

**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 VIII (AIV  
I), L.P., PEROXYCHEM HOLDING  
COMPANY LLC, PEROXYCHEM  
HOLDINGS, L.P., PEROXYCHEM  
HOLDINGS LLC, PEROXYCHEM LLC, AND  
PEROXYCHEM COOPERATIEF U.A.,

*Defendants.*

Case: 1:19-cv-02337-TJK

**ANSWER OF DEFENDANTS ONE EQUITY PARTNERS SECONDARY FUND, L.P.,  
ONE EQUITY PARTNERS V, L.P., LEXINGTON CAPITAL PARTNERS VIII (AIV I),  
L.P., PEROXYCHEM HOLDING COMPANY LLC, PEROXYCHEM HOLDINGS, L.P.,  
PEROXYCHEM HOLDINGS LLC, PEROXYCHEM LLC, AND PEROXYCHEM  
COOPERATIEF U.A.**

Defendants One Equity Partners Secondary Fund, L.P. and One Equity Partners V, L.P.,  
(collectively, “One Equity Partners”), Lexington Capital Partners VIII (AIV I), L.P., and  
PeroxyChem Holding Company LLC, PeroxyChem Holdings, L.P., PeroxyChem Holdings LLC,  
PeroxyChem LLC, and PeroxyChem Cooperatief U.A., (collectively, “PeroxyChem”) answer the  
Complaint for Temporary Restraining Order and Preliminary Injunction (the “Complaint”) by

the Federal Trade Commission (“FTC”) in relation to Evonik’s proposed acquisition of PeroxyChem LLC (the “Acquisition”) as follows.

### INTRODUCTION

PeroxyChem will demonstrate at trial—with facts rather than theory and presumption—that the FTC’s portrayal of the hydrogen peroxide industry in general and the Acquisition in particular bear little resemblance to reality. The FTC’s Complaint ignores that today at least five major hydrogen peroxide producers compete vigorously to serve powerful, sophisticated customers that demand high volume, long-term supply contracts for hydrogen peroxide products that come in various grades for a wide range of end uses, and that cannot be substituted for one another. After closing the divestiture proposed by the parties, Evonik will acquire from PeroxyChem only one North American hydrogen peroxide plant, which is located within 500 miles of three other competitors’ plants. This Acquisition will not dampen the robust competition that exists today.

In order to manufacture the strongest mathematical presumption under its Horizontal Merger Guidelines, the FTC asserts artificial relevant product and geographic markets. Neither posited relevant market comports with real world industry dynamics and complexities. As a result, the FTC’s asserted relevant markets both *understate* the vigorous competition in the hydrogen peroxide industry broadly and *overstate* the degree of head-to-head competition between Evonik and PeroxyChem.

First, the FTC alleges the relevant product market is all hydrogen peroxide except electronics-grade hydrogen peroxide. The FTC declines to include the latter on the basis that its “production requires additional manufacturing steps” and it “is not a substitute for other forms of hydrogen peroxide.” However, the same qualities that the FTC uses to *exclude* electronics-grade

hydrogen peroxide apply equally to other grades of hydrogen peroxide that the FTC *includes* in the alleged relevant product market. For example, the FTC purports to include hydrogen peroxide used for aseptic food packaging—which requires additional purification and specially formulated additives to be safe for human consumption—in the same relevant product market as the unpurified standard-grade hydrogen peroxide used for bleaching wood pulp or treating waste water. This is just one example. By including specialty grades of hydrogen peroxide like aseptic-packing-grade—which Evonik does not and cannot supply in the United States—in the alleged relevant product market, the FTC artificially overstates the overlap in product offerings of, and therefore the extent of competition between, Evonik and PeroxyChem.

The FTC similarly gerrymanders alleged relevant geographic markets that are implausible on their face. Although the FTC historically has defined a North American market for hydrogen peroxide in its prior matters, *In re Degussa Aktiengesellschaft, et al.*, 125 F.T.C. 1265, 1267 (1998) (Para. 12 of the complaint), in the Complaint the FTC inexplicably alleges a “South and Central United States” geographic market. That alleged relevant geographic market somehow includes California in the same market as Delaware and Florida (among a total of 35 states), but in a different market than neighboring Oregon and Washington state – the location of Solvay’s recently expanded Longview, Washington plant.

