IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

WILH. WILHELMSEN HOLDING ASA,

WILHELMSEN MARITIME SERVICES AS,

RESOLUTE FUND II, L.P.,

DREW MARINE INTERMEDIATE II B.V.,

and

DREW MARINE GROUP, INC.,

Defendants.

Civil Action No. 18-cv-00414-TSC

[redacted]

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

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INTRODUCTION

The FTC has presented a picture of competitive conditions in this industry solidly grounded in facts and the law. Wilhelmsen and Drew are the two largest competitors in the world for the supply of marine water treatment products and services, critical items that ensure the smooth and efficient operation of ocean-going vessels. For owners and operators of Global Fleets, whose vessels need to replenish these products while they travel all around the world and require consistent product wherever they may find themselves, Defendants are far and away the top two choices, with other options trailing far behind. This is clear from the documents, the testimony, and the data. Under the law of this Circuit, reinforced in case after case, this Acquisition is presumptively illegal based on the high market shares and market concentration, and Defendants cannot rebut that presumption. While Defendants criticize the FTC's case in colorful terms, replete with a "house of fictions" and a "gerrymandered" product market, they cannot ignore reality: it is Defendants that ignore the facts and ignore the law, standing instead on a fantastic alternate reality untethered by controlling precedent or record evidence, based largely on unsupported assertions and rank speculation.

Critically, Defendants fail to distinguish *Cardinal Health*,[1] *CCC Holdings*,[2] *H&R Block*,[3] *Staples II*,[4] or *Sysco*[5]—five recent merger cases in *this district* upon which the FTC relies that dealt with the types of anticompetitive realities present here. In fact, Defendants' brief is wholly devoid of a single citation to any of those cases. But ignoring these cases does not make them go away, any more than ignoring the record evidence justifies reliance on speculation.

Like most fantasy, Defendants' arguments—that they are just two of many competitors

[1] *FTC v. Cardinal Health*, 12 F. Supp. 2d 34 (D.D.C. 1998).
[2] *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009).
[3] *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011).
[4] *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016) ("*Staples II*").
[5] *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015).

selling commodity products, that customers are all the same, and that entry is a simple matter of outsourcing—cannot withstand close scrutiny. There is both a robust evidentiary record and a legal framework that demonstrates this Acquisition will harm competition, meaning that the FTC is likely to succeed at the administrative trial in proving that the effect of the Acquisition may be to substantially lessen competition in violation of Section 7 of the Clayton Act. The equities also weigh in favor of enjoining the Acquisition pending the outcome of that proceeding. Therefore, a preliminary injunction is warranted.

I. THE FTC IS LIKELY TO SUCCEED ON THE MERITS

At the outset, Defendants attempt to confuse the issues before this Court—as well as the standard that this Court should apply to its review—by suggesting the Court's role extends beyond deciding whether to *preliminarily* enjoin the Acquisition, based on Defendants' stated intention to abandon the transaction if the Court grants a preliminary injunction. Def. Br. at 1. If Defendants choose to do so, that will be their decision, but it is not relevant to these proceedings nor does it alter the standard for a preliminary injunction.[6] The procedures established by Congress call for the merits of this transaction to be adjudicated in the administrative trial, which will begin on July 24, 2018.[7] Defendants cannot convert this hearing into a *permanent* injunction hearing. That is not the motion brought before this Court, and Defendants should not be allowed to "represent" their way into changing the nature of the case. No statute or legal precedent allows them to do so.

In sum, Defendants' unilateral decisions have no bearing on the applicable standard of review for this proceeding under Section 13(b) of the FTC Act: whether this Court finds that, upon "weighing the equities and considering the Commission's likelihood of ultimate success, [a

[6] Defendants moved for a stay of the administrative proceedings (a motion the FTC opposes) just *one day* before filing their opposition brief.

[7] *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).

preliminary injunction] would be in the public interest." 15 U.S.C. § 53(b); *see also Staples II*, 190 F. Supp. 3d at 114.

Defendants also misstate the law concerning the FTC's burden in demonstrating a likelihood of success on the merits. Defendants contend that the FTC needs to demonstrate that "there is a *reasonable probability* that the merger will *substantially* lessen competition." Def. Br. at 20 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). That quotation, however, relates to the standard for *proving* a violation of Section 7 of the Clayton Act, not for obtaining a preliminary injunction. To evaluate the FTC's "likelihood of success," this Court need only "measure 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." *Heinz*, 246 F.3d at 714 (quoting 15 U.S.C. § 18) (emphasis added). The FTC "is not required to *establish* that the proposed merger would in fact violate Section 7 of the Clayton Act." *Id.* (emphasis in original).

A. The Relevant Market Is the Supply of Marine Water Treatment Products and Services to Global Fleets

Defendants claim that the FTC has "gerrymandered" its market definition "to produce high market shares and obtain an evidentiary, burden-shifting presumption." Def. Br. at 2. The FTC's market, however, accurately reflects the business realities of this industry, and is fully supported both by the evidence in this case and the case law in this Circuit.

