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

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REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The FTC and Defendants agree that "antitrust theory and speculation cannot trump facts" and that "cases must be resolved on the record evidence relating to the market." Def. Br. at 1. It is a fact that producers can supply H2O2 for the same grades and end uses, and that H2O2 is a largely undifferentiated commodity within each end use. It is a fact that Evonik and PeroxyChem are two of only five H2O2 producers in North America, and that the industry has an extensive history of price-fixing. It is a fact that customers currently achieve lower prices by playing Defendants off one another throughout the Southern and Central United States and the Pacific Northwest. Defendants' own documents and testimony establish these facts.

Defendants cannot ignore these facts, nor can they ignore the economic framework and controlling precedents that create a strong presumption that the FTC is likely to succeed at the administrative hearing in proving that the Acquisition may substantially lessen competition. Defendants fail to rebut this presumption because they cannot show that market shares inaccurately reflect firms' future competitive significance, or that the Acquisition will not decrease firms' incentives to aggressively compete. *See United States v. Baker Hughes*, 908 F.2d 981, 991 (D.C. Cir. 1990) ("a defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition.").

The FTC has defined markets and presented market shares demonstrating that the Acquisition is presumptively illegal, and buttressed that presumption with additional evidence that the Acquisition threatens both coordinated and unilateral anticompetitive effects. Defendants ask this Court to ignore the FTC's proof of market concentration based on quibbles with the precise contours of the FTC's market definition, but their criticisms rely on superficial distinctions that make no meaningful difference to the analysis. The FTC will easily meet its

burden based on the wealth of evidence developed, and the equities weigh in favor of preliminarily enjoining the Acquisition, FTC Br. at 39-40.

I. THE FTC IS LIKELY TO SUCCEED ON THE MERITS AT THE ADMINISTRATIVE HEARING

The question before the Court is whether the FTC is likely to succeed on the merits at the administrative hearing set to begin on January 22, 2020. Under procedures established by Congress, that administrative proceeding will adjudicate the merits of this transaction.[1] While Defendants try to downplay the significance of the administrative proceeding, *see* Def. Br. at 15-18, their speculation about what Defendants (or the FTC) might do if they lose in this Court does not alter either the statutory framework or the legal standard applicable here. Section 13(b) of the FTC Act requires this Court to determine whether, "weighing the equities and considering the Commission's likelihood of ultimate success, [a preliminary injunction] would be in the public interest." 15 U.S.C. § 53(b); *see also FTC v. Staples*, 190 F. Supp. 3d 100, 114 (D.D.C. 2016) ("*Staples II*"). To evaluate the FTC's likelihood of success, this Court assesses "the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger '*may be* substantially to lessen competition, or to tend to create a monopoly' in violation of section 7 of the Clayton Act." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting 15 U.S.C. § 18) (emphasis added).

A. The Relevant Market Is the Sale of H2O2 (Excluding Electronics-Grade H2O2) in the Southern and Central United States and in the Pacific Northwest

Defendants claim that the FTC's relevant markets are "contrived" in order to "inflate market shares, overstate the closeness of competition between [Defendants], and present the

[1] *See, e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726-27 (D.C. Cir. 2001) (Congress enacted the FTC preliminary injunction provision to "preserve [the] status quo" until the administrative proceeding) (internal citation omitted).

Court with an inaccurate picture of the competitive landscape." Def. Br. at 26. Yet the superficial arguments they present simply do not support these charges. The FTC's relevant markets are supported by the relevant case law, consistent with the principles in the *Merger Guidelines*, and grounded in the facts of the H2O2 industry (including documents, data, and testimony from customers, competitors, and Defendants themselves). *See* FTC Br. at 13-21. The FTC's market share allegations are consistent with Defendants' documents, and Defendants have advanced no relevant market in which the competitive effects of the Acquisition look any different.

