IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

RAG-STIFTUNG,

EVONIK INDUSTRIES AG,

EVONIK CORPORATION,

EVONIK INTERNATIONAL HOLDING B.V.,

ONE EQUITY PARTNERS SECONDARY FUND, L.P.,

ONE EQUITY PARTNERS V, L.P.,

LEXINGTON CAPITAL PARTNERS VII (AIV I), L.P.,

PEROXYCHEM HOLDING COMPANY LLC,

PEROXYCHEM HOLDINGS, L.P.,

PEROXYCHEM HOLDINGS LLC,

PEROXYCHEM LLC,

AND

PEROXYCHEM COOPERATIEF U.A.,

Defendants.

Civil Action No. 1:19-cv-02337-TJK

REDACTED VERSION OF DOCUMENT FILED UNDER SEAL

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The FTC seeks a preliminary injunction to enjoin Evonik's proposed acquisition of PeroxyChem ("the Acquisition"), which would combine two of only five hydrogen peroxide producers in North America. Hydrogen peroxide ("H2O2") is a commodity chemical used in a range of industrial applications, including in the pulp and paper, textile, mining, energy, food and beverage, and consumer product industries. If allowed to proceed, the Acquisition would create a firm accounting for nearly [redacted] of H2O2 sales (by revenue or by volume) in the Southern and Central United States, and nearly [redacted] of sales in the Pacific Northwest. It would eliminate direct head-to-head competition between Evonik and PeroxyChem, and increase the risk of coordination among the few remaining firms in markets with an extensive history of anticompetitive behavior, including guilty pleas for criminal price fixing, private price-fixing litigation, and substantial fines and settlements.

Under case law in this Circuit, the Acquisition would increase market concentration well beyond what is required to create "a presumption that the transaction will substantially lessen competition." *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1083 (D.D.C. 1997) ("*Staples I*"); *see also FTC v. Staples, Inc.*, 190 F. Supp. 3d. 100, 115 (D.D.C. 2016) ("*Staples II*"). This presumption is buttressed by substantial evidence that the Acquisition threatens to harm competition, based on current competitive conditions and industry history. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) ("an acquisition which reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful *in the absence of special circumstances*") (emphasis added).

There are no special circumstances to justify clearing this Acquisition, and Defendants will not be able to rebut the presumption of illegality. Defendants' proposed divestiture – selling the smallest H2O2 plant in the Pacific Northwest – does nothing to solve

competitive concerns in the Southern and Central United States, and serious questions remain as to whether it even restores competition in the Pacific Northwest. Solvay, the second-largest H2O2 producer in the market, modeled several scenarios related to the Acquisition (including multiple Pacific Northwest divestiture scenarios) and [redacted][1] Likewise, neither current competition, entry and expansion, nor efficiencies will offset the likely anticompetitive effects of the Acquisition.

The FTC has initiated an administrative proceeding, set to begin on January 22, 2020, to determine on the merits whether the Acquisition violates the antitrust laws. The FTC's request for a preliminary injunction here seeks only to maintain the status quo and prevent Defendants from closing the Acquisition before the Commission can render a decision in the administrative proceeding. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001). In this Circuit, a transaction must be enjoined to allow the FTC to conduct an administrative inquiry into the merits where the FTC "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC" in the administrative proceeding. *Id.* at 714-15. Given the strong presumption of illegality, the supporting evidence of likely anticompetitive effects, and the lack of offsetting procompetitive justifications, the Court should enjoin this illegal Acquisition pending that full administrative proceeding on the merits.

BACKGROUND

Evonik – previously operating as Degussa – is based in Germany, employs over 32,000 people,[2] and produces and sells H2O2 through its Active Oxygens business line, which operates

[1] PX3037-031-43.
[2] PX7100 ¶ 26.

13 production plants globally.[3] In 2017, Evonik's global revenues exceeded $14.5 billion.[4] Evonik operates three H2O2 plants in North America, located in Mobile, Alabama; Gibbons, Alberta; and Maitland, Ontario.[5] PeroxyChem – acquired by private equity firm One Equity Partners when it was spun out of FMC Corporation in 2014 – is headquartered in Pennsylvania.[6] It employs approximately 565 people[7] and operates two H2O2 plants in North America, located in Bayport, Texas and Prince George, British Columbia.[8] PeroxyChem had global revenues of [redacted] million in 2017.[9]

In addition to the five plants controlled by Defendants, three firms operate another five H2O2 plants in North America: Solvay (two plants), Arkema (two plants), and Nouryon (one plant). Figure A identifies H2O2 plant locations in North America:[10]

FIGURE A

[redacted]

[3] PX9005-001.
[4] PX9030.
[5] PX7100 ¶ 27.
[6] PX2335-001; PX7100 ¶ 29.
[7] PX7100 ¶ 29.
[8] PX7100 ¶ 30.
[9] PX0015-005-07.
[10] PX2058-057.

[redacted]. Defendants compete for customers located in the Southern and Central United States and in the Pacific Northwest.[11]

H2O2 is a commodity chemical used in a variety of industrial applications.[12] The pulp and paper industry accounts for the majority of H2O2 consumption in North America.[13] Additional end use applications include the oil and gas, environmental, chemical synthesis, mining, food and beverage, and home and personal care segments.[14] While producers market different "grades" of H2O2, producers are largely all able to make and sell the same grades for the same sets of end uses.[15]

As one would expect of a commodity, the H2O2 production process is largely the same for every producer, and involves moving a working solution through three basic steps: 1) hydrogenation, 2) oxidation, and 3) extraction, which results in "crude" H2O2.[16] This crude H2O2 is then purified (through distillation or filtration), brought to a specific concentration level, and stabilized with chemical additives.[17] The precise combination of purity level, concentration, and stabilization package may vary depending on the grade of H2O2, but within each grade the

[11] Defendants' Answer proposes divesting PeroxyChem's plant in Prince George, British Columbia to a new entrant. Dkt. Nos. 22, 23. Based on this proposal, the Acquisition (as described by Defendants) would not immediately reduce the number of competitors with plants located in the Pacific Northwest. However, serious questions remain as to whether this proposed divestiture is sufficient to address competitive concerns in the Pacific Northwest.

[12] *See, e.g.*, PX2364-003; PX1012-001; [redacted].

[13] PX9001-017; *see also* [redacted].

[14] PX1234-10.

[15] [redacted]; PX6004 at 56-57; PX6009 at 72-73; PX6010 at 64-65; [redacted]; *see also* PX6018 at 82-83.

[16] PX6010 at 42-43; PX6004 at 54-55; *see also* Dkt. Nos. 22, 23.

[17] *See, e.g.*, PX6010 at 44, 46-47; PX6002 at 31-32; PX 6004 at 90-91; PX6018 at 31-32.

H2O2 product sold by each producer is very similar.[18]

"Standard grade" H2O2, which has the highest level of impurities, is generally sold to pulp and paper customers, as well as customers in oil and gas, mining, and environmental end uses.[19] The substantial majority of H2O2 is sold as "standard grade," in part due to market demand, but also because the production process *requires* firms to produce a significant amount of "standard grade" due to limits on the amount of more highly purified H2O2 that can be produced from a given volume of crude H2O2.[20] Producers often refer to higher purity H2O2 as "specialty" grades, and these products may be finished with different chemical stabilizers depending on the specific end use.[21] All five H2O2 producers in North American markets can produce and sell a range of standard and specialty grades of H2O2, with the exception of "electronics-grade" H2O2.[22]

Electronics-grade H2O2 is a very highly purified product used by semiconductor manufacturers like Global Foundries, Intel, and Samsung to etch and clean silicon semiconductor wafers.[23] The purity levels required for this application – in order to avoid damaging the manufacturing equipment or the finished chips themselves – are far beyond even the high purity specialty grades used in food or personal care applications, requiring producers to reach impurity

---

[18] [redacted]; *see also* PX6009 at 52; PX6002 at 49; PX6010 at 43.

[19] *See, e.g.*, PX6004 at 63, 146-47; PX6026 at 8-9; PX6005 at 34.

[20] PeroxyChem's process requires that at least [redacted] of its total output consist of standard grade. *See* PX6004 at 96-97; PX6018 at 27-28. Evonik's process requires that at least [redacted] of its total output consist of standard grade. *See* PX6012 at 37-38, 91.

[21] PX6000 at 17-18; PX6002 at 41.

[22] PX1469-18-22; PX6008 at 19; PX6013 at 58. The most significant exception to this is that [redacted]. *See* [redacted].