1. The FTC Has Properly Defined the Relevant Product Market

Courts generally follow two complementary approaches in analyzing the relevant product market. First, they apply the hypothetical monopolist test, and second, they often analyze the *Brown Shoe* "practical indicia." *See Staples II*, 190 F. Supp. 3d at 118-122; *Sysco*, 113 F. Supp. 3d at 27, 33. Defendants make no mention of the first approach, and include only a perfunctory cite to the

second. Yet the supply of marine water treatment products and services to Global Fleets satisfies both tests, and therefore is a properly defined relevant market. FTC Br. at 16-19.

i. The Supply of Water Treatment Products and Services to Global Fleets Meets the Brown Shoe Factors

While Defendants cite to the *Brown Shoe* "practical indicia" factors, they do not apply them, and they ignore record evidence that the supply of water treatment products and services to Global Fleets meets the test. FTC Br. at 16-19. The supply of marine water treatment products and services to Global Fleets has unique characteristics and uses,[8] distinct customers,[9] and distinct prices.[10] Indeed, the marine industry recognizes these products as distinct.[11] In sum, customers place a premium on obtaining consistent, high quality marine boiler water and cooling water treatment products no matter where they call to port given the technical nature of these products and their application to highly critical[12] components of a vessel's operational system.

ii. The FTC's Cluster Market Approach Is Appropriate

Defendants criticize the FTC for including both marine boiler water treatment products and services *and* marine cooling water treatment products and services in the same product market because these products "are not reasonably interchangeable." Def. Br. at 24. But the FTC has never claimed that they are. This argument fundamentally misconstrues the FTC's product market and misunderstands the concept of "cluster markets" as discussed in, *inter alia*, *Staples II* and *ProMedica*

[8] PX61000 ¶¶ 14, 49, 76.
[9] PX61000 ¶¶ 152, 153.
[10] PX61000 ¶ 151.
[11] PX61000 ¶ 150. Defendants do not dispute that the distribution and sale of these products, including a dedicated marine sales force and a worldwide distribution network that allow customers to order from one part of the world while receiving delivery in another, are part of a relevant product market. FTC Br. at 16-18.
[12] In fact, Defendants make no effort to dispute the highly critical and low-cost nature of marine water treatment products and services, and with good reason; any suggestion to the contrary would contradict the very statements Defendants make to potential customers when they seek to obtain or retain business. For example, in a July 2016 proposal to supply [redacted] with boiler water treatment and cooling water treatment chemicals, Drew warned that "[b]oiler water and cooling water systems require careful testing and monitoring to ensure that correct water conditions are maintained at all times. Failure to maintain the correct water treatment will lead to serious equipment repairs. PX10346-002.

Health Sys., Inc. v. FTC, 749 F.3d 559, 565-68 (6th Cir. 2014), which is a framework for analyzing distinct products together.

Although marine boiler water treatment products and cooling water treatment products are individual products with different functions, the two can be grouped together in a *cluster market* for analytical convenience because they face similar competitive conditions. *Brown Shoe*, 370 U.S. at 327-28 (relevant markets need not be subdivided into smaller groupings when "considered separately or together, the picture of this merger is the same"); *see also Staples II*, 190 F. Supp. 3d at 117; *ProMedica*, 749 F.3d at 565-68.

While Defendants acknowledge that clustering is appropriate in defining a relevant antitrust market, Def. Br. at 2, they misapply both the law and the facts in claiming that the relevant market here is both "overinclusive and underinclusive." Def. Br. at 23-26.

First, Defendants' argument that the FTC's market is "overinclusive" is wrong as a matter of law. Defendants claim that boiler water treatment products and cooling water treatment products cannot be clustered together because they "are not reasonably interchangeable." Def. Br. at 24. This argument ignores the very premise of cluster markets in the first instance. "Cluster markets allow items that are not substitutes for each other to be clustered together in one antitrust market for analytical convenience." *Staples II*, 190 F. Supp. 3d at 117; *see also ProMedica*, 749 F.3d at 565-68. No one is disputing that marine boiler and cooling water treatment products are not interchangeable.

However, it is appropriate to cluster distinct relevant product markets for analytical convenience when the products in those markets face similar competitive conditions. *See Staples II*, 190 F. Supp. 3d at 117 ("Although a pen is not a functional substitute for a paperclip, it is possible to cluster consumable office supplies into one market for analytical convenience."). Much like the pens and paperclips in *Staples II*, boiler and cooling water treatment products face similar competitive

conditions and therefore can be clustered for analytical convenience.[13] Both products maintain active operational equipment on a vessel, with the same customers demanding consistent product on a global basis, in contrast with products like cleaning chemicals where global consistency is less important.[14] This is also borne out in the data, which shows that the Defendants earn higher margins, and have higher market shares, in marine water treatment products than in other marine products.[15] Additionally, Defendants compete against a nearly identical set of competitors for both products, and their water treatment product portfolios overlap with each other to a considerable degree.[16] Thus, here, there is ample record evidence that supports a cluster market including both products.