1. The FTC Has Properly Defined the Relevant Product Market

Defendants repeatedly accuse the FTC of ignoring "facts" when it comes to market definition, but it is Defendants who ignore both facts and the law. Defendants suggest that they don't meaningfully compete – despite the fact that they both produce and sell H2O2 into a wide range of diverse end uses – because they supposedly focus on different areas within the H2O2 industry. Judge Posner expressly rejected this argument in *FTC v. Elders Grain*, a case cited in the FTC's opening brief yet completely ignored by Defendants.

Elders Grain involved a merger of two operators of industrial dry corn mills, which process corn into a range of "prime products" used in a variety of downstream end uses.[2] Those "prime products" had different characteristics (size and price) and end uses,[3] and thus customers could not substitute between them. Suppliers, however, were able to reposition because "[w]ith few exceptions, industrial dry corn mills can reconfigure their processing equipment to produce all prime products used by food processors." *Illinois Cereal Mills*, 691 F. Supp. at 1135. The

[2] *See FTC v. Illinois Cereal Mills, Inc.*, 691 F. Supp. 1131, 1135 (N. D. Ill. 1988)., *aff'd sub nom, FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989).

[3] The prime products included flaking grits used to make breakfast cereal, brewers grits used in the production of beer, corn meal and flour used in baking mixes, and others. *Illinois Cereal Mills*, 691 F. Supp. at 1135.

district court determined that the appropriate relevant product market was "all prime products for food use produced by industrial corn mills," *id.* at 1141, and granted the request for preliminary relief. On appeal, defendants argued that they were not in the same market because "they tend to sell different varieties of industrial dry corn to different customers." *Elders Grain*, 868 F.2d at 906. Judge Posner's response? "These points are not impressive." *Id.*

> The argument that [defendants] are not in the same market because most of their customers are different and because the two firms don't sell the same product mix is based on a misunderstanding of competition. No market fits the economist's model of perfect competition – implying an infinite number of sellers having identical costs, a perfectly homogeneous product, and perfectly informed buyers – although some agricultural markets come close. In a normal market, sellers establish relations of mutual trust and advantage with particular customers, and the result is that at a given moment different sellers may have different customers. That doesn't mean the sellers aren't competing. Customers aren't locked into these relationships; they can be lured away by a better offer.

Id. at 907. In short, Judge Posner focused on competitive realities rather than a snapshot of suppliers' product focus or customer focus. This is consistent with the realities of the FTC's relevant product market. Defendants insist that Evonik "focuses" on standard grade applications while PeroxyChem "focuses" on different products, Def. Br. at 2-3, but this does not mean that they do not compete in the same relevant market: "If producers of product X can readily shift their production facilities to produce product Y, then sales of both should be included in the relevant market." *Rebel Oil Co. v. Alt. Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995). As explained in the FTC's opening brief, H2O2 producers can readily adjust their production to produce virtually any grade of H2O2. FTC Br. at 14. Indeed, Defendants conceded as much to

the European Commission ("EC"),[4] and this admission to the EC was appropriate, because an accurate assessment of competitive conditions must take into account the ease with which competitors can shift production. Defendants would prefer to ignore supply-side substitution and focus myopically on whether customers can substitute among the products each firm has chosen to produce at the current moment, but the Court should reject this attempt to ignore market realities. *See Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660, 665 (6th Cir. 1993) ("defining a market . . . on the basis of demand considerations alone is erroneous because such an approach fails to consider the supply side of the market.").

Defendants point to niche end-use applications in which they claim that the parties do not currently compete, but these overstated claims boil down to an assertion that Evonik "cannot" serve certain end uses or customers because Evonik *does not* do it at the present moment. Defendants' supposed examples involve products that are either sold in miniscule quantities [redacted], or which Evonik is actively attempting to enter [redacted]. Defendants refer to a [redacted] end use eight times in their brief, and while [redacted] is the only producer that currently selling into this end use in North America, it accounts for less than [redacted] total sales. [redacted]. Evonik's lack of sales into this niche end use fails to support Defendants' assertion that Evonik does not compete across a full range of