[23] PX6001 at 21; [redacted]

levels measured in the parts per billion or even parts per trillion range.[24] Electronics-grade H2O2 requires specialized equipment and proprietary technology possessed by only a limited set of firms—today, [redacted] are the primary suppliers of electronics-grade H2O2 to semiconductor manufacturers.[25] Evonik, [redacted], and [redacted] all lack the capability to produce electronics-grade H2O2.[26] Evonik has considered getting into this business, but decided against it based on [redacted] which would be [redacted] to overcome.[27]

Given its commodity nature, producers of H2O2 (excluding electronics-grade H2O2) compete mainly based on price and reliability of supply.[28] Customers typically pay a delivered price, based on the location of their facility, which they negotiate individually with producers.[29] H2O2 is shipped diluted with significant quantities of water.[30] Thus, transportation costs can be a significant component of price, affecting how far H2O2 can be shipped economically.[31] H2O2 plants experience both planned and unplanned outages, and customers value a supplier that is able to guarantee consistent service in order to minimize disruptions to the customer's operations.[32] Supply locations then, are important both with respect to price (given the importance of transportation cost) and security of supply (with additional locations providing additional supply options).

---

[24] [redacted].
[25] PX9001-028; PX2058-014; [redacted]; [redacted].
[26] [redacted]; PX6010 at 65-67. Evonik and [redacted] produce "pre-electronics" H2O2 sold to firms like [redacted], who further process it into electronics-grade H2O2. [redacted]. [redacted]. *See id.*; [redacted].
[27] PX6010 at 65-66.
[28] [redacted]; [redacted]; [redacted]; [redacted].
[29] *See, e.g.*, [redacted]; [redacted]; *see also* Dkt. Nos. 22, 23.
[30] *See, e.g.*, [redacted]; [redacted].
[31] PX6004 at 103.
[32] *See, e.g.*, [redacted]; [redacted]; [redacted].

Perhaps not surprisingly, given the commodity nature of the product and the highly concentrated market with few suppliers, the H2O2 industry has an extensive history of price-fixing, involving guilty pleas, litigation, and substantial fines and settlements. In 2006, Evonik's predecessor, Degussa, entered into an antitrust leniency agreement with the U.S. Department of Justice ("DOJ"), admitting its role in an H2O2 price-fixing conspiracy in North America.[33] Two other H2O2 producers, Solvay and AkzoNobel (Nouryon's predecessor), were charged with "conspiring with their competitors to fix the price of hydrogen peroxide sold in the United States,"[34] and agreed to pay criminal fines totaling more than $72 million in the United States.[35]

Following DOJ's criminal price fixing investigation, H2O2 customers filed class action suits against all producers of H2O2 in the United States, including Degussa and FMC (PeroxyChem's predecessor), alleging antitrust harm from the price fixing conspiracy.[36] Degussa settled for $21 million, and FMC settled for $10 million.[37] While FMC denied that it engaged in price fixing, its economic expert in the private litigation described H2O2 market dynamics in significant detail in his expert report, stating that FMC acted as a [redacted] by [redacted] and being [redacted][38]

Although certain behaviors—including the swap agreements and exchanges of price

[33] *See generally* PX1293; PX1294; *see also* Dkt. No. 22.
[34] PX9031-001.
[35] *See* PX9031-001. The European Commission ("EC") has likewise found price fixing behavior in the European H2O2 market, in 1984 and 2006, with participants in the price fixing conspiracy (including Degussa and FMC) paying combined fines of over €388 million. PX9032-001. The Canadian Competition Bureau also fined Solvay $2.5 million after pleading guilty to criminal charges for fixing the price of hydrogen peroxide. PX9035-001.
[36] *See In re Hydrogen Peroxide Antitrust Litig.*, 401 F. Supp. 2d 451, 454-55 (E.D. Pa. 2005).
[37] PX9036-001.
[38] PX2331-022, 027.

increase announcements that the conspirators used to effectuate their illegal agreement—are currently less frequent than during the period of active price-fixing, the fundamental characteristics of H2O2 markets in North America remain largely the same. The production process is the same, the production plants are essentially the same, the producers are the same, and H2O2 is still sold to the same types of customers in the same end uses.[39] And critically for our purposes, the major H2O2 producers all [redacted][40] One thing has changed, however—there are fewer producers today than there were in the early 2000s, after Kemira exited the market in 2011 by selling its Maitland plant to Evonik.[41]

ARGUMENT

The FTC investigated, and found reason to believe that this Acquisition[42] violates Section 7 of the Clayton Act and Section 5 of the FTC Act because "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18; *see also* 15 U.S.C. § 45. The FTC issued an administrative complaint, and filed a complaint in this Court seeking a preliminary injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The FTC seeks a preliminary injunction to preserve the status quo pending the full administrative proceeding on the merits, which is scheduled to begin January 22, 2020. The Court has entered a

[39] PX1313-020; PX1292-003; PX2330-007; PX9001-018. In its 2006 press release announcing the Solvay and Akzo guilty pleas and fines, DOJ described H2O2 as a chemical with "multiple industrial uses, including applications in the electronics, energy production, mining, cosmetics, food processing, textiles and pulp and paper manufacturing industries." PX9031-001.

[40] *See, e.g.*, PX1073-001 (Evonik [redacted]); PX3037-040 (Solvay concluded that the Acquisition [redacted]"); PX3000-001 (Arkema believes the Acquisition [redacted]); PX3020-001 (Arkema believes the Acquisition [redacted]).

[41] PX9033-001; *see also* PX1277.

[42] On November 7, 2018, Evonik agreed to acquire PeroxyChem for approximately $625 million. PX9034.

stipulated temporary restraining order that prohibits Defendants from merging pending the outcome of the FTC's motion for a preliminary injunction. Dkt. No. 9.

When pursuing a preliminary injunction under Section 13(b), the FTC is "not held to the high thresholds applicable where private parties seek interim restraining orders." *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 197 (D.D.C. 2018) (quoting *Heinz*, 246 F.3d at 714). Instead Section 13(b) creates a "unique public interest standard," under which an injunction should issue whenever the relief "would be in the public interest—as determined by a weighing of the equities and a consideration of the [FTC's] likelihood of success on the merits." *Heinz*, 246 F.3d at 714. The FTC's "likelihood of success on the merits" is evaluated by "measur[ing] the probability that, *after an administrative hearing on the merits*, the Commission will succeed in proving that the effect of the [proposed transaction] may be substantially to lessen competition in violation of the Clayton Act." *Tronox*, 332 F. Supp. 3d at 197 (quoting *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 22 (D.D.C. 2015) (emphasis added).[43] If the FTC demonstrates a likelihood that it will prevail after an administrative hearing on the merits, an injunction should issue, as the "public interest in effective enforcement of the antitrust laws is of primary importance," and "a showing of likely success on the merits will presumptively warrant an injunction." *Id.* at 198 (quoting *FTC v. Arch Coal*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004).

As explained below, the FTC has a high likelihood of prevailing at the administrative hearing, as the Acquisition will increase concentration to the point that the FTC benefits from a well-established "presumption" of illegality. *Tronox*, 332 F. Supp. 3d at 197 (citing *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990)). Moreover, "an acquisition which

[43] *See also Heinz*, 246 F.3d at 714 (to obtain a preliminary injunction it is not necessary for the FTC to establish that "the proposed merger would in fact violate section 7 of the Clayton Act."); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67 (D.D.C. 2009).

reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful *in the absence of special circumstances*." *Elders Grain*, 868 F.2d at 906 (emphasis added). There are no special circumstances that would justify clearing this Acquisition. To the contrary, the presumption of illegality here is buttressed by substantial evidence that the Acquisition threatens to increase the likelihood of coordinated interaction among the few remaining H2O2 producers. As explained by the Court of Appeals, "[t]acit coordination 'is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws. *It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur*.'" *Heinz*, 246 F.3d at 725 (quoting 4 Phillip E. Areeda, at. al., Antitrust Law ¶ 901b2, at 9 (rev. ed. 1998) (emphasis added)). Moreover, the Acquisition will eliminate direct competition between Evonik and PeroxyChem, which benefits customers today.

I. The FTC Is Likely to Succeed on the Merits at the Administrative Hearing

At the administrative hearing, the FTC will demonstrate that the Acquisition violates Section 7 of the Clayton Act, which bars mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or . . . activity affecting commerce in any section of the country." 15 U.S.C. § 18. "Congress used the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." *Heinz*, 246 F.3d at 713 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). As a result, "certainty, even a high probability, need not be shown." *Elders Grain*, 868 F.2d at 906. Instead, an acquisition violates Section 7 if it "create[s] an appreciable danger of [anticompetitive consequences] in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for." *Heinz*, 246 F.3d

at 719 (quotation omitted). Where uncertainty exists as to the likelihood of harm, "doubts are to be resolved against the transaction." *Elders Grain*, 868 F.2d at 906; *see also Brown Shoe*, 370 U.S. at 323. A merger's "probable" effects on competition are at issue because Section 7 of the Clayton Act is intended to arrest anticompetitive mergers "in their 'incipiency.'" *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963) (quoting *Brown Shoe*, 370 U.S. at 317, 322).

