **RELIEF PURSUANT TO 15 U.S.C. SECTION 26**

15 Section 16 of the Clayton Act provides that any “person” may sue for injunctive relief
 16 under the antitrust laws including Section 7 of the Clayton Act, 15 U.S.C. § 18. 15 U.S.C. § 26.
 17 California, as a sovereign state of the United States, qualifies as a person within the meaning of
 18 these statutes and may sue in its *parens patriae* capacity for injunctive relief against any
 19 threatened loss or damage to its general economy. *Hawaii v. Standard Oil Co. of California*, 405
 20 U.S. 251, 257-61 (1972); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 447(1945).

21 This Court has the authority to issue a temporary restraining order and preliminary
 22 injunction prohibiting Valero from completing its purchase of Plains. *See e.g., California v. Am.*
 23 *Stores, Inc.*, 495 U.S. 271 (1990).

24 **II. THE PROPOSED ACQUISITION VIOLATES THE ANTITRUST LAWS**

25 Section 7 of the Clayton Act prohibits any merger or acquisition “where in any line of
 26 commerce . . . in any section of the country, the effect of such acquisition may be substantially to
 27 lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18. The analysis involves a
 28 consideration of: “(1) the ‘line of commerce’ or product market in which to assess the transaction;

1 (2) the ‘section of the country’ or geographic market in which to assess the transaction; and (3)
2 the transaction’s probable effect on competition in the product and geographic markets.” *F.T.C.*
3 *v. Staples, Inc.*, 970 F.Supp. 1066, 1072; *see also United States v. Marine Bancorporation*, 418
4 U.S. 602, 618-23 (1974).

5 Section 7 is intended to “arrest anticompetitive mergers in their incipiency” and,
6 accordingly, requires a prediction as to the merger’s likely impact on future competition. *United*
7 *States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 362 (1963). Because of the forward-looking
8 context, certainty is not required. “[A]ll that is necessary is that the merger create an appreciable
9 danger of [anticompetitive] consequences in the future. A predictive judgment, necessarily
10 probabilistic and judgmental rather than demonstrable . . . is called for.” *Hosp. Corp.of Am. v.*
11 *F.T.C.*, 807 F.2d 1381, 1389 (7th Cir. 1986); *See also Brown Shoe Co. v. United States*, 370 U.S.
12 294, 323 (1962) (holding that Section 7 “deals in probabilities, not certainties”).

13 **A. The Relevant Product Market**

14 A relevant product market under Section 7 is defined by the “reasonable interchangeability
15 of use . . . between the product itself and substitutes for it.” *Brown Shoe Co. v. United States*, 370
16 U.S. 294, 325 (1962). The Supreme Court identified a number of “practical indicia” useful in
17 determining the scope of a product market, including “industry or public recognition of the
18 submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique
19 production facilities, distinct customers, distinct prices, sensitivity to price chances, and
20 specialized vendors.” *Brown Shoe*, 370 U.S. at 325; *see also Olin Corp. v. FTC*, 986 F.2d 1295,
21 1299 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994).¹ These and other factors indicate the
22 extent to which market participants are likely to treat products as substitutes when confronted
23 with an attempt to exercise market power.

24 If the transaction is consummated, Valero would acquire two of Plains’ San Francisco Bay
25 Area petroleum terminals in Martinez and Richmond, California. If allowed to proceed, the
26 Transaction would eliminate the only independent terminal owner in the Bay Area with

27 ¹ While the Court was specifically addressing the submarkets, the factors are equally
28 useful in identifying a relevant market, since a submarket is simply a narrower relevant market
included within a broader one. *Olin*, 986 F.2d at 1299.

1 unconstrained access to the region's key trading hub. This trading hub, Kinder-Morgan's
2 Concord Station ("Concord"), performs a critical role in setting prices for gasoline, diesel fuel
3 and other refined, light petroleum products ("LPPs") in much of Northern California and
4 Northern Nevada. Here, LPP terminaling services to access Concord Station are the relevant
5 product market. Refiners, independent traders, and fuel marketers require a means to deliver
6 LPPs into Concord Station for sale or downstream distribution, and no alternatives exist that serve
7 these functions other than to buy LPPs from others at Concord Station.