[4] Defendants ask this Court to ignore their statements to the EC, suggesting that [redacted]. Def. Br. at 30-31. But the facts that Defendants presented to the EC in support of their assertion that [redacted] PX1201-012, are equally true in North America: producers can easily manipulate the concentration and purity of their product to service most end uses, many end use applications use the same grade, and most producers are serving end uses representing the vast majority of industry sales. *See* [redacted].

specialty grades. With respect to [redacted], Evonik's [redacted] product is well-recognized in this end-use globally; [redacted]. PX6032 at 60, 83-84, 103-104; *see generally* PX1435 [redacted]. PX6032 at 78-79; PX1435-037. And while Defendants claim Evonik is unable to produce [redacted] ordinary course documents suggest that if the market opportunity were attractive, [redacted]. PX1522-001. [redacted]. *See* DX348 [redacted].

Pre-Electronics Grade H2O2 is Properly Included in the Market. Pre-electronics grade H2O2 can be produced by all North American suppliers of H2O2, and belongs in the relevant market. Defendants claim that "not all producers are capable" of producing pre-electronics grade without citing any evidence. *See* Def. Br. at 30. This unsupported representation directly contradicts statements Defendants made in June 2019, when they admitted that:

[redacted]

PX0002-031 (emphasis added). Further, while [redacted] and [redacted] primarily (currently) consume pre-electronics grade H2O2 for internal use rather than selling it to external customers,

[redacted],[5] and simply because they have not yet made significant external sales does not mean that they are not market participants with "competitive significance."[6]

Defendants Ignore the Hypothetical Monopolist Test. Despite its wide acceptance in this Circuit[7] and frequent use by the U.S. antitrust agencies to define relevant antitrust markets, Defendants ignore the hypothetical monopolist test ("HMT") in their 50-page brief. *See* FTC Br. at 17-18. Notably, Defendants fail to rebut or even seriously contest Dr. Rothman's application of the HMT in defining the relevant market, or his conclusion that a hypothetical monopolist supplier of H2O2 could profitably impose a small but significant and non-transitory increase in price on customers located in each of the geographic markets he defined. PX7100 ¶¶ 70-78; FTC Br. at 18.

2. The FTC Has Properly Defined the Relevant Geographic Market

Ordinary course evidence supports the FTC's alleged geographic markets in the Southern and Central United States and the Pacific Northwest. PeroxyChem has for many years analyzed

[5] *See, e.g.*, [redacted]; PX2366-001 [redacted]; PX2512-004 [redacted]; PX2514-001 [redacted].

[6] *See* PX9045 § 5.1 ("All firms that currently earn revenues in the relevant market are considered market participants. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance.").

[7] *See, e.g.*, *FTC v. Wilh. Wilhelmsen ASA*, 341 F. Supp. 3d 27, 57-58 (D.D.C. 2018); *Staples II*, 190 F. Supp. 3d at 121-22; *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 33-34 (D.D.C. 2015) ; *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 51-52 (D.D.C. 2011); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 40 (D.D.C. 2009) .

competitive conditions using regions that closely track the FTC's geographic markets.[8] Furthermore, at least one H2O2 competitor's documents likewise analyze supply and demand within regions that align with the FTC's geographic markets. [redacted].

Defendants point to distinctions between competitors' share of sales in various states throughout the South and Central United States region, Def. Br. at 32, but these variations do not alter the conclusion that customers in those states are choosing from among the same set of competing suppliers. Dr. Rothman reached his conclusions about the appropriate geographic market by analyzing *actual* customer locations and which supplier *actually* supplied them. *See* Ex. A (PX7102, Exhibit 2). This analysis, consistent with documents and testimony, shows that all suppliers are capable of supplying customers throughout the South and Central United States.

Moreover, Defendants' arguments on geographic market are inconsistent. First, they complain that the FTC in the past accepted a consent decree referencing an all-North American H2O2 market. Def. Br. at 31. They then argue that the FTC's geographic market is too broad, encompassing too many states. Def. Br. at 31-33. Neither argument suggests that Dr. Rothman was incorrect in defining a market based on customer locations, grouped in the Southern and Central U.S. and in the Pacific Northwest. PX7102 ¶¶ 43-57; PX7100 ¶¶ 87-102.