The FTC bears the initial burden of showing the Acquisition would result in "undue concentration in the market for a particular product in a particular geographic area." *FTC v. Wilh. Wilhelmsen ASA*, 341 F. Supp. 3d 27, 44 (D.D.C. 2018) (quoting *Baker Hughes*, 908 F. 2d at 982). "Such a showing entitles the FTC to a presumption that the merger will substantially lessen competition." *Id.*; *see also Baker Hughes*, 908 F.2d at 982 (citing *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 120-22 (1975)); *Staples I*, 970 F. Supp. at 1083; *Heinz*, 246 F.3d at 715; *Staples II*, 190 F. Supp. 3d at 115. Here, the Acquisition would result in the Defendants controlling nearly [redacted] of H2O2 sales by revenue and volume in the Southern and Central United States,[44] with more than [redacted] of the H2O2 sales in the hands of three suppliers—Evonik, [redacted].[45] The market in the Pacific Northwest is even more highly concentrated. Absent Defendants' proposed divestiture, the Acquisition would combine two of only three significant competitors and give Defendants control of nearly [redacted] of H2O2 sales.[46] These concentration levels, and increases in concentration, are well above the threshold needed to establish a presumption that the Acquisition is unlawful. *See Staples II*, 190 F. Supp. 3d at 131.

Once the FTC establishes a *prima facie* violation of Section 7, the burden shifts to

[44] PX7100 ¶ 111, Ex. 2-1 through 2-5.
[45] PX7100 Ex. 2-1 through 2-5.
[46] PX7100 ¶ 111, Ex. 2-1 through 2-5.

Defendants to rebut the presumption by "produc[ing] evidence that 'show[s] that [] market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Heinz*, 246 F.3d at 715 (quoting *Citizens & Southern Nat'l Bank*, 422 U.S. at 120). Defendants bear a particularly heavy burden of production where, as here, they confront a strong *prima facie* case. *See Wilhelmsen*, 341 F. Supp. 3d at 66 ("Given that the FTC has made out a strong prima facie case, Defendants must make out a correspondingly strong rebuttal showing."); *Staples II*, 190 F. Supp. 3d at 115 ("'The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully.'") (quoting *Baker Hughes*, 902 F.2d at 991); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 72 (D.D.C. 2011).[47]

Defendants will be unable to meet this burden. The divestiture Defendants have proposed in the Pacific Northwest does nothing to address the Acquisition's likely anticompetitive effects in the Southern and Central United States, and serious questions remain as to whether it even restores competition in the Pacific Northwest. Defendants will not be able to show that current competition, entry and expansion, or efficiencies will offset the likely anticompetitive effects of the Acquisition. Rather, the FTC will present evidence that the combination of Evonik and PeroxyChem threatens to harm competition, buttressing the presumption of illegality and the FTC's likelihood of success on the merits. *See Sysco*, 113 F. Supp. 3d at 61; *Staples II*, 190 F. Supp. 3d at 131.

A. The Proposed Acquisition Is Presumptively Unlawful

Courts typically assess whether a merger violates Section 7 by determining: (1) the "line of commerce," or relevant product market; (2) the "section of the country," or relevant geographic market; and (3) the merger's probable effect on competition in the relevant product

[47] Even under the burden-shifting framework, the burden of persuasion remains at all times with the FTC. *Staples II*, 190 F. Supp. 3d at 116.

and geographic markets. *See United States v. Marine Bancorp.*, 418 U.S. 602, 618-23 (1974); *Staples I*, 970 F. Supp. at 1072. Courts often rely on the principles expressed in the FTC and DOJ Horizontal Merger Guidelines ("Merger Guidelines") to define the market.[48] *See, e.g.*, *Heinz*, 246 F.3d at 716 n.9, 718; *CCC Holdings*, 605 F. Supp. 2d at 37. The purpose of market definition under the *Merger Guidelines* is to "specify the line of commerce and section of the country in which the competitive concern arises" and "identify market participants and measure market shares and market concentrations." *Merger Guidelines* § 4. Here, the product and geographic markets in which the Acquisition would substantially increase concentration and lessen competition in the market are the markets for the sale of H2O2 (excluding electronics-grade H2O2) in the Southern and Central United States and the Pacific Northwest.

1. The Relevant Product Market is the Sale of H2O2, Excluding Electronics-Grade H2O2

The Supreme Court in *Brown Shoe* established that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. Thus, "courts look at 'whether two products can be used for the same purpose and, if so, whether and to what extent purchasers are willing to one substitute for the other.'" *H&R Block*, 833 F. Supp. 2d at 51 (internal citation omitted). In addition to demand side factors, the Court in *Brown Shoe* also noted that substitutability on the supply side – the ability of production facilities to adjust product mix – may also be an important factor in defining the relevant market. *Brown Shoe*, 370 U.S. at 325 n.42; *see also FTC v. Illinois Cereal Mills, Inc.*, 691 F. Supp 1131, 1141 (N.D. Ill.

[48] "The Merger Guidelines are not binding, but the Court of Appeals and other courts have looked to them for guidance in previous merger cases." *Sysco*, 113 F. Supp. 3d at 38 (internal citation omitted).

1988). In determining the relevant product market, courts look to ordinary course business documents, testimony from market participants, and economic analysis. *H&R Block*, 833 F. Supp. 2d at 52.

Here, the appropriate relevant product market within which to evaluate the competitive effects of the Acquisition is the sale of H2O2 (excluding electronics grade H2O2). H2O2 is a commodity chemical serving an important function in a range of applications, where its effectiveness and environmental benefits (it breaks down into water and oxygen) make it difficult to replace.[49] Thus, the competition that matters here is competition among H2O2 producers. *See Illinois Cereal Mills*, 691 F. Supp. 1131 at 1141 ("the overriding principle [of market definition] is to identify meaningful competition where it actually exists"). While Defendants may argue that markets should be defined around individual grades of H2O2 or end uses, this is flatly inconsistent with prior statements. Evonik explicitly told the European Commission ("EC") during its investigation of the Acquisition that "[redacted]"[50] Moreover, it doesn't matter whether narrower sub-markets could be defined within the H2O2 market, because the merger would be presumptively illegal in most, if not all, of such narrower markets. Because H2O2 producers can and do alter the mix of H2O2 grades they produce, the exact same group of H2O2 producers included in the FTC's relevant market would be present in any meaningful narrower market. Consistent testimony from customers, competitors, and Defendants themselves, buttressed by ordinary course documents and economic analysis conducted by Dr. Dov Rothman, Plaintiff's economic expert, all supports H2O2 as the appropriate relevant market.

[49] PX9001-007; [redacted].
[50] PX1201-012.

Customers consistently state that they have no viable alternatives to H2O2 for use in their products or processes.[51] In the paper and pulp industry, the largest end use for H2O2, consuming more than half of all H2O2 sold in North America, H2O2 is used to bleach pulp and deink recycled paper.[52] Pulp and paper mill machinery and processes are designed around the use of H2O2; other chemicals are incompatible with those setups; and changing the machinery and processes would be difficult and expensive.[53] Customers in other applications tell similar stories. Whether H2O2 is being used in toothpaste, laundry detergent, or to produce epoxodized soybean oil, customers would not replace H2O2 with alternative chemicals in response to a small but significant price increase.[54] In addition to the application-specific benefits of H2O2, customers also view it as an environmentally friendly alternative to other chemistries because it decomposes into water and oxygen.[55] Testimony from employees of the Defendants and other H2O2 producers are consistent with these customer views, acknowledging that other chemicals are not viable substitutes.[56]

Evonik's documents confirm producers' ability to engage in supply-side substitution among H2O2 grades. Most tellingly, in a submission to the EC in connection with that antitrust enforcer's review of the Acquisition, Evonik stated that H2O2 was the correct market to consider due to "[redacted]"[57] And while PeroxyChem claims to be differentiated within the "core peroxide" business that consumes

[51] *See, e.g.*, [redacted].
[52] PX9001-017.
[53] [redacted].
[54] *See, e.g.*, [redacted].
[55] *See, e.g.*, PX9001-007; [redacted].
[56] *See, e.g.*, PX6007 at 54; PX6002 at 190; [redacted].
[57] PX1201-012; *see also*, PX6009 at 51-54.

the vast majority of H2O2 sold in the United States, senior executives acknowledged "[redacted]"[58] Other ordinary course documents tell the same story, tracking H2O2 competitors, H2O2 capacities and shares, H2O2 customers, etc.[59] Competing firms confirm that all H2O2 producers do or can serve all of the various end uses and produce largely the same set of grades.[60] Distributors of H2O2 likewise acknowledge that H2O2 producers make the same grades, even the grades that are "a little bit more specialized in nature."[61]