The contrived nature of the FTC’s complaint is also revealed by its discordant theories of anticompetitive harm. On the one hand, the FTC simultaneously alleges that “[f]or years, hydrogen peroxide producers have engaged in parallel pricing behavior and other types of parallel accommodating conduct, *including refraining from competing aggressively*” as a means to prop up its unsupported theory that the Acquisition will increase the probability that suppliers will coordinate. But on the other hand, the Complaint simultaneously acknowledges that

customers nonetheless are able to “pit hydrogen peroxide producers against each other in negotiations,” belying its contention of withheld competition and coordination. The FTC also inconsistently contends—without regard for the facts—that the Acquisition would reduce “significant direct, head-to-head competition” to suggest that the companies are somehow uniquely competitive with one another. Recognizing that neither of its theories of harm is strong enough to stand on its own, the FTC has instead sought to marry two internally inconsistent theories of harm to bolster its case.

What is more, the FTC ignores the divestiture of PeroxyChem’s Prince George plant in Western Canada, which the parties proposed to the FTC in May 2019. As a result of the divestiture, Evonik proposes to acquire only one North American hydrogen peroxide plant in Bayport, Texas, via the Acquisition. The parties have a signed divestiture agreement, contingent on closing the Acquisition that fully addresses any proffered anticompetitive effects in the FTC’s alleged Pacific Northwest geographic market and ensures that there will be no harm to competition or consumers. The divestiture buyer is a leading global supplier of organic peroxides—a complementary product to hydrogen peroxide—that does not produce hydrogen peroxide in North America. By ignoring the proposed divestiture, the FTC unnecessarily brings claims that have been obviated. The parties’ proposed divestiture will preserve the status quo of five North American hydrogen peroxide producers.

In contrast to the picture painted in the Complaint, assessment of actual market dynamics reveals supply of a wide variety of different hydrogen peroxide products that are sold in highly competitive bid events in which Evonik and PeroxyChem are not close competitors. There are at least six key points to note about how competition actually works in this industry:

**First**, hydrogen peroxide is not a commodity product. A variety of grades are specifically tailored to suit different end-use applications. Evonik and PeroxyChem focus on different ends of the hydrogen peroxide spectrum, with Evonik focused on supply of standard-grade hydrogen peroxide, and PeroxyChem focused on supply of high-end, specialty hydrogen peroxide products. In 2018, only around 5 percent of Evonik's hydrogen peroxide revenue in the United States was generated by the sale of specialty products that directly compete with products sold by PeroxyChem, which has a heavy and growing focus on specialty products.

**Second**, Evonik and PeroxyChem operate plants that are geographically differentiated, and each faces closer competition from more proximate hydrogen peroxide suppliers. PeroxyChem's Bayport, Texas, hydrogen peroxide plant—located less than 10 miles from Solvay's Deer Park, Texas, plant—is more than 400 miles from Evonik's Mobile, Alabama, plant; similarly, Evonik's Mobile plant is significantly closer to the hydrogen peroxide plants of both Arkema and Nouryon than it is to PeroxyChem's Bayport plant. Due to the high transportation costs associated with shipping hydrogen peroxide, each hydrogen peroxide producer competes more closely with more proximate competitors.

**Third**, hydrogen peroxide is sold via long-term contracts that are fiercely contested in competitive bid processes. These competitive bid processes promote competition and allow customers to leverage competing bids to extract more favorable contract terms. Because Evonik and PeroxyChem are not close competitors—either geographically or in terms of product mix—they are not each other's primary competitive constraints in bid processes.