B. The Acquisition Is Presumptively Illegal in the Relevant Markets

The FTC has demonstrated that the Acquisition is presumptively illegal under controlling precedent. FTC Br. at 21-23. Unable to rebut this, Defendants instead offer the unremarkable proposition that HHIs alone do not "guarantee litigation victories," citing *Baker Hughes*. Def. Br. at 4. But the FTC is not relying on HHIs alone here. In contrast to *Baker Hughes*, where the court

[8] PX2344-012 (2013); PX2058-057 (2014); PX2194-008 (2016); *see also* PX6002 at 96-97 [redacted].

concluded that firms' shares in the market failed to provide an accurate picture of their competitive significance because that market was " minuiscule, market share statistics are 'volatile and shifting,' . . . and easily skewed." 908 F.2d at 986 (internal citation omitted), Defendants cannot explain why the presumptively illegal market share and concentration levels here should be ignored. Moreover, the *Baker Hughes* defendants rebutted the presumption created by HHIs by demonstrating that rapid entry was likely, *see id.*, while Defendants have failed to make a similar showing. Finally, in *Baker Hughes*, the government failed to respond to that rebuttal by producing "any additional evidence showing a probability of substantially lessened competition, and thus failed to carry its ultimate burden of persuasion." *Id.* at 983. Here, the FTC has presented an abundance of evidence to buttress the strong presumption under the Guidelines that the Acquisition will substantially lessen competition. FTC Br. at 23-32.

Defendants also point to *FTC v. Arch Coal*, but the comparison only highlights the strength of the FTC's case here. In *Arch Coal*, "the single best available measure of market concentration . . . produce[d] an increase in HHI of only 49, which is actually below the level for significant concern." 329 F. Supp. 2d at 129. And even the highest measures of market concentration resulted in a change in HHI of only 224, leading that court to conclude "the FTC's prima facie case is not strong." *See id.*[9] In stark contrast, Dr. Rothman shows that this Acquisition would increase concentration by more than [redacted] the *highest* estimate in *Arch Coal*. The HHI increase in this case significantly surpasses the thresholds in the *Merger*

[9] The *Arch Coal* defendants were able to rebut the FTC's prima facie case in part because the court concluded that "less of a showing is required from defendants to rebut a less-than-compelling price facie case." 329 F. Supp. 2d 129. Among the many notable differences between *Arch Coal* and this case is the fact that no express or tacit coordination had *ever* taken place in the relevant market, *id.* at 139, and the products were "heterogeneous; [because] SPRB coal is different from one mine to another." *Id.* at 140.

Guidelines, in line with *nine* other cases in this Circuit in which the FTC has prevailed. FTC Br. at 23.

Ultimately, all Defendants' quibbling with the precise contours of the market and resulting market shares does not affect the conclusion that the Acquisition is illegal. As a starting point, "[t]he FTC need not present market shares and HHI estimates with the precision of a NASA scientist. The closest approximation often will do." *FTC v. Sysco*, 113 F. Supp. 3d 1, 54 (D.D.C. 2015) (internal quotation omitted). That said, Dr. Rothman tested a range of alternatives to see if the chosen contours of his proposed markets were driving his results, and that sensitivity analysis shows that the presumption of illegality holds under a wide range of alternative assumptions about the market. All his results show a highly concentrated market with HHIs far surpassing the threshold for a presumption. PX7102-010, 021, Tables 1 & 2. The market for H2O2 is highly concentrated no matter how you look at it.