Further, both Defendants acknowledge that it is relatively easy to alter the mix of H2O2 grades produced in a facility, depending on customer demand.[62] While the nature of the production process requires all firms to produce a substantial quantity of standard grade H2O2,[63] all the producers in North America are also able to make a range of specialty grade products. Ordinary course documents show that Evonik, PeroxyChem, [redacted], and [redacted] are all present in every one of the end use segments where H2O2 is used.[64] Even [redacted], is present in the vast majority of those end use segments.[65]

The sale of "electronics-grade" H2O2 is not in the relevant market. Semiconductor manufacturers use electronics-grade H2O2 as a cleaning and etching agent for semiconductor wafers, and require extremely strict purity specifications, in the parts per billion or even trillion

---

[58] PX2364-002.
[59] PX1119-007-08, 017-21; *see also* PX6009 at 91-93.
[60] *See, e.g.*, [redacted].
[61] [redacted].
[62] PX6018 at 82-83; PX6004 at 64-65; *see also* PX6010 at 63-64.
[63] PX6018 at 82-83; PX6008 at 61; PX6010 at 54-55; PX2369-002.
[64] PX11119-056 (pulp and paper); PX1243-010 (environmental); PX2361-064 (environmental); PX1435-032 (aseptic); PX2361-048 (aseptic); *see also* PX3026-025.
[65] [redacted].

range.[66] Compared to the production of "regular" H2O2, electronics-grade requires different and additional purification capabilities, proprietary technology, and specialized equipment.[67] The only H2O2 producers able to make an electronics-grade H2O2 in North America are PeroxyChem and [redacted].[68] Other suppliers of electronics-grade utilize specialized facilities and technology, such as [redacted], which buys a "pre-electronics" grade of H2O2 from [redacted] and further processes it into electronics-grade product.[69] Further illustrating the fact that electronic-grade is distinct from other types of H2O2, Evonik has considered entering electronics-grade H2O2, but declined when it determined that such entry [redacted][70]

In addition to the supply and demand factors outlined in *Brown Shoe* and later cases, and discussed above, courts frequently rely on the "hypothetical monopolist test" set forth in the Merger Guidelines to define a relevant market. *Merger Guidelines* §§ 4.1.1-4.1.3; *H&R Block*, 833 F. Supp. 2d at 51-52; *Staples II*, 190 F. Supp. 3d at 121-22; *Wilhelmsen*, 341 F. Supp. 3d at 47. The test "queries whether a hypothetical monopolist who has control over the products in an alleged market could profitably raise prices on those products," *i.e.*, impose a small but significant and non-transitory increase in price ("SSNIP"). *Staples II*, 190 F. Supp. 3d at 121-22; *see also Merger Guidelines* §§ 4.1.1-4.1.3. If so, the products may comprise a relevant product market. *H&R Block*, 833 F. Supp. 2d at 51-52; *Staples II*, 190 F. Supp. 3d at 121-22.

Plaintiff's expert Dr. Dov Rothman uses this framework to identify a relevant antitrust market. After (i) reviewing industry facts, including ordinary-course documents and testimony

---

[66] [redacted].
[67] *See, e.g.*, PX6010 at 65-66; PX6002 at 34-35, 119-120; [redacted].
[68] *See* [redacted]; [redacted]; PX9001-028; PX2058-014.
[69] [redacted]; [redacted].
[70] PX6010 at 65-66.

from various market participants, (ii) analyzing multiple data sources from both merging parties and other suppliers, and (iii) implementing several versions of the hypothetical monopolist test, Dr. Rothman concluded that a hypothetical monopolist supplier of H2O2 (excluding electronics-grade) could profitably impose a SSNIP, thus satisfying the hypothetical monopolist test.[71]

2. The Southern and Central United States and the Pacific Northwest Each Constitute a Relevant Geographic Market

Under the Clayton Act, a relevant geographic market is the area to which customers "can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 49 (D.D.C. 1998) (citation omitted). A relevant geographic market must "correspond to the commercial realities of the industry" as determined by a "pragmatic, factual approach" to assessing the industry. *Brown Shoe*, 370 U.S. at 336. Where, as here, suppliers set prices based on customer locations, and customers cannot avoid targeted price increases through arbitrage, the relevant geographic market may be defined around the locations of customers. *See In re Polypore Int'l Inc.*, 150 FTC 586 at *16 (2010), *aff'd, Polypore Int'l v. FTC*, 686 F.3d 1208 (11th Cir. 2012) (applying *Merger Guidelines* § 4.2.2). This comports with the intuitively obvious proposition that where transportation costs for a product are high, a firm could profitably impose a small but significant price increase on customers in a region for which the firm is a monopoly supplier of the product, even if the firm sells the same product in other regions in which the firm faces competition. *See Merger Guidelines* § 4.2.2 (where "customers cannot avoid targeted price increases through arbitrage, suppliers may be able to exercise market power over customers located in a particular geographic region, even if a price increase to customers located in other geographic regions would be unprofitable.").

[71] PX7100 ¶¶ 62-78.

Here, it is appropriate to define relevant geographic markets around customer location.[72] Suppliers ship H2O2 diluted with water, which makes shipping expensive relative to the value of the product.[73] Suppliers typically quote delivered prices, based on customer location.[74] Arbitrage is not possible for most customers due to "significant logistics costs for interregional shipments."[75] Moreover, ordinary course documents and testimony from Defendants' executives show that suppliers view the North American H2O2 markets as regional.[76] For example, PeroxyChem's CEO testified that there are "[redacted]"[77] Further, in advocacy to the FTC, Defendants argued, "[redacted]"[78] Defendants compete to sell H2O2 to customers in at least two regional markets in North America relevant to this Acquisition: the Southern and Central United States; and the Pacific Northwest.[79]

a. The "Southern and Central United States" Constitutes One Relevant Geographic Market

Ordinary course documents and expert analysis demonstrate that the proposed Acquisition's probable effect on competition should be assessed within a geographic market of the "Southern and Central United States," which consists of Alabama, Arkansas, Arizona, California, Colorado, the District of Columbia, Delaware, Florida, Georgia, Illinois, Indiana,

---

[72] PX7100 ¶¶ 82-86.
[73] *See, e.g.*, [redacted].
[74] *See, e.g.*, [redacted].
[75] PX1124-008; *see also* [redacted].
[76] *See, e.g.*, PX2058-057; PX6002 at 97-98; *see also* [redacted].
[77] PX6002 at 96-97; *see also* [redacted].
[78] PX0006-001.
[79] While Dr. Rothman found that grouping customers in the Southern and Central United States together is appropriate because they face largely the same competitive conditions, how customers are grouped is not important via-à-vis concentration levels. PX7100 ¶ 113.

Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Mississippi, North Carolina, North Dakota, Nebraska, New Mexico, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and West Virginia.

Dr. Rothman concludes that grouping customers in these states is appropriate because customers in these states face largely the same competitive conditions.[80] As the market is defined around customer location, not around the location of H2O2 plants, current sales into the relevant market are the best indicator of competitive significance. Customers in the Southern and Central United States purchase almost exclusively from one of five suppliers, and receive approximately [redacted] of their shipments from the suppliers' plants in the southern United States.[81]

Dr. Rothman's analysis is confirmed by Defendants' ordinary course documents and testimony,[82] which confirm that the majority of customers in this region are served from plants in the southern United States,[83] and that competitive conditions in this region differ from other areas of North America.[84]

b. The "Pacific Northwest" Constitutes One Relevant Geographic Market

Similarly, ordinary course documents and expert analysis demonstrate that the proposed Acquisition's probable effect on competition should be assessed within a geographic market of the "Pacific Northwest," which consists of Washington, Oregon, Montana, Idaho, and Wyoming in the United States, along with British Columbia, Alberta, Manitoba, and Saskatchewan in Canada. As in the Southern and Central United States, customers in this region receive

[80] PX7100 ¶ 94.
[81] PX7100 ¶ 95, Ex. 1-1 and 1-2.
[82] *See, e.g.*, PX6005 at 76-77.
[83] PX1469-018-22.
[84] *See, e.g.*, PX2058-057; PX6002 at 97-98, 111.

approximately [redacted] of their shipments from suppliers' plants in the Pacific Northwest.[85]

Likewise, ordinary course documents confirm that competitive conditions in the Pacific Northwest justify grouping customers in this region as a distinct geographic market.[86] A PeroxyChem strategic presentation indicates that in this region, [redacted].[87] Indeed, a senior sales and marketing executive at PeroxyChem indicated that they [redacted].[88] Customers confirm that the competitive conditions in the Pacific Northwest are distinct.[89] Indeed, the parties appear to concede that the Pacific Northwest constitutes a relevant geographic market, arguing that the divestiture of PeroxyChem's Prince George facility will address any competitive concerns within that region. *See infra* Section I.B.3.