**Fourth**, these bid processes are initiated by powerful, sophisticated customers that have substantial bargaining leverage vis-à-vis hydrogen peroxide suppliers and are capable of undermining coordinated conduct. For example, nearly 95 percent of Evonik's 2018 hydrogen

peroxide sales in the United States was attributable to its top 20 customers. Similarly, nearly 75 percent of PeroxyChem's 2018 hydrogen peroxide sales in the United States was attributable to its top 20 customers.

*Fifth*, hydrogen peroxide producers continually look for opportunities to increase sales, both by growing capacity to keep pace with demand and by winning business away from other suppliers. After Solvay expanded its Longview, Washington, plant in 2016, it competed vigorously to sell out its new capacity—including by earning new business from customers previously served by competing hydrogen peroxide producers. As a result, prices fell not only in the Pacific Northwest, but across North America. In addition to formal expansions, hydrogen peroxide suppliers routinely optimize and de-bottleneck their production processes, gradually increasing capacity.

*Finally*, actual market performance indicates that the hydrogen peroxide industry is characterized by robust competition. There is no evidence of coordination, let alone collusion, in recent history. The FTC referenced past alleged collusive conduct, quoting a court filing, but neglected to indicate the time period of the conduct described in the filing. The alleged price fixing to which the FTC referred ceased in 2001—nearly twenty years ago—and has no bearing on current market conditions or the likely effects of the Acquisition.

These real world facts, which are central to any proper antitrust analysis of the likely effects of the Acquisition, are repeatedly misunderstood, overlooked, or simply disregarded by the FTC in its Complaint and in its decision to bring this action. The result is a caricature of the hydrogen peroxide industry that understates existing competition, overstates direct competition between Evonik and PeroxyChem, and ignores market complexities that undermine any potential

coordination between the five post-transaction North American hydrogen peroxide producers that will continue to compete vigorously after the close of this Acquisition.

### **RESPONSES TO SPECIFIC ALLEGATIONS OF THE COMPLAINT**

Except to the extent specifically admitted herein, PeroxyChem denies each and every allegation contained in the Complaint, including all allegations contained in headings or otherwise not contained in one of the Complaint's 65 numbered paragraphs.

The first paragraph of the preamble to the Complaint characterizes this action and asserts legal conclusions to which no response is required; to the extent that a response is deemed necessary, PeroxyChem admits that the FTC has petitioned this Court for a preliminary injunction enjoining Evonik's proposed acquisition of PeroxyChem and in all other respects denies the allegations in the first paragraph of the preamble to the Complaint.

The second paragraph of the preamble to the Complaint characterizes this action and asserts legal conclusions to which no response is required; to the extent that a response is deemed necessary, PeroxyChem admits that the FTC has filed an administrative complaint before the FTC and in all other respects denies the allegations in the second paragraph of the preamble the Complaint. Specifically, PeroxyChem denies that the FTC's administrative complaint noticed a merits trial scheduled to begin on January 2, 2020; PeroxyChem denies that competition will be harmed if the Court denies the FTC's request for a preliminary injunction enjoining the Acquisition; PeroxyChem denies that the FTC's administrative hearing "will determine the legality of the Acquisition" or "will provide all parties a full opportunity to conduct discovery and present testimony and other evidence regarding the likely competitive effects of the Acquisition."

To the contrary, PeroxyChem avers that, as the FTC is aware, the last day on which the Acquisition can close is February 3, 2020 (the “Outside Closing Date”), meaning that either party to the Acquisition may unilaterally terminate the Acquisition as of February 4, 2020. The FTC’s administrative hearing is scheduled to begin at the earliest either on January 2, 2020 (the date set forth in the FTC’s Complaint) or January 22, 2020 (the date noticed in the FTC’s administrative complaint). Whichever date is correct, the FTC’s administrative hearing will not result in a ruling prior to the Acquisition’s Outside Closing Date. Instead, given the commercial realities surrounding the Acquisition, this Court’s determination with respect to this preliminary injunction action will decide the fate of the Acquisition on the merits. Indeed, based on information and belief, since the FTC adopted its current policy statement in 1995 regarding administrative litigation following the denial of a preliminary injunction (available at <https://www.ftc.gov/enforcement/merger-review>), the FTC has not pursued its administrative complaint to completion after the denial of its motion for preliminary injunction; likewise, since 1995, only a very small number of transactions have been able to survive through an entire FTC administrative hearing and ruling after the FTC’s motion for preliminary injunction was granted. FTC administrative proceedings typically take anywhere from 12 to 24 months before the FTC issues its final decision. Given the Outside Closing Date and the commercial realities, it is inconceivable that the Acquisition could survive such an extraordinary delay.