Defendants curiously argue that a "5-to-4" merger in North America is actually a "5-to-5" merger with the divestiture. Def. Br. at 4. However, the FTC does not allege a North American market, and in any event ordinary course documents show high levels of concentration in North America. *See, e.g.*, PX1119-008. Divesting the smallest H2O2 production plant in North America, *see id.*, to a geographically isolated and inexperienced buyer would not remedy the anticompetitive effects of Evonik acquiring the far larger Bayport plant. This is yet another stark contrast with *Arch Coal*, where the divestiture resulted in "five *significant* producers," and the buyer had mining experience, well-developed business plans that included expanding output, and undertook the acquisition using "the same sophisticated modeling techniques the company uses for all of its major investments." 329 F. Supp. 2d at 114, 124, 148 (emphasis added). As discussed below, none of these are true of the proposed divestiture buyer here. *Infra*, Section I.D.

C. The FTC Has Presented Evidence Showing Likelihood of a Substantial Lessening of Competition

Contrary to what Defendants assert, the FTC has gone well beyond relying on the strong presumption of illegality created by the high market share and concentration figures here. Consistent record evidence demonstrates that this transaction presents substantial risks of both coordinated and unilateral anticompetitive effects.

1. History of Coordination Strengthens the Presumption of Illegality

The *Merger Guidelines* explain that a market is considered presumptively vulnerable to coordinated interaction where there has been prior express collusion, § 7.2, as does the case law. *See Elders Grain*, 868 F.2d at 906 ("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."). Defendants claim that market conditions have changed since criminal price-fixing last occurred,[10] but point to nothing which alters the conclusion that these markets remain vulnerable to coordination. Indeed, fewer competitors are active today than existed during the criminal conspiracy, as Evonik eliminated Kemira as a competitor when it bought Kemira's Maitland plant in 2011.[11] Defendants claim that market demand has changed, including an increase in specialty H2O2 sales, Def. Br. at 8, but they point to no meaningful differences. There were numerous different end uses then, just as there are today. The 2006 DOJ press release on the price-fixing conspiracy describes H2O2 in

[10] Defendants claim the criminal conduct did not involve PeroxyChem or its predecessor FMC. Def. Br. at 35. However, while FMC was not charged, it paid a substantial settlement in private litigation, and during that litigation its economic expert defended the company's behavior as that of a [redacted], recognizing [redacted] PX2331-022.

[11] *See* PX1277 [redacted]; *see also* PX6014 at 8-9 [redacted].

terms that remain true today, noting it "has multiple industrial uses, including applications in the electronics, energy production, mining, cosmetics, food processing, textiles and pulp and paper manufacturing industries." PX9031-002.

2. Ordinary Course Evidence Confirms that the H2O2 Market is Vulnerable to Coordination

The evidence clearly shows the H2O2 market is vulnerable to coordination. Defendants suggest that the FTC should specify precisely "how suppliers would reach a common understanding on price," etc., and explain how "suppliers would then be able to effectively monitor and punish deviations." Def. Br. 36. But the FTC is not required to supply such detail, nor even to prove that any explicit scheme will be hatched and maintained. *See In re Tronox Ltd.*, Dkt. No. 9377, 2018 WL 6630200, at *29, (F.T.C. Dec. 14, 2018) ("[I]t is not necessary to demonstrate that market participants can form and enforce an agreement."); *see also FTC v. OSF Healthcare Sys.*, 822 F. Supp. 2d 1069, 1088 (N.D. Ill. 2012) ("To be clear, the court is not finding that the hospitals would necessarily collude after the merger, only that this merger adds to the risk of such behavior."). Judge McFadden explained in *Tronox* that the remaining competitors in that matter "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." *FTC v. Tronox*, 332 F. Supp. 3d 187, 210 (D.D.C. 2018); *see also* PX9056-009.

If this merger were allowed to proceed, Evonik and its remaining competitors could likewise maintain price discipline simply by competing less aggressively. Such concerns are paramount here, as Evonik [redacted] when it acquired Kemira's Maitland plant in 2011. PX1277-022. Defendants argue that Evonik lost some customers as a result, Def. Br. at 43, but that is exactly the point – [redacted]. In fact, [redacted]

[redacted] of the Maitland deal. PX1277-017-18. Evonik cannot wave these documents away, claiming they are taken out of context. Def. Br. at 42. Its own witnesses confirm they mean exactly what they say: [redacted] PX6013 at 89-90; *see also* PX1464-001.[12] Statements like this are completely consistent with Evonik's actions.