3. The Proposed Acquisition Is Presumptively Illegal Because It Would Create Extraordinarily High Market Shares and Concentration in a Relevant Market

Acquisitions that significantly increase economic concentration are presumptively unlawful. *Phila. Nat'l Bank*, 374 U.S. at 363. Courts assess an acquisition's presumptive illegality by considering the Defendants' shares of the relevant market and employing a simple statistical measure of market concentration called the Herfindahl-Hirshman Index ("HHI"). *Wilhelmsen*, 341 F. Supp. 3d at 58-59; *Sysco*, 113 F. Supp. 3d at 52-53*; Heinz*, 246 F.3d at 716; *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 166-67 (D.D.C. 2000). HHIs are calculated by summing the squares of each market participant's individual market share both pre- and post-

[85] PX7100 ¶ 95, Ex. 1-1 and 1-2.
[86] PX1003-002; PX1012-001.
[87] PX2058-057; *see also* PX6002 at 97-98, 111.
[88] PX2113-001.
[89] *See, e.g.*, [redacted].

acquisition.[90] *See Sysco*, 113 F. Supp. 3d at 52-53*; Heinz*, 246 F.3d at 716; *Swedish Match*, 131 F. Supp. 2d at 166-67. If an acquisition increases the HHI within a relevant market by more than 200 points and results in a post-acquisition HHI exceeding 2,500, it is presumptively anticompetitive. *Merger Guidelines* § 5.3;[91] *Wilhelmsen*, 341 F. Supp. 3d at 59; *Sysco*, 113 F. Supp. 3d at 52-53.

In his report, Dr. Rothman uses sales data collected from Defendants and other H2O2 producers to estimate the approximate size of the market for the sale of H2O2 to customers in the Southern and Central United States and the Pacific Northwest. Using these data, Evonik controls at least [redacted] of sales by revenue and volume, and PeroxyChem controls at least [redacted] in the Southern and Central United States.[92] The Acquisition would result in Evonik controlling more than [redacted] of sales by revenue and volume with an HHI in excess of [redacted] and a post-Acquisition increase of at least [redacted] in the Southern and Central United States.[93] In the Pacific Northwest, these shares and concentration levels are even higher, with Evonik controlling at least [redacted] of sales by revenue and volume, and PeroxyChem controlling at least [redacted].[94] Post-Acquisition, Evonik would control more than [redacted] of sales by revenue and volume in the Pacific Northwest, with an HHI in excess of [redacted] and a post-Acquisition increase of at least [redacted].[95]

These figures blow past the thresholds that trigger a presumption of illegality—the post-Acquisition increase in concentration alone is more than *five times* the point at which the Merger

[90] PX7100 ¶ 106, n.119.
[91] The Merger Guidelines state: "Mergers resulting in highly concentrated markets [HHI above 2500] that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power." *Merger Guidelines* § 5.3.
[92] PX7100 ¶ 111, Ex. 2-1.
[93] *Id.*
[94] *Id.*
[95] *Id.*

Guidelines and courts presumptively view a combination as one that is "likely to enhance market power." *Merger Guidelines* § 5.3; *Sysco*, 113 F. Supp. 3d at 52. In fact, the market share and concentration levels that would result from the Acquisition are in line with the levels in other proposed combinations that courts in this Circuit have enjoined.

Case	Combined Share	Post-Merger HHI	Holding
Cardinal Health (D.D.C. 1998)[96]	37-40%	3,079	Enjoined
Swedish Match (D.D.C. 2000)[97]	60%	4,733	Enjoined
Heinz (D.C. Cir. 2001)[98]	32.8%	5,285	Enjoined
H&R Block (D.D.C. 2011)[99]	28.4%	4,691	Enjoined
Sysco (D.D.C. 2015)[100]	75%	5,836	Enjoined
Staples II (D.D.C. 2016)[101]	79%	6,265	Enjoined
Anthem (D.C. Cir. 2017)[102]	47-54%	3,000-3,663	Enjoined
Wilhelmsen (D.D.C. 2018)[103]	84.7%	7,214	Enjoined
Tronox (D.D.C. 2018)[104]	38%	>3000	Enjoined
***Evonik* (D.D.C. 2019)**	[redacted]	[redacted]	**TBD**

Moreover, the presumption of illegality does not depend on the precise metes and bounds of the markets the FTC has alleged. Dr. Rothman examined alternative scenarios, examining concentration within standard-grade-only-H2O2, and concentration within a geographic region comprising of North America.[105] In every scenario, the concentration levels and increases in concentration create a presumption that the Acquisition will result in anticompetitive effects.

4. The Documented History of Coordination in the H2O2 Industry Strengthens the Presumption

The well-documented history of price fixing in the H2O2 industry strengthens the

[96] *Cardinal Health*, 12 F. Supp. 2d at 53, 68.
[97] *Swedish Match*, 131 F. Supp. 2d at 151, 167, 173.
[98] *Heinz*, 246 F.3d at 712, 716, 727.
[99] *H&R Block*, 833 F. Supp. 2d at 72, 92.
[100] *Sysco*, 113 F. Supp. 3d at 53-61, 88.
[101] *Staples,* 190 F. Supp. 3d at 128, 131, 138.
[102] *United States v. Anthem*, 855 F.3d 345, 351, 372 (D.C. Cir. 2017).
[103] *Wilhelmsen*, 341 F. Supp. 3d at 59-60, 74.
[104] *Tronox*, 332 F. Supp. 3d at 195, 207, 219-220.
[105] PX7100 ¶¶ 112-113, Ex. 2-2 through 2-5.

presumption resulting from market concentration statistics, and emphasizes the strong risk of anticompetitive effects here. Indeed, as the Seventh Circuit observed: "The theory of competition and monopoly that has been used to give concrete meaning to section 7 teaches that an acquisition which reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful *in the absence of special circumstances*." *Elders Grain*, 868 F.2d at 906 (emphasis added). No special circumstances are present here.

Under the *Merger Guidelines*, a market is presumed vulnerable to coordination where "firms representing a substantial share in the relevant market appear to have previously engaged in express collusion affecting the relevant market, unless competitive conditions in the market have changed significantly." *Merger Guidelines* § 7.2. The extensive history of price-fixing among H2O2 producers here is well-documented, and Defendants cannot point to any change that suggests the market is no longer vulnerable to coordination. To the extent competitive conditions have changed, the industry may be *more* conducive to coordination today because of the reduced number of competitors—Kemira exited the H2O2 market when it sold its Maitland plant to Evonik in 2011.[106] Otherwise, the H2O2 remains the same; the H2O2 production remains the same; and the H2O2 plants remain the same.[107]

5. Competitive Effects Evidence Corroborates the Presumption of Illegality

The FTC's strong *prima facie* case is bolstered by ordinary-course documents and testimony evincing a significant risk that the Acquisition will increase the risk anticompetitive coordination and eliminate direct competition between Defendants.

[106] PX9001-033; PX1277-004.
[107] PX1313-019-20; PX9001-018; PX2330-007.

a. The Proposed Acquisition Would Increase the Likelihood of Coordination in an Already Vulnerable Market

While an extensive history of express collusion raises obvious concerns, the FTC need not show a likelihood of price-fixing in order to prevail in a merger case. Rather, Section 7 cases are primarily concerned with tacit coordination. Section 7 of the Clayton Act presumes a significant increase in concentration to be unlawful because merger law "rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *Heinz*, 246 F.3d at 715 (internal quotation marks omitted). Coordination includes conduct ranging from outright to tacit collusion. As explained by this Circuit, "[t]acit coordination 'is feared by antitrust policy even more than express collusion, for tacit coordination . . . cannot easily be controlled directly by the antitrust laws. *It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur*.'" *Heinz*, 246 F.3d at 725 (emphasis added) (quoting 4 Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, Antitrust Law ¶ 901b2, at 9 (rev. ed. 1998)).