Second, Defendants' argument that the FTC's market is "underinclusive" by including just marine boiler water treatment products and cooling water treatment products—and not other marine products—is wrong as a matter of fact and law. Products should not be clustered together when "competitive conditions" for the products are not similar.[17] *Staples II*, 190 F. Supp. 3d at 117; *ProMedica*, 749 F.3d at 565-68. For the reasons set out above, marine boiler and cooling water treatment products and services face similar competitive conditions, and those conditions are different from other types of marine products. Therefore, it is proper for the FTC and its expert, Dr. Nevo, to cluster these products together.[18]

Marine cleaning chemicals and marine refrigerants, for example, are less specialized and technical than marine water treatment chemicals, making it easier for customers to purchase these

[13] *See ProMedica*, 749 F.3d at 565-68 (6th Cir. 2014) (clustering distinct inpatient procedures that are not functionally interchangeable into a single market was appropriate for analytical convenience). Defendants' reliance on *United States v. Grinnell Corp.* is misplaced. *Grinnell* dealt with a single product market—accredited central station services—that were purchased as a bundle or "package-deal" rather than distinct product markets aggregated for analytical convenience, which is the situation here. *United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966); *see also ProMedica*, 749 F.3d at 567-68; *Staples II*, 190 F. Supp. 3d at 117.
[14] PX61002 ¶ 82.
[15] PX61002 ¶¶ 10, 14-15, 17.
[16] PX61000 ¶ 150; PX61002 ¶ 74; PX20004-015.
[17] PX61002 ¶¶ 72-73.
[18] PX61002 ¶ 75.

from many different suppliers.[19] Unlike marine water treatment products, marine fuel oil treatment additives, marine welding gases, and pool and spa water treatment chemicals are not used in some vessels.[20] The difference in competitive conditions between marine water treatment products and other marine products is also evident in market share and margin data as noted above.

Defendants argue that the FTC should set aside established principles because customers often negotiate for these other marine products at the same time as they negotiate for marine water treatment chemicals, and may contract to buy all of these products in the same "framework agreements." Def. Br. at 25. This argument, however, has been squarely rejected by courts that have analyzed cluster markets.[21] The FTC's position, by contrast, is well-supported in the law.

iii. Defendants Ignore the Legal Framework Set Forth in Sysco, Staples II, and the Horizontal Merger Guidelines Regarding Targeted Customers

Defining a relevant market based on a distinct category of customers—here, Global Fleets—is appropriate when a firm can raise prices to certain customers but not to others. *See U.S. Dep't of Justice and Federal Trade Comm'n Horizontal Merger Guidelines* §§ 3, 4.1.4 (2010) ("*Merger Guidelines"*); *see also Sysco*, 113 F. Supp. 3d at 38-39, 46; *Staples II*, 190 F. Supp. 3d at 117-18, 120-21. Whether or not Defendants use the term "Global Fleets" in the ordinary course of their business is irrelevant; what is relevant is whether Defendants could price differently to a set of targeted customers. *Id*. Here, that condition is met.[22] Likewise, even if Defendants did not engage in pre-Acquisition price discrimination against owners and operators of Global Fleets (which they

[19] PX61000 ¶ 148 & n.265; PX80008 ¶ 11; PX70000 at 68-69.
[20] PX61000 ¶ 148 & n.265; PX70003 at 190.
[21] *See ProMedica*, 749 F.3d at 565-66 (not including obstetrics in a cluster market of hospital services even though customers negotiated for obstetrics services in the same contracts as other services); *Staples II*, 190 F. Supp. 3d at 123 (not including "ink, toner and other BOSS products" in the relevant market cluster of consumable office supplies despite undisputed evidence that customers included them in their contracts and RFPs along with consumable office supplies).
[22] PX61000 ¶¶ 170-77. The ability to define a market around targeted customers also requires limited arbitrage in the market, and Defendants do not appear to dispute that arbitrage is difficult if not impossible. PX61000 ¶¶ 168, 178-183; PX61002 ¶ 87.

do), a market based on targeted customers is still appropriate "when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product." *Merger Guidelines* § 4.1.4. That is certainly the case here.[23]

The importance of global customers is underscored by Defendants' own documents, which confirm that they view large fleets of globally trading vessels as "target" customers who Defendants are uniquely positioned to serve.[24] All of Wilhelmsen's, and all but two of Drew's, top 25 customers fall within the FTC's definition of Global Fleets.[25] As noted above, Defendants fail to distinguish *Staples II or Sysco* for any point, including the appropriateness of defining a market around a targeted customer.

2. Defendants Do Not Contest That the Relevant Geographic Market Is Global

Neither Defendants (in their briefing) nor Defendants' expert (in his expert report) dispute that the relevant geographic market in this case is global. FTC Br. at 20-21. The effects of this Acquisition will be felt globally, including on numerous owners and operators of Global Fleets that call the United States home and receive these products and services at dozens of port locations across the country and the world.

3. Defendants Ignore the Hypothetical Monopolist Test

Despite its wide acceptance by courts[26] and frequent use by the U.S. antitrust agencies to define relevant antitrust markets, Defendants ignore the hypothetical monopolist test ("HMT") in their 49-page brief. *See* FTC Br. at 19-20. Indeed, Defendants' brief fails to rebut Dr. Nevo's

[23] PX61002 ¶ 88.
[24] PX61000 ¶¶ 91-92, 105, 160; PX20172-046; PX70003 at 186-87.
[25] PX61000 ¶ 125 Exs. 14, 15.
[26] *See, e.g.*, *Staples II*, 190 F. Supp. 3d at 121-22; *Sysco*, 113 F. Supp. 3d 33-34; *H&R Block*, 833 F. Supp. 2d at 51-52; *CCC Holdings*, 605 F. Supp. 2d at 40.

application of the HMT in defining the relevant market or his conclusion that a hypothetical monopolist supplier of marine water treatment products and services globally could profitably impose a small but significant and non-transitory increase in price on Global Fleets.[27] FTC Br. at 19-20. Nowhere in their brief do Defendants deny that the FTC's relevant market passes the HMT.