Defendants and other H2O2 suppliers try hard to gain visibility into the H2O2 market, and they have a tremendous amount of information regarding one another's capacities and customers served; for example, Evonik's [redacted]. PX1119-007, 018-021. Capacity and volume transparency is important because if one competitor is able to determine that another's plant is "sold out," it can increase prices to customers that might otherwise by served by the "sold out" rival. *See* [redacted]. Defendants protest that Evonik has "only imperfect information about capacities," Def. Br. at 40, but there is no support for the notion that mergers can result in coordinated harm only when information is perfect.

Likewise, Defendants argue that the "sealed" bid process is a barrier to explicit coordination, Def. Br. at 37-38, but suppliers do not need perfect insight into rivals' pricing to compete less vigorously, or tacitly coordinate to increase prices. While customers may not always share the precise prices offered by suppliers, Defendants' own citations show that customers *do* expect suppliers to know who they are bidding against, and will indicate when a supplier needs to lower prices due to a competing offer. [redacted]; [redacted]. [redacted]

[12] Notably, Defendants have dropped this witness from their final witness list.

acknowledges its ability to get percentage or margin information on the winning price, all of which is helpful to [redacted].

Further, Defendants claim that "[H2O2] suppliers have ceased issuing [price increase] announcements," as a factor hindering coordination. Def. Br. at 42. However, Solvay publicly raised prices in 2016, and [redacted] sent a price increase letter to customers in 2019, which promptly made its way to [redacted] *See, e.g.*, [redacted]; [redacted]; PX1114. Moreover, the same competitors issue public price announcements in Europe, and those announcements are closely monitored and promptly acted upon by rivals: for example, when [redacted] received [redacted] July 2018 European price increase announcement,[13] [redacted] PX2420; *see also* PX6014 at 80-84.

3. Competition in the Market Does Not Prevent Vulnerability to Coordination

Defendants claim that H2O2 suppliers currently compete vigorously for large contracts. Def. Br. at 12, 38. This is not always true,[14] but even if it were, it is no more than what firms are supposed to do in a free market economy. Current competition does not mean that the market is not vulnerable to coordinated behavior. Moreover, the Acquisition will certainly end both current competition between Evonik and PeroxyChem,[15] and forestall future competition between them,

[13] PX1019 ([redacted]); PX2420.

[14] Often suppliers bid high on business if they don't want to take a customer and risk retaliation. *See, e.g.*, PX1072-001 [redacted]. Further, [redacted]. *See* [redacted].

[15] Indeed, it is this competition that the FTC aims to protect. *See, e.g.*, PX2003-006 [redacted];

as Evonik was [redacted].[16] Evonik does not need this Acquisition to "diversify into specialty products," although eliminating competition from PeroxyChem would certainly be a convenient shortcut.

4. The Acquisition Increases the Market's Vulnerability to Coordination

As in *Tronox*, this acquisition will make it "easier to coordinate through implicit understanding and sheer market power, in a market where producers have already shown an awareness that implicit coordination would be beneficial." 332 F. Supp. 3d at 209. Common sense suggests that, as Dr. Hill acknowledged in *Tronox*, "the smaller is the number of firms, the easier it typically is to coordinate." PX8010 ¶ 219. Post-Acquisition, Evonik will have more information by gaining access to PeroxyChem's customers and documents; the remaining suppliers will share more overlapping customers; and remaining H2O2 suppliers will better be able to coordinate. PX7102 ¶¶ 85-89.