Here, there is no question that this market is vulnerable to coordination, whether express or tacit. The Merger Guidelines establish factors for determining whether a market is vulnerable to coordinated conduct, including a small number of competing firms, the relative homogeneity of products, and low price elasticity of demand. *Merger Guidelines* § 7.2; *see also Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986) ("The fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations of section 1 of the Sherman Act, which forbids price fixing."). Here, the H2O2 market is highly concentrated, with a small number of firms who have remained the same over the years,

even if spun off or re-structured.[108] Indeed, the market has only become more concentrated in the last decade—Kemira exited the market in 2011, selling its plant to Evonik.[109] Further, H2O2 is a homogeneous product, as most customers can use another firm's H2O2 as a drop-in replacement.[110] Finally, Dr. Rothman's analysis confirmed that market conditions supported inelastic demand.[111]

The Merger Guidelines also consider whether market transparency allows firms to monitor their competitors' behaviors, which heightens the opportunities for coordination. *See Merger Guidelines* § 7.2; *CCC Holdings*, 605 F. Supp. 2d at 62, 65. Here, H2O2 producers' pricing and supply decisions are easily observed by their competitors. H2O2 producers devote significant resources to tracking their competitors' actions, including customers served and prices offered,[112] competitor plants serving specific customer locations,[113] and competitors' production and cost activity.[114] Indeed, Evonik's North American Sales Director testified that Evonik will [redacted][115] H2O2 producers gather market intelligence from customers,[116] distributors,[117] terminal operators,[118] and

[108] PX1313-20.
[109] *See* PX1277-004.
[110] [redacted].
[111] PX7100 ¶¶ 63-69; *see also* PX2354-032 [redacted]
[112] *See, e.g.*, PX2022-006; PX1075; [redacted]; PX2191-011.
[113] *See, e.g.*, PX1119-017-21.
[114] *See, e.g.*, PX2188-007; PX2194-007; PX1228-010-12; PX6010 at 138-40.
[115] PX6000 at 63.
[116] PX2030-001; PX2035-001; PX6009 at 74-75; PX6000 at 65.
[117] PX1071-001; PX2072-003; PX2115-001; PX6009 at 74-75.
[118] PX6000 at 63-66.

industry publications.[119]

Finally, the Merger Guidelines consider mutual interdependence, as the understanding that all firms stand to benefit from avoiding aggressive competition increases the likelihood that firms will expect aggressive competition to beget aggressive competition. *See Merger Guidelines* § 7.2. Defendants and other H2O2 suppliers recognize their strategic interdependence, including avoiding price wars,[120] preventing price spirals,[121] and operating with a high level of discipline.[122] Evonik's General Manager for the Americas stated that Evonik [redacted][123] In both 2014 and 2015, multiple producers announced simultaneous price increases in North America.[124] Similarly, an Evonik presentation describes the North American and European H2O2 markets as [redacted] but while [redacted]"[125]

Once it is established that the market is vulnerable to coordination, the Merger Guidelines then ask how the merger will increase the likelihood of coordinated interaction. *See Merger Guidelines* § 7.1. Courts in this Circuit look to "[t]he available real-world evidence" to evaluate whether the "merger raises serious and substantial questions about likely anticompetitive effects." *Tronox*, 332 F. Supp. 3d at 210. Here, the Acquisition increases the risk of coordination by eliminating a major competitor in a concentrated market already vulnerable to coordination, and strengthens and reinforces existing oligopolistic market dynamics. The economic expert of

---

[119] PX1297-001; PX6000 at 65-66, 128; PX6005 at 19-20; PX9001-016 – 019.
[120] *See, e.g.*, PX2339-001; PX1290-001; PX2338-002-03; PX2340-001; PX1359-001; PX1356-001; PX1357-034; PX2337-001; PX1358-008.
[121] *See, e.g.*, PX2190-001.
[122] *See, e.g.*, PX2001-001.
[123] PX1073-001.
[124] *See, e.g.*, [redacted]; PX2055-004; PX2356-017; PX2193-001; *see also* PX6005 at 96; PX6007 at 169-70.
[125] PX1320-030.

FMC (PeroxyChem's predecessor) in the price fixing litigation acknowledged in his expert report: "[redacted]"[126] He went on to argue that [redacted] FMC [redacted][127] More recently, PeroxyChem acknowledged that [redacted][128]

Evonik has a history of prioritizing price over volume,[129] and acquiring plants in North America to [redacted] and [redacted]"[130] After Evonik's acquisition of the Maitland plant from Kemira in 2011, Evonik successfully increased prices to customers between [redacted] and [redacted], noting that there was [redacted]"[131] A profitability study of that increase shows that Evonik [redacted] which led to [redacted][132]

As the court in *Tronox* recently observed, the two largest suppliers "would often be able to maintain price discipline and control supply in a post-merger market simply by competing less vigorously against each other for major accounts." *Tronox*, 332 F. Supp. 3d at 210. So too here, where each of the remaining major H2O2 producers acknowledge the benefits of the Acquisition on pricing and admit to desiring to raise H2O2 prices. Further, coordination is easier, "through implicit understanding and sheer market power, in a market where producers have already shown an awareness that implicit coordination would be beneficial." *Id.* at 209. After the Acquisition,

[126] PX2331-027.
[127] PX2331-022.
[128] PX2484-002.
[129] PX1277-018.
[130] PX1488-046.
[131] PX1277-017.
[132] PX1277-018.

the combined firm and Solvay would be similarly incentivized to compete less vigorously, [redacted]. Indeed, a consultant for Solvay concluded that the Acquisition [redacted]"[133] Similarly, Arkema executives observed that the Acquisition [redacted]"[134] and [redacted]"[135] Further, Arkema would not be able to defeat such a strategy – even if it wanted to – because the Acquisition [redacted][136] Nouryon, on the other hand, [redacted].[137] Indeed, post-Acquisition, [redacted] of H2O2 sales in the Southern and Central United States would be concentrated among the three largest producers (Evonik, [redacted]), and Evonik alone would control nearly [redacted] of the H2O2 sales in that region.[138]

b. The Proposed Acquisition Would Eliminate Significant and Beneficial Price Competition Between the Defendants

While the market operates as an oligopoly, that does not mean that there is no competition between H2O2 producers. Indeed, customers benefit from price competition between Evonik and PeroxyChem in both the Southern and Central United States, as well as the Pacific Northwest, and it is that competition that the FTC aims to protect.[139]

In the Southern and Central United States, customers have pitted one Defendant against the other in competitive RFPs and contract negotiations. Faced with these scenarios, Evonik and

[133] PX3037-040, 042; *see also* PX9007-007.
[134] PX3000-001.
[135] PX3020-001.
[136] PX3000-001.
[137] *See, e.g.*, [redacted]; [redacted]; [redacted].
[138] PX7100 ¶ 111, Ex. 2-1; *see also* PX1473-016.
[139] *See generally* PX7100 ¶¶ 183-251.

PeroxyChem have lowered prices to take or keep business from each other. Customer testimony, Defendants' documents, and Defendants' testimony confirm this dynamic:

- [redacted], a large pulp-and-paper company, has a mill in [redacted] that was once served by Evonik, but is currently served by PeroxyChem.[140] As a result of competition with Evonik, PeroxyChem lowered its bid by [redacted], resulting in substantial cost savings for [redacted].[141] Additionally, while [redacted] also bid on [redacted] mills in the 2017 RFP, Evonik and PeroxyChem were the two lowest bidders at three mills, and two of the three lowest bidders at two mills.[142]
- [redacted], a large chemical distributor with locations throughout the United States, has experienced head-to-head competition between Evonik and PeroxyChem to serve a number of distribution centers. In 2017, PeroxyChem lowered pricing to [redacted] and [redacted] locations based on Evonik's price.[143]
- In its most recent bid cycle, [redacted], a large pulp and paper company, identified Evonik and PeroxyChem as the two finalists at one of its mills in [redacted].[144] Both Evonik and PeroxyChem improved their offerings in order to try to win the business, although the outcome of this bid has not yet been determined.[145] [redacted] either did not bid on this mill, or did not offer competitive pricing compared to Evonik and PeroxyChem.[146]
- In 2017, Evonik and PeroxyChem were the only two bidders for [redacted]

[140] *See, e.g.*, [redacted]; PX2002-003; [redacted]; [redacted]; [redacted].
[141] [redacted]; PX2002-003; [redacted]; [redacted]; [redacted].
[142] [redacted]
[143] *See, e.g.*, PX2004-007; PX2006-003; PX2183-006; PX6002 at 146-47.
[144] [redacted].
[145] *Id.* at 57-61.
[146] *Id.* at 63, 67, 94.