8 Another relevant product market is the bulk supply of LPPs. "Bulk" volumes are volumes
9 that grossly exceed the size of a truckload. For example, Oil Price Information Service ("OPIS")
10 reports trades of 10,000 barrels or greater into the Kinder Morgan pipeline system. A tanker
11 truck, by comparison, carries approximately 200 barrels. Wholesale fuel marketers and traders
12 that buy LPPs in bulk typically transport these volumes to a terminal to "break bulk" into
13 truckload-sized portions for distribution to customers or end users that demand LPPs. Such bulk
14 LPP purchasers would not switch to purchasing smaller volumes of LPPs or to other products in
15 response to a small but significant and non-transitory increase in price ("SSNIP").

16 The proposed merger between Valero and Plains would eliminate the only independent petroleum
17 terminal owner in the Bay Area with unconstrained access to the region's key trading hub. Independent
18 terminal operators like Plains have no economic interest in the prevailing prices of the products
19 they handle, they are pure logistics companies providing a service to the refiners and marketers
20 that use their facility in exchange for a fee. By contrast, vertically integrated refiners like Valero
21 have to consider the effect of their actions on both fuel prices *and* terminal fees when they operate
22 a terminal. The Transaction significantly increases the risk that Valero and a very small group of
23 similarly situated refiners can collectively reduce supply into the region's key trading hub. When
24 supply is constricted, prices normally rise, so cutting supply into the hub is expected to raise fuel
25 prices across the region.

26 **B. The Relevant Geographic Market**

27 As is the case with product market definition, the task in geographic market definition is to
28 determine whether an effort by a post-acquisition firm to exercise market power could be

1 defeated by customers who turn to other suppliers in other geographic areas. A relevant
2 geographic market, therefore, is the area “in which the seller operates, and to which the purchaser
3 can practicably turn for supplies.” *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327
4 (1961). The geographic market must be defined in terms of the “commercial realities of the
5 industry,” *Brown Shoe*, 370 U.S. at 336, and the practical alternatives available to consumers if
6 prices increase. *See, e.g., FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995) (referencing
7 “the critical question of where consumers . . . could practicably turn”).

8 Post-Transaction, if Valero raised terminaling fees or restricted access at Plains, Plains
9 customers requiring access to Concord would have few alternatives. The other potential
10 independent terminaling service providers [REDACTED], and thus do not
11 provide a competitive check on the prices for these terminaling services at Plains Martinez today.
12 Instead, Plains customers would have to look to refiners with [REDACTED]
13 additional LPP volumes to Concord Station sufficient to meet these customers’ demands. Only
14 [REDACTED].

15 The Kinder Morgan Service Area (“KMSA”), the area currently served by terminals
16 downstream of Concord on the KMI pipeline system, is the relevant geographic market in which
17 to assess the impact of the Transaction in the upstream market. All terminals that allow
18 customers to access the KMSA are located in the San Francisco Bay Area.

19 The relevant geographic market in which to assess the impact of the Transaction on the
20 downstream bulk LPP supply market is the KMSA. Customers that wish to ship bulk LPPs to
21 any terminal within the KMSA or spot trade LPPs at Concord would not substitute LPPs that are
22 outside of KMSA in response to a small but significant and non-transitory increase in price.

23 **C. The Acquisition is Likely to Substantially Lessen Competition**

24 “By showing that a transaction will lead to undue concentration in the market for a
25 particular product in a particular geographic area, the government establishes a presumption that
26 the transaction will substantially lessen competition.” *United States v. Baker Hughes Inc.*, 908
27 F.2d 981, 982 (D.C. Cir. 1990).

28

1 Courts and antitrust agencies commonly use the Herfindahl-Hirschman Index (“HHI”) to
2 measure market concentration. The HHI is calculated by totaling the squares of the market shares
3 of every firm in the relevant market. Under relevant case law and the Horizontal Merger
4 Guidelines, the market concentration levels in the market for LPP terminaling services to access
5 Concord Station render the Transaction presumptively unlawful. A merger or acquisition is
6 presumed likely to create or enhance market power—and is presumptively illegal—when the
7 post-acquisition HHI exceeds 2,500 points and the merger or acquisition increases the HHI by
8 more than 200 points. Here, post-Transaction market concentration levels far exceed these
9 thresholds.

10 Of the eight market participants currently providing LPP terminaling services to access
11 Concord Station, only four – [REDACTED]
12 [REDACTED] increase or output shortage. As the constrained providers cannot
13 discipline a price increase or output reduction, it is appropriate to exclude them from the market
14 concentration calculation. The Transaction would significantly alter the competitive dynamics in
15 the market. Combining Plains Martinez and Valero Benicia under common Valero ownership
16 would transform a four-player market into a three-player market in which all three remaining
17 players – [REDACTED] – have the same incentive to keep LPP prices (and LPP
18 margins) high. As measured by throughput capacity to Concord Station, the HHI calculated for
19 unconstrained firms increases from [REDACTED], an increase of [REDACTED].