B. The Acquisition Is Presumptively Illegal in the Relevant Market

Defendants' combined market share in the relevant market exceeds 80%, and the post-Acquisition HHI and change in HHI blow past the presumption of illegality. Defendants wisely do not attempt to distinguish ***seven*** previously enjoined merger cases from this district with shares and post-merger HHIs lower than those that would result from this Acquisition. FTC Br. at 22-23; Def. Br. at 29. Instead, Defendants cite a single case outside of this district, *FTC v. Butterworth*, 946 F. Supp. 1285, 1294 (D. Mich. 1996), in which a court did not enjoin a merger with post-merger shares that approach (but fall short) of those present here. Def. Br. at 29-30. But *Butterworth* is simply inapplicable here, and numerous subsequent cases have called into question the *Butterworth* court's reliance on a number of facts, dissimilar to this case.[28]

Defendants also ignore their own documents that provide estimates of their combined shares in the relevant market nearly identical to the combined shares calculated by Dr. Nevo. FTC Br. at 22. In fact, Defendant Wilhelmsen's consultant SAI warned in 2015 that a merger between Wilhelmsen and Drew would lead to combined marine water treatment market shares [redacted]."[29]

Even so, Defendants' expert proffers three different candidate "markets" that he contends

[27] PX61000 ¶¶ 138-146, 203-240.
[28] For example, the merging parties in *Butterworth* were non-profit hospitals, and the court found as dispositive studies that showed an increases in market share did not automatically convert into higher prices and profits in the case of non-profit hospitals. Subsequent courts have called *Butterworth*'s rationale into question. *See, e.g., FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1081 (N.D. Ill. 2012).
[29] JX-0178-005; *see also* PX20115-003.

more accurately reflect the conditions in which Defendants compete. And yet, Dr. Nevo ran market share calculations and HHIs for each of the three alternative markets Defendants proposed, and for *all three* the result was the same as for the market alleged by the FTC—market shares and concentration levels exceeding the HHI thresholds in the Merger Guidelines. In other words, even using markets identified by *Defendants*, the FTC can establish a presumption that the Acquisition is anticompetitive and illegal.[30] This puts the lie to Defendants' claim that the FTC gerrymandered its market definition to manufacture high shares and concentration figures.

Indeed, in a failed attempt to deny their own dominance in the market, Defendants' expert is forced to rely on convoluted and deeply flawed approaches to calculating market shares in his attempt to downplay the high market concentration. He calculates shares based on counting the number of ships in a cherry-picked subset of vessels, regardless of the actual revenues associated with those vessels. In other words, when determining market shares, Defendants' expert would count a vessel purchasing $100 of marine water treatment products the same as one purchasing $10,000. These unreliable methods lead Defendants' expert to many faulty conclusions and claims that strain credulity, including his proclamation that "head-to-head competition between WSS and Drew is not a primary constraint on prices today" and his assertion that there is an "absence of barriers to entry and expansion," despite the fact that Wilhelmsen is spending $400 million dollars following a years-long campaign to acquire Drew and "take out [its] competitor."[31]

C. Defendants Ignore Robust Evidence of Direct Head-to-Head Competition and Lack of Alternatives

The FTC supported its strong *prima facie* case with evidence from Defendants' own documents and testimony, customer and competitor testimony, and other market information

[30] PX61002 ¶¶ 134-42.
[31] PX20329-015.

consistently supporting the unassailable fact that Wilhelmsen and Drew are each other's closest competitor and vigorously compete to secure business from owners and operators of Global Fleets. FTC Br. at 23-27.[32] Defendants are literally peerless in this market, as follows from their large market shares, and validated by customer testimony. Despite Defendants' dismissive suggestion that the FTC presented "limited anecdotal evidence" of head-to-head competition, the FTC provided four unrebutted *specific* examples of recent head-to-head competition between Wilhelmsen and Drew that resulted in lower prices for owners and operators of Global Fleets. FTC Br. at 26-27. Defendants' own documents reveal many other examples.[33]

Defendants also attack a strawman, claiming that the FTC "ignore[s] . . . many existing competitors."[34] To the contrary, the FTC has accounted for every supplier identified in the table in Defendants' brief, as well as others.[35] The stark reality, however, is that these firms have only a small fraction of the marine water treatment chemical sales to Global Fleets that either Wilhelmsen or Drew have.[36] That gap speaks volumes because "[r]evenues in the relevant market tend to be the best measure of attractiveness to customers, since they reflect the real-world ability of firms to surmount all of the obstacles necessary to offer products on terms and conditions that are attractive to customers." *Merger Guidelines* § 5.2.

Still, Defendants devote pages and pages of argument and myriad footnotes to website citations and other speculative sources as support for its contention that the market is comprised of many other suppliers who regularly compete for business and provide a constraint on Defendants.[37] The facts belie this; customers consistently testified that they were only aware of two suppliers—

[32] *See also* PX61000 ¶¶ 281-314.
[33] *See, e.g.*, PX20338-001; PX10090-002; PX20081-001; PX20201-001; PX20072-001; JX-0229-036-039.
[34] Def. Br. at 1, 11-12.
[35] Def. Br. at 1, 11-12.
[36] PX61000 ¶ 258 Ex. 30.
[37] Interestingly, Mr. Knowles, President of Drew, and Mr. Grimholt, Wilhelmsen's President, claimed that materials cited on their company's websites were primarily "marketing" materials. PX70023 at 31-32; PX70016 at 24-25.