[redacted] mill.[147] According to [redacted], Evonik won the contract to supply H2O2 at the mill from PeroxyChem, who was the incumbent supplier, because Evonik had a more competitive price, resulting in savings of close to [redacted] for [redacted].[148]

Direct competition between Defendants is also present in the Pacific Northwest, where Evonik and PeroxyChem are two of only three suppliers with meaningful sales to customers in the region. At [redacted], an oil and gas company, PeroxyChem lowered its offer in 2016 due to a competitive offer from Evonik, resulting in [redacted] enjoying a [redacted] price reduction.[149] Evonik has since taken this business from PeroxyChem, by offering a lower price in 2019.[150] [redacted], a large pulp and paper company, has switched between Evonik and PeroxyChem during its last two bidding cycles depending on which supplier gave the lowest bid.[151] PeroxyChem specifically targeted [redacted], another pulp and paper company, with lower prices in 2018, and gained share at Evonik's expense.[152]

Other H2O2 producers could not constrain a post-Acquisition Evonik after PeroxyChem is eliminated as an independent competitor. Customers' leverage in negotiations for contracts is largely a function of the viable alternative suppliers with available capacity. Once the Acquisition gives Evonik control of PeroxyChem's production capacity, which its rivals predict will lead to Evonik "market dominance,"[153] the remaining rivals will lack the excess capacity needed to prevent price increases. As recently as 2019, [redacted] declined to bid on a customer

---

147 [redacted].
148 [redacted].
149 *See, e.g.*, PX2055-004; PX2132-001.
150 *See, e.g.*, PX2396-001; PX6014 at 86; PX2397-001; PX6013 at 68-70.
151 *See, e.g.*, PX2120-008; [redacted].
152 *See, e.g.*, PX2130-002; PX2129-001; PX2120-008; [redacted].
153 [redacted].

that is currently supplied by both Evonik and PeroxyChem because they are "sold out."[154] For another customer, [redacted] bid the highest price on each mill that it competed for, and requested unacceptable payment terms.[155] [redacted].[156] In addition to customers viewing [redacted] as an inferior option due to security of supply concerns,[157] [redacted] sometimes declines to bid,[158] or quotes higher prices.[159] And while Solvay expanded its plant in Longview, Washington in 2016, which initially added excess capacity to the market, Solvay acknowledges that the "North American situation has normalized."[160]

B. Defendants Cannot Rebut the Strong Presumption of Illegality

Once the FTC establishes a *prima facie* violation of Section 7, the burden shifts to Defendants to rebut the presumption by "produc[ing] evidence that 'show[s] that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Heinz*, 246 F.3d at 715 (quoting *Citizens & Southern Nat'l Bank*, 422 U.S. at 120). Defendants bear a particularly heavy burden of production where, as here, they confront a strong *prima facie* case. *See Staples II*, 190 F. Supp. 3d at 115 ("'The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully.'") (quoting *Baker Hughes*, 902 F.2d at 991); *see also H&R Block*, 833 F. Supp. 2d at 72.[161]

---

154 [redacted].
155 [redacted].
156 PX7100 ¶¶ 36-38, Ex. 1-1 and 1-2.
157 [redacted].
158 [redacted].
159 *See, e.g.*, [redacted].
160 PX1066-001.
161 Even under the burden-shifting framework, the burden of persuasion remains at all times with the FTC. *Staples II*, 190 F. Supp. 3d at 116.

Here, Defendants will be unable to "affirmatively show[] why [the Acquisition] is unlikely to substantially lessen competition, or . . . discredit[] the data underlying the initial presumption in the [FTC's] favor" in order to rebut the presumption of illegality. *Staples II*, 190 F. Supp. 3d at 115-16. New entry is challenging, and new competitors will face significant hurdles to build an H2O2 production plant. Further, there has been minimal expansion among current competitors in the last two decades. Defendants' purported efficiencies are not substantiated, are unlikely to be passed on to consumers, and will otherwise fall far short of offsetting the Acquisition's competitive harm. Finally, the proposed partial divestiture does not address at all the likely harm to competition in the South and Central United States, and serious questions remain as to whether it addresses the harm in the Pacific Northwest.

1. Entry and Expansion Will Not Be Timely, Likely, and Sufficient to Replace the Competition Eliminated by the Acquisition

Defendants bear the burden of producing evidence sufficient to show that "entry into the market[s] would likely avert [the proposed acquisition's] anticompetitive effects." *Baker Hughes*, 908 F.2d at 989. Entry must be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *H&R Block*, 833 F. Supp. 2d at 73 (quoting *Merger Guidelines* § 9); *see also CCC Holdings*, 605 F. Supp. 2d at 47. A finding of high entry barriers "eliminates the possibility that the reduced competition caused by the merger will be ameliorated by new competition from outsiders and further strengthens the FTC's case." *Heinz*, 246 F.3d at 717.

Neither new entry nor expansion by existing suppliers will be timely, likely, and sufficient to replace the loss of competition from this Acquisition. New suppliers cannot achieve sufficient size and scale in the near term to provide a meaningful alternative to a post-

Acquisition Evonik.[162] There are substantial capital costs and time required for a new entrant to build an H2O2 plant.[163] Further, a new producer would have to build up a logistics network (including rail cars, transloading locations, and drivers) to deliver the product, and comply with regulations and permits related to the handling and processing of hazardous chemicals.[164]

Indeed, there has been no entry in North America since the 1990s.[165] Rather, there have been plant closures and market consolidation. Kemira exited the market in 2011, selling its H2O2 plant in Maitland, Ontario to Evonik.[166] And PeroxyChem closed a H2O2 plant in South Charleston, West Virginia in the late 1990s,[167] another plant in Mexico in 2009,[168] and in 2010 announced that it would "mothball" a substantial portion of its Bayport facility.[169]

As for expansion by existing firms, the last significant expansion by an H2O2 producer in North America was Solvay's Longview, Washington plant in 2016—[redacted].[170] Firms acknowledge that the market is returning to normal after Solvay's expansion,[171] and that [redacted].[172] Indeed, aside from Solvay's expansion, the only H2O2 capacity expansion has been a result of debottlenecking and capacity creep, consistent with steadily increasing demand.[173] Therefore, future expansion by H2O2 producers is speculative.[174]

---

[162] *See generally* PX7100 ¶¶ 255-274.
[163] PX7100 ¶ 256; *see also* [redacted].
[164] PX7100 ¶ 27.
[165] *See* PX6007 at 179-80; PX6000 at 150; [redacted].
[166] PX9033-001; *see also* PX1277.
[167] *See* PX6000 at 151.
[168] PX6014 at 8-9; PX1319-034.
[169] PX2201-002. This planned "mothballing" at Bayport did not actually occur. PX6002 at 64-65.
[170] [redacted]; *see also* PX1005-002; PX2194-005, 007.
[171] *See* [redacted].
[172] *See* [redacted].
[173] *See, e.g.*, PX2068-003.

Moreover, there is no evidence that customers are likely or able to vertically integrate to supply their own H2O2.[175] Likewise, nothing suggests that foreign imports would competitively constrain post-Acquisition Evonik for the production and sale of H2O2.[176] The evidence is clear and irrefutable: entry or expansion are unlikely to be timely, likely, and sufficient to deter or counteract the harmful competitive effects of this illegal Acquisition.

2. Defendants Have Not Demonstrated Sufficient Efficiencies

Given the "high market concentration levels" that will result from the proposed Acquisition, Defendants must present "proof of extraordinary efficiencies" and must substantiate their claimed efficiencies such that one can "verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific." *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz,* 246 F.3d at 720-21). "The court cannot substitute Defendants' assessments and projections for independent verification." *Wilhelmsen*, 341 F. Supp. 3d at 73 (citing *H&R Block*, 833 F. Supp. 2d at 91). No court has ever relied on efficiencies to rescue an otherwise unlawful transaction. *See, e.g.*, *CCC Holdings*, 605 F. Supp. 2d at 72; *Heinz,* 246 F.3d at 720-21; *see also Wilhelmsen*, 341 F. Supp. 3d at 71 ("the Supreme Court has never recognized the so-called 'efficiencies' defense in a Section 7 case"). Here, Defendants have failed to substantiate their purported efficiencies. Even if they could and did, only a small percentage of Defendants' claimed efficiencies are likely merger specific, and they would not offset the clear competitive harm that would result from this Acquisition.

---

[174] *See, e.g.*, PX2084-001; PX1064-002; PX6000 at 151-52; [redacted]

[175] *See* [redacted]; [redacted]; [redacted].

[176] *See* [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted].

Defendants have presented the FTC with claimed efficiencies totaling approximately [redacted] million per year, including purported supply-chain, production, and administrative efficiencies of [redacted] million, offset by approximately [redacted] million in "dis-synergies."[177] However, Defendants' substantiation for these efficiencies is opaque at best, and the FTC is unable to verify the likelihood, magnitude, timeframe for achieving, or merger-specificity of any claimed efficiency.[178] Defendants offer "mere speculation and promises about post-merger behavior" without any substantiated proof. *See Heinz*, 246 F.3d at 721.