PeroxyChem responds to the numbered paragraphs of the Complaint as follows:

1. PeroxyChem admits that the FTC has filed an action to temporarily restrain and preliminarily enjoin the consummation of the acquisition of PeroxyChem by Evonik and that PeroxyChem and Evonik are two hydrogen peroxide producers in North America. PeroxyChem admits that hydrogen peroxide is used for oxidation, sterilization, and bleaching, among a

number of other end uses. PeroxyChem admits the allegations in the third sentence of Paragraph 1. PeroxyChem also admits the fourth sentence of Paragraph 1 insofar as it pertains to standard grade hydrogen peroxide. PeroxyChem admits that electronics-grade hydrogen peroxide is a specialty grade that requires additional purification capabilities versus standard grade hydrogen peroxide, that electronics-grade hydrogen peroxide purification methods vary by hydrogen peroxide producer, and that not all hydrogen peroxide producers are capable of producing electronics-grade hydrogen peroxide. PeroxyChem states that – just like electronics grade hydrogen peroxide – other specialty grades of hydrogen peroxide that PeroxyChem produces that are included in Plaintiff’s alleged relevant product market, such as food grade and water treatment grade, also require additional purification capabilities versus standard grade hydrogen peroxide, that specialty grade hydrogen peroxide purification methods vary by hydrogen peroxide producer, and that not all hydrogen peroxide producers are capable of producing specialty grades. PeroxyChem denies the remainder of Paragraph 1.

2. PeroxyChem admits that it competes vigorously for customers against all North American hydrogen peroxide suppliers. PeroxyChem denies the remainder of Paragraph 2, except to the extent it contains legal conclusions to which no response is necessary, and specifically denies that the FTC’s alleged “Pacific Northwest” and “Southern and Central United States” markets on which the allegations of Paragraph 2 are based constitute properly defined relevant geographic markets and that the FTC’s alleged hydrogen peroxide market, excluding electronics-grade hydrogen peroxide, constitutes a properly-defined relevant product market.

3. PeroxyChem lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 3 pertaining to Evonik and other suppliers, and on that basis denies these allegations. PeroxyChem states the hydrogen peroxide industry is highly

competitive and customers are free to select an alternative supplier, and therefore no supplier can control sales. PeroxyChem states further that the proposed divestiture of the Prince George plant fully addresses any proffered or potential anticompetitive effects in the alleged Pacific Northwest geographic market.

4. PeroxyChem states that the Horizontal Merger Guidelines speak for themselves. PeroxyChem specifically denies that the Merger Guidelines are vested with the authority to determine the legality of any acquisition, presumptively or otherwise. PeroxyChem denies the remainder of Paragraph 4, except to the extent that it contains legal conclusions to which no response is necessary.

5. PeroxyChem denies the allegations in Paragraph 5, except to the extent it states legal conclusions to which no response is necessary. PeroxyChem states that the hydrogen peroxide industry is highly competitive and will remain so post-merger. There is nothing about the Acquisition that would make coordination meaningfully more likely. PeroxyChem states that Plaintiff's allegation of a "long history of price-fixing" in the hydrogen peroxide industry mischaracterizes a single investigation into alleged conduct that ended about twenty years ago when the industry differed significantly from what it is today. PeroxyChem states further that neither it nor its predecessor was fined for alleged price-fixing, nor were any of its employees indicted let alone pled guilty.