Wilhelmsen and Drew—that could meet their global needs and provide reliable, consistent, and high quality marine water treatment products and services across the globe, and outreach efforts to other suppliers confirmed this.[38]

Chevron Marine is typical of Defendants' jury-rigged arguments. Defendants tout Chevron Marine as a "massive" global competitor that distributes cooling water treatment chemicals "around the world" and whose mere presence "will discipline the merged entity." Def. Br. at 32-35. However, when Defendants met with staff during the FTC's investigation and provided a list of *39* purported competitors, Chevron Marine failed to even make the cut.[39] And the facts are that Chevron sold [redacted] in marine cooling water treatment chemicals in 2017, a small fraction of what Defendants sell, with that number [redacted] over the [redacted] years for which it provided information.[40] Defendants' suggestion that Chevron Marine is a robust competitor that can discipline the post-merged entity is another misleading fiction divorced from the record evidence.

D. Defendants Have Not Rebutted the Strong Presumption of Illegality

1. There Is No Evidence That Global Fleets Are "Powerful Buyers" or Will Have Meaningful Alternatives Post-Acquisition

The "powerful buyer" antitrust analysis does not, as Defendants claim, invite analysis of whether a Global Fleet customer is for or against the merger or whether vessels of Global Fleets could store more products on board in order to avoid a price increase in certain ports. Def. Br. at 44-46. Rather, the analysis should be framed as one that asks the following two questions: (1) will owners and operators of Global Fleets have sufficient alternatives to post-Acquisition such that they can prevent a price increase by a combined Wilhelmsen/Drew; or (2) will owners and operators of

[38] PX80007 ¶ 8; PX80012 ¶ 14; JX-0137 ¶ 17; PX80006 ¶ 24; JX-0277 ¶ 11.
[39] PX00003-008 – 012.
[40] PX80027 ¶ 6.

Global Fleets have the ability and incentive to vertically integrate upstream or sponsor entry? *Merger Guidelines* § 8; *Sysco*, 113 F. Supp. 3d at 48. The answer to each question is a clear "no."

Owners and operators of Global Fleets will not have alternatives post-Acquisition to prevent a price increase. These customers currently rely on competition between Wilhelmsen and Drew in order to obtain better pricing[41] and have consistently testified that their options to a post-Acquisition Wilhelmsen will be minimal to non-existent.[42] Similarly, owners and operators of Global Fleets have *no* desire, ability, or incentive to vertically integrate or sponsor entry or expansion into the sale of marine water treatment chemicals and services. As Teekay's Director of Global Procurement testified, Teekay would not help suppliers expand because "that's not our business. . . . We want proven suppliers and competent suppliers, and we just can't take that risk . . . both operational, reputational risk to have a problem occur to train or teach somebody."[43] Defendants' arguments to the contrary are pure speculation and factually and legally baseless.

Finally, Defendants spin a fanciful tale that customers stave off competitive harm by simply storing additional product on board their vessels so they do not need to stock up as often. Owners and operators of Global Fleets, however, have *repeatedly* testified that (1) they are already storing as much product on board as they can, to minimize the need to restock in more distant (and more expensive) ports[44] and (2) doing so would be harmful in that it would (a) expose the vessel to unnecessary risks associated with storing more hazardous chemicals, and (b) force the cost of carrying extra chemical inventory onto the customer.[45] Further, if storing additional product on board were a viable strategy for customers to reduce costs or increase their competitive options,

[41] PX61000 ¶¶ 162, 308-09.
[42] JX-0135 ¶ 54; PX80012 ¶ 16; PX80007 ¶ 8; JX-0137 ¶ 23.
[43] PX70025 at 140-41.
[44] PX70025 at 92-93, 95; PX80012 ¶ 10.
[45] PX70022 at 211-12; PX70031 at 57-61.

customers would already be fully using this strategy today, and its impact would already be factored into the pre-Acquisition market.[46]

2. Entry Will Not Be Timely, Likely, and Sufficient

i. Defendants' Contention that Entry and Expansion are "Easy" Cannot Be Squared with the Acquisition's Rationale and Purchase Price

In this litigation, Defendants boldly assert that it would be "easy" to "replicate Drew," and that there are no barriers to doing so. Def. Br. at 5. This claim, however, contradicts Wilhelmsen's stated rationale for the Acquisition as well as the purchase price. Wilhelmsen described its $400 million deal for Drew as "a *unique* opportunity to enhance the scale and geographic reach of our marine products division."[47] Yet how can anything be unique, let alone worth $400 million, if it can easily be replicated by any number of companies just a fraction of Drew's size.

ii. Reputation and Brand Are Barriers to Entry

Defendants assert that "[r]eputation and brand are not barriers to entry." Opp. Br. at 42. But Defendants' reliance on Sherman Act private monopolization cases and predatory pricing cases is misplaced. Indeed, Defendants ignore relevant holdings in Clayton Act Section 7 merger cases from this district that hold that reputation and brand are considerable barriers to entry particularly in industries where, as here, experience and expertise matter. *See Sysco*, 113 F. Supp. 3d at 80 ("[i]ncumbency is a powerful force"); *H&R Block*, 833 F. Supp. 2d at 75 ("importance of reputation and brand in driving consumer behavior" limited existing competitor's ability to expand); *CCC Holdings*, 605 F. Supp.2d at 54 ("Reputation can be a considerable barrier to entry where customers and suppliers emphasize the importance of reputation and expertise.").