Defendants' efficiencies defense also suffers from additional flaws. For example, Defendants suggest that the Acquisition will reduce costs in production, sourcing, and supply chain, but PeroxyChem has projected that it could reduce a portion of these costs on its own.[179] *See H&R Block*, 833 F. Supp. 2d at 91 (efficiencies not credited when merging parties could obtain the efficiencies on their own and without the proposed acquisition). Further, Defendants' efficiencies defense fails because they have not established that the claimed savings would benefit customers.[180] *See Saint Alphonsus Med. Ctr. – Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 789-92 (9th Cir. 2015); *FTC v. University Health*, 938 F.2d 1206, 1223 (11th Cir. 1991); *CCC Holdings*, 605 F. Supp. 2d at 74. Finally, some of the claimed efficiencies are out-of-market efficiencies, relating to products and production outside the relevant markets.[181] *See Merger Guidelines* § 10 n.14; *see also Anthem*, 855 F.3d at 363-64 (rejecting savings claims that, among other "analytic flaws," were "unmoored from the actual market at issue").

[177] PX1148-011.
[178] *See generally* PX7100 ¶¶ 284-327.
[179] PX7100 ¶ 278; *see e.g.*, PX6004 at 38-41.
[180] *See, e.g.*, PX6003 at 146-47.
[181] PX7100 ¶¶ 279, 297, 304, 329.

Further, even if Defendants' unsubstantiated efficiencies were taken at face value, Dr. Rothman estimates that the elimination of head-to-head competition would result in harm outweighing Defendants' claimed cost savings.[182] Thus, Defendants' efficiencies defense does not—and cannot—rescue this unlawful Acquisition.

3. Defendants' Proposed Divestiture Does Not Resolve Competitive Concerns

Defendants bear the burdens of production and persuasion as to whether their proposed divestiture will remedy the anticompetitive effects of the Acquisition. *See generally United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017); *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *Sysco*, 113 F. Supp. 3d at 72. Further, the Sixth Circuit has held that defendants have the burden of demonstrating that the government's claim against the original agreement was moot. *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 857 (6th Cir. 2005). When, as here, the FTC has issued an administrative complaint, the questions of ultimate liability, and consequently remedy, are for the Commission to decide in the first instance and then the Court of Appeals. *See FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342-43 (4th Cir. 1976); *accord Heinz*, 246 F.3d at 714. Thus, the Court should not even consider Defendants' (inadequate) proposal to divest the Prince George plant. In similar circumstances, courts have bifurcated consideration of liability and remedy. *See* Attachment 3, Scheduling and Case Management Order at 1, *United States v. Quad/Graphics, Inc.*, No. 1:19-cv-04153 (N.D. Ill. Jul. 10, 2019) (requiring a separate scheduling and case management order regarding any proposed remedy). And here, as the remedy determination should be made by the Commission, the appropriate course is to defer the issue to the administrative proceeding.

[182] PX7100 ¶ 330.

Addressing the adequacy of the proposed divestiture in the administrative proceeding is especially warranted in this case, where significant questions remain about the sufficiency of the remedy. Defendants identified the proposed acquirer of Prince George (United Initiators) only *after* the FTC filed its Complaint, and discovery to date has not allowed the FTC to determine whether United Initiators conducted adequate due diligence, understands how to run the divested business, has a business plan that demonstrates it will compete effectively for H2O2 customers, and has an adequate management and sales team in place. A fulsome examination will be required to address these issues beyond the normal scope of a preliminary injunction hearing.

Even if the Court were inclined to consider the proposed divestiture, the minimal discovery to date suggests that the divestiture buyer is is wholly inadequate. "In order to be accepted, curative divestitures must be made to . . . a willing, independent competitor capable of effective production." *Sysco,* 113 F. Supp. 3d at 77 (quoting *CCC Holdings*, 605 F. Supp. 2d at 59). First, customers of H2O2 value "security of supply,"[183] but United Initiators, with only one H2O2 plant in North America, will not be able to provide the same level of security of supply as Evonik, PeroxyChem, or Arkema, who all operate multiple plants. Second, United Initiators' only present experience with H2O2 arises out of its purchase—in July 2019—of an H2O2 plant in Turkey. Third, United Initiators' purchase price for the Prince George plant is extremely low relative to the plant's revenues and operating profits, as United Initiators has agreed to pay only [redacted] million for a plant that generated [redacted] million in EBITDA in 2017. Such a "low purchase price raises concerns about whether [the proposed buyer] can be a successful competitor" and "reveals divergent interest between the divestiture purchaser and the consumer." *Aetna*, 240 F. Supp. 3d at 72. In fact, after [redacted] evaluated acquiring this plant in the divestiture, it came up

[183] *See, e.g.,* [redacted]; [redacted]; [redacted]; [redacted].

with a proposed price of [redacted] million, taking into account a number of risks.[184] Put simply, the purchase price is so low that United Initiators can fail as a competitor and still profit from its purchase of Prince George. In sum, serious questions remain as to the ability of United Initiators to replicate the competitive constraint that PeroxyChem currently provides in the Pacific Northwest.

II. THE EQUITIES HEAVILY FAVOR A PRELIMINARY INJUNCTION

Upon finding a "likelihood of success on the merits," the Court must then "weigh the equities" to determine whether injunctive relief is in the public interest. *Heinz*, 246 F.3d at 726-27. "The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws." *Id.* at 726. A second public interest lies in "ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial." *Wilhelmsen*, 341 F. Supp. 3d at 73 (quoting *Sysco*, 113 F. Supp. 3d at 86). Without a preliminary injunction, Defendants can "scramble the eggs"—that is, merge their operations and make it extremely difficult, if not impossible, for competition to be restored to its previous state if the Acquisition is subsequently found to be illegal. *See FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085-86 n.31 (D.C. Cir. 1981). Without a preliminary injunction, Defendants can share competitively sensitive information, raise prices, eliminate services, reduce staff, and close facilities. Any harm that customers suffer in the interim likely would be irreversible.

Defendants cannot offer any equities that override the strong public equities favoring preliminary relief. Indeed, no court has ever denied relief in a Section 13(b) proceeding in which the FTC "has demonstrated a likelihood of success on the merits." *FTC v. ProMedica Health Sys., Inc.*, No. 3:11-cv-47, 2011 WL 1219281, at *60 (N.D. Ohio Mar. 29, 2011); *see also FTC*

184 [redacted]

v. PPG Industries, 798 F.2d 1500, 1508 (D.C. Cir. 1986) (establishment of a likelihood of success "weighs heavily in favor of a preliminary injunction") (quoting *Weyerhaeuser Co.*, 665 F.2d at 1085). In weighing the equities, public equities are "paramount," *ProMedica*, 2011 WL 1219281, at *60, and "only 'public equities' that benefit consumers" can overcome the FTC's showing of likely success on the merits. *CCC Holdings*, 605 F. Supp. 2d at 75-76 (citing *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1041 (D.C. Cir. 2008) (Brown, J.)). Private equities are "subordinate to public interests," *Illinois Cereal Mills*, 691 F. Supp. at 1146 (citing *Weyerhaeuser*, 665 F.2d at 1083), and any private harm that Defendants can claim, such as a delay in consummating the Acquisition, is outweighed by the strong public interest in allowing the FTC an opportunity to grant full and effective relief if the FTC determines the relief is warranted after a full examination of the merits. Accordingly, to protect interim competition and preserve the FTC's ultimate ability to order effective relief, the equities call for a preliminary injunction.

CONCLUSION

For the reasons identified above, the FTC respectfully requests that the court grant a preliminary injunction to prevent the consummation of this illegal merger, pending a review on the merits in an FTC administrative proceeding.

Dated: October 2, 2019

Respectfully Submitted,

/s/ James Rhilinger

James Rhilinger
Amy Dobrzynski
Daniel Matheson
James Weingarten

Federal Trade Commission
Bureau of Competition
400 Seventh Street, S.W.
Washington, DC 20024
Telephone: (202) 326-2871
Facsimile: (202) 326-2286
Email: jrhilinger@ftc.gov

Counsel for Plaintiff Federal Trade Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of October, 2019, I served the foregoing on the following counsel via electronic mail:

Eric Mahr
Andrew Ewalt
Freshfields Bruckhaus Deringer US LLP
700 13th Street, NW, 10th Floor
Washington, DC 20005-3960
Tel: (202) 777-4545
Email: eric.mahr@freshfields.com

Counsel for Defendants RAG-Stiftung, Evonik Industries AG, Evonik Corporation, and Evonik International Holding B.V.

Mike Cowie
James Fishkin
Dechert LLP
1900 K St, NW
Washington, DC 20006
Tel: (202) 261-3339
Email: mike.cowie@dechert.com

Counsel for Defendants One Equity Partners Secondary Fund, L.P., One Equity Partners V, L.P., Lexington Capital Partners VII (AIV I), L.P., PeroxyChem Holding Company LLC, PeroxyChem Holdings, L.P., PeroxyChem Holdings LLC, PeroxyChem LLC, and PeroxyChem Cooperatief U.A.

/s/ Amy E. Dobrzynski
Amy E. Dobrzynski
Attorney for Plaintiff Federal Trade Commission