Further, Defendants offer no evidence that the other three H2O2 suppliers will be motivated to or able to thwart coordination. Defendants' expert, Dr. Hill, opines that [redacted] is a likely maverick, PX7101 § 7.2.2.a, but this is not grounded in reality. Quite the opposite in fact – [redacted] testified that [redacted] tries to avoid customer churn, and would seriously consider increasing prices in response to price increases from other suppliers. [redacted]. This may account for the fact that Defendants previously have asserted that

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[redacted] (head-to-head competition between PeroxyChem and Evonik at [redacted]); [redacted] (head-to-head competition between PeroxyChem and Evonik at [redacted]); [redacted] (head-to-head competition between PeroxyChem and Evonik at [redacted]); [redacted] (head-to-head competition between PeroxyChem and Evonik at [redacted]).

[16] *See, e.g.*, PX6013 at 63-65 ([redacted]); PX6032 at 41 ([redacted]), 55-56 [redacted]), 86-88 ([redacted]).

[redacted], rather than [redacted], is [redacted] PX0019-010. And while Defendants cite their own executive's testimony that [redacted] focuses on offering the lowest price – testimony about *perceived* aggressive pricing in eastern Canada, outside of the FTC's relevant market (*see* PX6009 at 106-07) – this is inconsistent with testimony from [redacted], which indicated a desire to *increase* price. [redacted]. Finally, Defendants point to Solvay's "recent" expansion, but this expansion was undertaken to serve just one customer, and [redacted]. PX6036 at 241. Instead, Solvay has publicly admitted its desire to increase prices. PX9002-012-13.

D. UI's Purchase of Prince George Will Not Sufficiently Remedy the Loss of Competition in the Pacific Northwest

The evidence – or lack thereof – is fatal to Defendants' argument that the proposed divestiture of Prince George to UI can "sufficiently remedy any loss of competition from [the] merger." Def. Br. at 23. With all the questions surrounding this hastily executed scheme,[17] [redacted]. Def. Br. at 23. But UI's [redacted] is undermined by its apparent refusal to appear in this Court in support of the divestiture.[18] And in any event, [redacted] is insufficient to overcome the questions raised by UI's lack of concrete plans to address challenges to the viability of the divested business, UI's lack of experience, and the low purchase price.

[17] [redacted].

[18] Surprisingly, UI has moved to quash the FTC's subpoena for live testimony at the hearing on this matter. *See* Dkt. No. 059 (Oct. 31, 2019). The FTC is not aware of any case in which a proposed divestiture purchaser refused to testify in court in support of the divestiture. *Cf. Arch Coal*, 329 F. Supp. 2d at 147-49 (discussing trial testimony of divestiture buyer regarding detailed business plans); *Sysco*, 113 F. Supp 3d at 72-78 (discussing trial testimony of divestiture buyer's President and CEO).

Perhaps most concerning is UI's complete lack of formal planning for the Prince George business. It has not developed [redacted]. Without such plans, it is not clear how UI will overcome the challenges the Prince George facility faces. Defendants mention in passing that UI will need to replace volume that PeroxyChem recently lost, Def. Br. at 25, but omit [redacted]. UI also made its final bid contingent on [redacted] and UI has no plans to address that development. [redacted]. Given these challenges, UI told Defendants that [redacted] 1.

UI's experience is also dubious. Defendants claim UI has "sufficient experience to compete effectively." Def. Br. at 24. UI, however, [redacted]. Whatever UI's experience as a "global supplier of organic peroxides," Def. Br. at 24, H_2O_2 is not an organic peroxide. The court in *United States v. Aetna* recently found that despite a proposed divestiture buyer's "substantial experience" outside of the market, "this experience will not transfer so as to enable it to be a successful competitor" in the divested market. 240 F. Supp. 3d 1, 73 (D.D.C. 2017).

Finally, the low purchase price here raises further questions. *See Aetna*, 240 F. Supp. 3d at 72 ("The low purchase price raises concerns about whether [the divestiture buyer] can be a

successful competitor."). There is no question that the purchase price here is extremely low.[19] That low price reflects the risks presented by the proposed divestiture – here, risks faced by an inexperienced buyer taking over a business that's [redacted] with no concrete plans for how it will actually compete. This high-risk proposal falls well short of replacing the competition lost by eliminating PeroxyChem.