[46] PX61002 ¶¶ 151-53, 249.
[47] *Wilhelmsen Acquires Drew Marine Technical Solutions* (Apr. 26, 2017), *available at* https://www.wilhelmsen.com/media-news-and-events/press-releases/2017/wilhelmsen-acquires-drew-marine-technical-solutions/ (emphasis added).

Owners and operators of Global Fleets value Defendants' reputations for supplying high-quality, consistent, and timely products and services all over the world and feel confident when purchasing Defendants' brands.[48] Customers stick with suppliers and brands they know and trust because a lead into the unknown can be costly.[49] Defendants' reputations and brands not only provide them with a built-in advantage over existing competitors, but they also serve as a considerable barrier for any existing supplier or new entrant to replace the lost competition between Wilhelmsen and Drew.[50]

iii. Existing Suppliers Cannot Replicate Drew in a Timely, Likely, and Sufficient Manner

Defendants portray many other existing suppliers of marine water treatment products and services as ready to fill the void left by Drew in a matter of weeks or months, and claim that Global Fleet customers are ready and willing to use these suppliers. The Guidelines, however, require entry or expansion to be timely, likely, and *sufficient* to replace the lost competition. Rather than address this requirement, Defendants provide hyperbolic over-estimates of the size and capabilities of existing competitors and the willingness of Global Fleets to use untested suppliers.

While Defendants muse about how smaller suppliers could expand to a new port here or there by using third-party outsourcing agents, they flatly ignore the critical importance of scale. One of Defendant Drew's own executives testified that smaller suppliers face scale and cost disadvantages that larger suppliers such as Wilhelmsen and Drew do not, and these disadvantages

[48] PX70022 at 136; PX80002 ¶ 26.
[49] *See infra* I.D.2.v; *see also* PX70025 at 116-17; PX70011 at 68-68, 106-108.
[50] Defendants also overstate the FTC's reliance on reputation as a barrier to entry. Defendants cite cases that reject generalized notions of reputation as the only barrier to entry. *See Am. Prof'l Testing Serv., Inc. v. Harcort Brace Jovanovich Legal & Prof'l Pub'ns, Inc.*, 108 F.3d 1147, 1154 (9th Cir. 1997) ("[R]eputation alone does not constitute a sufficient barrier to entry") (emphasis added); *Epicenter Recognition, Inc., v. Jostens, Inc.*, 81 F. App'x 910, 911 (9th Cir. 2003) (good reputation by itself is not an entry barrier) (emphasis added). Here, the FTC demonstrates that reputation and brand are amongst a number of barriers to entry/repositioning, including large scale, a global distribution network, on-board/remote technical assistance, breadth of product portfolio, certifications from engine/boiler manufacturers, and necessary government safety and regulatory approvals. FTC Br. at 32-33.

apply to outsourcing arrangements as well.[51] And the scale gap here is enormous. The notion that remaining firms will somehow grow sufficiently to replicate the competitive constraint posed by Drew today is pure speculation.

Defendants' story about [redacted] recent inquiry to Vecom is a perfect example of their failure to support their entry claims. [redacted], a long-time customer of both Defendants, sent Vecom an RFQ after learning about the Acquisition. Def. Br. at 12. However, Defendants tell only part of the story. Vecom was unable to supply all of the products on [redacted] RFQ, and quoted one boiler water treatment chemical at a price 60% higher than Wilhelmsen.[52] Additionally, Vecom required a three-day lead-time to serve Houston, one of the world's major ports and [redacted] largest port (unlike Wilhelmsen, which had product readily available in stock in Houston).[53] In fact, Vecom could not serve [redacted] in a price-effective or timely manner—unlike both Drew and Wilhelmsen. As a result, [redacted] eliminated Vecom as a potential supply option.[54]

Defendants claim that Global Fleet customers will take a leap of faith and trust unknown and untested suppliers to supply reliable and consistent products and services for highly critical components of their vessels across the globe. But they do not mention the utter lack of evidence that any Global Fleet customer would do so.

iv. Defendants Misstate the Willingness of Firms Who Do Not Currently Supply Marine Water Treatment Products and Services to Enter

Defendants' suggestion that industrial suppliers, ship chandlers, and others are waiting in the wings and ready to replace the competitive significance of Drew is more unsupported speculation. For example, Defendants suggest that Suez Water and Solenis sell to marine customers; they do

[51] PX70019 at 25, 63-64, 66-67, 78, 83, 95, 107, 110.
[52] PX70011 at 60, 133.
[53] PX70011 at 61, 133-35; *see also* JX-0137-009.
[54] PX70011 at 61.

not.[55] Defendants also suggest that industrial suppliers like Solenis and [redacted] could enter the market and replicate Drew's capabilities by using third-party distributors. Def. Br. at 39. Both Solenis and [redacted], however, testified they have no desire to do so.[56] [redacted],[57] in fact, [redacted] because it lacked the global marine distribution network and scale to effectively compete for business, even though [redacted].[58] Similarly, Defendants tout Wrist, a ship chandler that delivers some products for Drew and Wilhelmsen, as a potential entrant even though [redacted].[59]