20 The Transaction would grant Valero the ability to engage in exclusionary conduct. Plains’
21 independence today guarantees that its customers have the opportunity to access a terminal to
22 store product, export product, or inject additional product into the KMI system, regardless of the
23 LPP price environment. This independence prevents [REDACTED]
24 [REDACTED] control incremental supply of LPPs into the KMI
25 system. Valero’s proposed acquisition of Plains Martinez would remove the constraint that an
26 independent Plains Martinez provides, giving just three refiners control over the throughput of
27 marginal LPP volume to Concord Station, and incentivizing Valero to exercise the market power
28 in the relevant market for bulk LPP supply it would acquire as a result of the Transaction.

1 **D. New Entry Will Not Counter Anticompetitive Effects**

2 Analysis of the conditions of new entry into or expansion within a relevant market is part of
3 a determination of the likely anticompetitive effects of any acquisition because even a firm with
4 high market share will be unable to exercise market power if entry is easy. *See Rebel Oil Co. v.*
5 *Atlantic Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995) (“with easy entry, a predator charging
6 supracompetitive prices will quickly lose market share . . . as new rivals enter the market and
7 undercut its high price”). The evidence will establish that entry into the relevant markets would
8 be difficult and would not be likely, timely, or sufficient to prevent the anticompetitive effects
9 that are likely to result from the Transaction. Given permitting constraints for terminals in the
10 Bay Area, timely construction of a new LLP terminaling facility in Northern California is
11 impossible.

12 **III. A TEMPORARY RESTRAINING ORDER IS WARRANTED AND**
13 **NECESSARY**

14 If not enjoined by this Court, the Transaction is likely to immediately, substantially lessen
15 competition, leading to higher prices, in the markets for gasoline, diesel fuel, and other refined,
16 light petroleum products in Northern California.

17 California has reason to believe that Defendants’ proposed merger would substantially lessen
18 competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. In such circumstances, a
19 temporary restraining order requires that the plaintiff show either (1) “probable success on the merits
20 and the possibility of irreparable injury,” or (2) “that serious questions are raised and the balance of
21 hardships tips in its favor.” *Hunt v. Nat’l Broad. Co.*, 872 F.2d 289, 293 (9th Cir. 1989). Here, the
22 imminent merger will irreparably harm competition in the market for gasoline, diesel, and other
23 light petroleum products in California, giving the Defendants a stranglehold on transportation in
24 the region.

25 Injunctive relief is plainly appropriate here. At a minimum, California should be afforded
26 the opportunity to prove its case before the merger is consummated. Private interests the parties
27 have in closing their transaction immediately are overwhelmed by the public interests that
28 mandate issuance of a preliminary injunction when the party seeking the preliminary injunction

1 demonstrates a likelihood of success. *See F.T.C. v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083
2 (D.C. Cir. 1981). The public's vital interest in preserving competition, especially when its
3 reduction can raise the price and threaten the quality of transportation and shipping, which will
4 touch every part of the California economy, justifies a temporary restraining order precluding
5 consummation of the merger while a preliminary injunction hearing and trial can be litigated.

6 Preliminary relief is warranted and necessary. Should the Court rule, after the full trial,
7 that the Transaction is unlawful, reestablishing the *status quo ante* of competition would be
8 difficult, if not impossible, without preliminary injunctive relief from this Court. The integration
9 of the Plains Martinez and Richmond terminals into Valero's operations, including the sharing of
10 information about Valero's competitors (i.e., volumes stored at the terminals), would substantially
11 impair any attempt to restore competition to pre-Transaction levels.

12 Absent temporary injunctive relief, Defendants will be able to consummate the merger after
13 5:01 PM on July 10, 2017. As a result, California needs a temporary restraining order from this
14 Court to prevent interim harm to competition and preserve this Court's ability to enter effective
15 relief after consideration of California's motion for a preliminary injunction.

16 CONCLUSION

17 For the foregoing reasons, the Court should grant California's request for a temporary
18 restraining order. California also requests that the matter be calendared for a status conference
19 for consideration of a case management order that will guide the rest of the litigation.

20 Dated: July 10, 2017

Respectfully submitted,

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23 KATHLEEN FOOTE
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25 /s/ Paul A. Moore
26 PAUL A. MOORE
27 Deputy Attorney General
28 *Attorneys for the State of California*