E. Defendants Have Not Rebutted a Strong Presumption of Illegality

Faced with the *prima facie* presumption of competitive harm and high market concentration levels, Defendants make almost no attempt to save their illegal merger.

Efficiencies. Defendants fall far short of proffering "proof of extraordinary efficiencies," let alone any substantiation for these efficiencies. *See* FTC Br. at 35-37. The procompetitive efficiencies that Defendants assert are too thinly supported and too speculative to play any significant role in rebutting the presumption of illegality. Further, despite Defendants' claims that these efficiencies will benefit customers, [redacted]. PX6003 at 146-47.

Entry. Defendants make only a cursory reference to potential expansion by a new entrant in H2O2. Def. Br. at 8, n. 12. However, even this footnote is misleading—testimony shows that the supposed entrant's theoretical expansion plans are one-sixth of what Defendants claim them to be by 2021, and any expansion beyond that is "very optimistic." PX6039 at 44, 123.

"Powerful Buyers." Finally, Defendants conflate two sections of the *Merger Guidelines*—

[19] [redacted]

Section 7.2, which deals with coordinated effects, and Section 8, dealing with "powerful buyers." On coordinated effects, while many large pulp and paper customers do indeed go through one bidding process for convenience, they often make decisions on a mill-by-mill basis.[20] Thus, the bid process does not inherently thwart coordinated conduct, as Defendants suggest. With respect to "powerful buyers," the relevant inquiry is: (1) will customers have sufficient alternatives post-Acquisition such that they can prevent a price increase by a combined Evonik/PeroxyChem; or (2) will customers have the ability and incentive to vertically integrate upstream or sponsor entry? *See Merger Guidelines* § 8; *Sysco*, 113 F. Supp. 3d at 48. The answer to each question is a clear "no." Even large customers—such as [redacted]—currently rely on competition between Evonik and PeroxyChem in order to obtain better pricing,[21] and will be unable to do so post-merger. *See FTC v. Wilh. Wilhelmsen ASA*, 341 F. Supp. 3d 27, 71 (D.D.C 2018) (If "sophisticated buyers will have one less alternative strategy through which they can exercise power," those customers can be harmed). Further, Defendants have proffered no evidence that customers have the desire, ability, or incentive to vertically integrate or sponsor entry or expansion into the production and sale of H2O2.

II. THE EQUITIES HEAVILY FAVOR A PRELIMINARY INJUNCTION

Defendants suggest that, in weighing equities, this Court should conclude that the administrative proceeding will not take place, regardless of the outcome in this proceeding. But a decision to abandon the Acquisition is entirely within Defendants' own control, and speculation about what steps the FTC will take is similarly irrelevant. Defendants have offered no valid equities weighing against a preliminary injunction. The case law is clear—there is an overriding "public

[20] *See, e.g.*, [redacted].

[21] *See, e.g.*, [redacted].

interest in effective enforcement of the antitrust laws [which] was Congress's specific public equity consideration in enacting [Section 13(b)]." *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (quoting *Heinz*, 246 F.3d at 726). "Moreover, if the benefits of a merger are available after a trial on the merits, they do not constitute public equities weighing against a preliminary injunction." *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 v. Penn State Hershey*, 838 F.3d 327, 353 (3d Cir. 2016).

Further, Defendants suggest that this unlawful merger in the Pacific Northwest market will have no substantial effect on American consumers. Def. Br. at 26-27, fn. 66. There is no *de minimis* exception to U.S. antitrust laws, and in any event many of Defendants' Canadian customers in this market make substantial sales to the United States. The balance of equities decisively weighs in favor of enforcement of the antitrust laws and a preliminary injunction.

CONCLUSION

Therefore, we respectfully reiterate our request that the Court grant a preliminary injunction and preserve the competition that exists today between Evonik and PeroxyChem during the pendency of the FTC's administrative proceeding on the merits.

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Respectfully Submitted,

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I HEREBY CERTIFY that on the 4th day of November, 2019, I served the foregoing on the following counsel via electronic mail:

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