Industrial chemical suppliers do not sell marine water treatment products, do not market chemicals to marine customers, and do not have a global marine distribution network and dedicated marine sales force and technical service.[60]

Even if industrial chemical suppliers partnered with ship chandlers like Wrist to facilitate the last mile of delivery of marine water treatment products—a speculative scenario unsupported by any evidence from either the industrial suppliers or chandlers—those suppliers would still need the dedicated marine sales force, technical expertise, and on-board and remote technical services that Wrist does not [redacted]) provide.[61] Defendants also tout the capability of companies like toll-blender Navadan and ship chandler Seven Seas to "readily expand their existing portfolios of marine

[55] PX80015 ¶¶ 2-3; PX70024 at 18-19.
[56] PX70024 at 71; PX70029 at 127.
[57] Ecolab operated as "Nalco" in 2010.
[58] JX-0136 ¶ 4; JX-0136-006; PX70029 at 109-17.
[59] PX70013 at 129-31, 135-37.
[60] PX61002 ¶¶ 33-34, 36, 38-39; PX70029 at 21-23, 102-03, 104-05; PX80003 ¶¶ 2, 4, 8; PX70024 at 18-19; PX80016 ¶¶ 3-4; PX10350-114; PX80015 ¶¶ 3-4; PX80010 ¶¶ 3, 6.
[61] *See* PX70013 at 129-30, 135-37.

products to offer a complete line of BWTC and CWTC," but again Defendants provide no factual support for these bald assertions.

v. Switching Suppliers of Marine Water Treatment Products and Services Is Risky and Not Easy

Defendants downplay the importance of framework agreements and suggest that customers move from one supplier to another "overnight." Def. Br. at 18. Again, they are wrong. Defendants ignore record evidence that (i) switching suppliers is expensive and risky; (ii) Defendants' own best practices recommend draining, flushing, and cleaning systems before switching suppliers, which are time- and resource-consuming processes; and (iii) Wilhelmsen's own consultant noted that switching suppliers is "rare." FTC Br. at 5-6. Switching suppliers often takes months,[62] and customers are reluctant to deviate from framework agreements because of the guarantees that these agreements provide for pricing and service.[63]

In addition to costs incurred in preparing a vessel's systems for a different supplier's chemicals and retraining the crew on proper dosage and testing, owners and operators of Global Fleets incur risk when switching suppliers. For example, in approximately 2014, Global Fleet operator [redacted] switched the marine water treatment chemical supplier for its US-based fleet from Drew to Wilhelmsen.[64] Following the switch, [redacted] engineers discovered damage to auxiliary engines in one of its vessels and spent tens of thousands of dollars (and additional downtime) to fix the engines.[65] [redacted] attributed the defective auxiliary engines to problems the crew encountered when switching the vessel's cooling water treatment chemicals from Drew to Wilhelmsen.[66] [redacted] switch "introduce[ed] risk" and caused additional repairs and additional downtime, which

[62] PX70022 at 233-32; PX70026 at 48.
[63] PX70022 214-16; PX70011 at 25; PX70027 at 118-20; PX70025 at 116-17.
[64] PX70031 at 37-38.
[65] PX70031 at 37-38.
[66] PX70031 at 37-38.

was "severely cost prohibitive."[67] This example illustrates the risk of switching even with leading firms like Wilhelmsen and Drew, and that risk is only magnified with the far smaller and less well-established firms that will remain if Drew disappears.

vi. Competitors Have Turned Down Business from Global Fleets

Defendants assert that "there is no evidence that a competitor who was offered business by a 'Global Fleet' turned it down or would turn it down based on an insufficient existing port coverage and an unwillingness to expand." Def. Br. at 38. Again, Defendants are wrong. Here, they ignore evidence from two owners and operators of Global Fleets that directly contradicts this point. In 2011, [redacted] invited four marine water treatment chemical suppliers (Wilhelmsen, Drew, UNI, and Marichem) to bid on its marine chemicals business, but both Marichem and UNI declined to bid.[68] In late 2017 and early 2018, after learning about the proposed Acquisition, Teekay held multiple meetings with Marichem to explore using them as an alternative to Wilhelmsen post-Acquisition. However, Marichem "did not have the breadth to handle [Teekay]" and lacked the "port coverage, . . . stocking locations, [a]nd technical expertise in the ports that [Teekay's] ships may call."[69]

Teekay's experience with Marichem is illustrative of a pervasive weakness in Defendants' argument. Defendants' arguments heavily rely on websites from other suppliers of marine water treatment products and services to suggest that these suppliers have the capabilities and the breadth of a global distribution network to compete with a post-Acquisition Wilhelmsen. *See, e.g.*, Def. Br. at 9, 12-13, 15, 33-35, 37-38. Indeed, Defendants use Marichem's website as one of their best examples of the worldwide reach and breadth of products of these suppliers. *See id.* at 13. And yet, as Teekay's interactions with Marichem illustrate, the facts tell a different story. Despite what

[67] PX70031 at 37-38; *see also* PX70025 at 105.
[68] JX-0137 ¶ 21; *see also* PX70011 at 121-22.
[69] PX70025 at 62-64.

Marichem represents on its website, Marichem is incapable of meeting Teekay's needs as a supplier of marine water treatment products and services. As Teekay's Director of Global Procurement stated when asked for his views on Marichem, "[a]nybody can tell you that they deliver. . . . [W]hether they have product in those ports when you need it, when you require it, that's another story."[70]

3. Defendants Fail to Present "Proof of Extraordinary Efficiencies"

Faced with the *prima facie* presumption of competitive harm and high market concentration levels, Defendants try to save their illegal merger with claims of extraordinary efficiencies. But Defendants fall far short of proffering "proof of extraordinary efficiencies," let alone any substantiation for these efficiencies. FTC Br. at 36-37. In an attempt to verify their purported efficiencies, Defendants devote eleven total lines of text in their brief and cite to a single paragraph from their expert's report, which in turn cites to a single piece of testimony from one of Defendant Drew's executives as the sole support for the expert's efficiencies "analysis". Def. Br. at 46-47. Such a dearth of validation does not come close to meeting the requirements for substantiating verifiable, merger-specific cost savings that will be passed on to customers.[71] In any event, no court has ever rescued an otherwise illegal merger by relying on efficiencies. *See, e.g.*, *CCC Holdings*, 605 F. Supp. 2d at 72; *Heinz*, 246 F.3d at 720-21.

II. THE EQUITIES HEAVILY FAVOR A PRELIMINARY INJUNCTION

Defendants ask this Court to factor Defendants' current plans to abandon the Acquisition if an injunction is granted into the Court's weighing of the equities. But a commitment to abandon the Acquisition is entirely within Defendants' own control and should be seen in the context of its goal to "take out the one competitor that contributes in 'driving' the global market."[72] The procompetitive

[70] PX70025 at 133-34.
[71] *See* PX61003 ¶¶ 2, 8, 15, 20, 23, 33, 35, 41, 44.
[72] PX20329-015.

efficiencies that Defendants assert are too thinly supported and too speculative to play any significant role in balancing the equities. Instead, there is an overriding "public 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." *ProMedica*, 2011 WL 1219281, at *60; *see also FTC v. Penn State Hershey*, 838 F.3d 327, 353 (3d Cir. 2016). Defendants have offered no valid equities weighing against a preliminary injunction.

Further, Defendants curiously suggest that the impact on American consumers of this unlawful merger will be miniscule. Def. Br. at 6. Beyond the absence of any *de minimis* exception to U.S. antitrust laws, many of Defendants' customers, including witnesses in this proceeding, are based in and have vessels calling on the United States and whose vessels call to port at dozens of domestic locations. Indeed, one of Defendant Drew's (a New Jersey-based company) biggest customers is Military Sealift Command, the "primary sea-based transportation provider for the U.S. Department of Defense."[73] The balance of equities decisively weighs in favor of enforcement of the antitrust laws and a preliminary injunction.

III. THE FTC'S CONCLUSIONS ARE CONSISTENT WITH CONCLUSIONS REACHED BY TWO FOREIGN COMPETITION AUTHORITIES

Two other competition authorities—the United Kingdom's Competition and Markets Authority ("CMA") and Singapore's Competition & Consumer Commission ("CCCS")—have already assessed the competitive effect of the proposed Acquisition. The CMA concluded that for, *inter alia* "the supply of marine water treatment chemicals", the Acquisition "will give rise to a realistic prospect of a substantial lessening of competition," and that "entry and expansion into would

[73] PX80000 ¶ 2.

not be timely, likely, and sufficient to mitigate these potential anticompetitive effects."[74] And on May 25, the CCCS issued its provisional decision finding that the Acquisition "is likely to result in a substantial lessening of competition in the market for the supply of marine water treatment chemicals (including ancillary materials and services)," and is illegal under Singapore law.[75]

CONCLUSION

Contrary to Defendants' alternative reality, the facts and the law demonstrate that this merger would create a colossus in marine water treatment chemicals and services for global fleets roughly *20 times* bigger than the next largest competitor. It is also true that despite Defendants' hypothesizing and wish-casting, no present or future competitor can replace the lost competition in a timely, likely, and sufficient manner. And the unverified "efficiencies" mentioned in passing by Defendants do not even approach the bar for rescuing this illegal merger. Ultimately, it comes down to this: American consumers will be harmed by this illegal merger between the only two significant participants in the market for the supply of marine water treatment products and services to Global Fleets. Therefore, we respectfully reiterate our request that the Court grant a preliminary injunction and preserve the robust competition that exists today between Wilhelmsen and Drew during the pendency of the FTC's administrative proceeding on the merits.

[74] Competition & Markets Authority, Anticipated acquisition of Wilhlemsen Maritime Services AS of Drew Marine's Technical Services, Fire, Safety and Rescue Businesses, Sept. 28, 2017, *available at* https://assets.publishing.service.gov.uk/media/59cca90de5274a0f8e101f0b/wilhelmsen-drew-marine-full-text-decision.pdf (last visited May 25, 2018).

[75] Competition & Consumer Commission Singapore, CCCS Provisionally Finds That Proposed Merger Is Likely To Substantially Reduce Competition Between Maritime Products Suppliers, May 25, 2018, *available at* https://www.cccs.gov.sg/media-and-publications/media-releases/wms-dmts-proposed-merger-provisional-decision-issued (last visited May 25, 2018).

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