6. PeroxyChem admits that competition between and among all of the hydrogen peroxide suppliers benefits customers. PeroxyChem denies the remainder of Paragraph 6, except to the extent it states legal conclusions to which no response is necessary.

7. PeroxyChem admits that building a new hydrogen peroxide requires a significant monetary investment in time and money, but denies that this is a barrier to entry or expansion.

PeroxyChem specifically denies that expansion or repositioning by other firms is difficult or unlikely, and, indeed, is contradicted by competing hydrogen peroxide producer Solvay's recent significant expansion of its Longview, Washington plant in 2016. PeroxyChem denies the remainder of Paragraph 7, except to the extent it states legal conclusions to which no response is necessary.

8. PeroxyChem denies the allegations in Paragraph 8, except to the extent it states legal conclusions to which no response is necessary.

9. PeroxyChem denies that the acquisition would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. PeroxyChem admits the remainder of Paragraph 9, except to deny that the administrative complaint noticed a merits trial scheduled to begin on January 2, 2020.

10. PeroxyChem admits the allegations in the first sentence of Paragraph 10. PeroxyChem denies the remainder of Paragraph 10, except to the extent it states legal conclusions to which no response is necessary.

11. PeroxyChem denies the allegations in Paragraph 11, except to the extent it states legal conclusions to which no response is necessary.

12. PeroxyChem admits that Plaintiff purports to bring this civil action pursuant to Section 13(b) of the FTC Act, 15 U.S.C. §53(b), and under 28 U.S.C. §§ 1331, 1337, and 1345, and admits that Plaintiff is an agency of the United States. PeroxyChem denies the remainder of Paragraph 12, except to the extent it states legal conclusions to which no response is necessary.

13. Paragraph 13 contains a statutory citation that speaks for itself.

14. Paragraph 14 states legal conclusions to which no response is required.

15. PeroxyChem admits that it consented to personal jurisdiction in the District of Columbia for the sole purpose of this proceeding. The remainder of Paragraph 15 states legal conclusions to which no response is required. PeroxyChem lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations as they relate to Evonik, and therefore denies these allegations.

16. PeroxyChem admits the allegations in Paragraph 16.

17. PeroxyChem lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 17, and on that basis denies these allegations.

18. PeroxyChem admits the allegations in Paragraph 18.

19. PeroxyChem denies the allegations in Paragraph 19, except to admit that pursuant to an Agreement and Plan of Merger dated November 7, 2018, Evonik proposes to acquire 100% of the non-corporate interests of PeroxyChem Holding Company LLC, 99% of the non-corporate interests of PeroxyChem Coöperatief U.A., and 100% of the non-corporate interest of PeroxyChem Holdings LLC for \$625 million.

20. PeroxyChem admits the allegations in Paragraph 20.

21. PeroxyChem admits that the FTC authorized the filing of this Complaint. In all other respect, PeroxyChem denies the allegations of Paragraph 21 and specifically denies that the Acquisition would violate any provision of the Clayton Act or the FTC Act, or that Evonik's acquisition of PeroxyChem would substantially lessen competition or harm consumers in any line of commerce, or that enjoining Evonik's acquisition of PeroxyChem would in any way be in the public interest.

22. PeroxyChem denies the allegations in Paragraph 22, except to the extent it states legal conclusions to which no response is necessary. PeroxyChem specifically denies that the

FTC's alleged "Pacific Northwest" and "Southern and Central United States" markets constitute properly defined relevant geographic markets, and specifically denies that the FTC's alleged hydrogen peroxide market, excluding electronics-grade hydrogen peroxide, constitutes a properly-defined relevant product market.

23. PeroxyChem admits that hydrogen peroxide can be used as an oxidizing agent with diverse uses, including various grades appropriate for end uses such as bleaching pulp, chemical synthesis, and sterilizing food packaging, among many others including electronics. PeroxyChem admits that the primary use of standard grade hydrogen peroxide produced in North America is for bleaching in the pulp and paper industry. PeroxyChem denies the remainder of Paragraph 23, except to the extent it states legal conclusions to which no response is necessary.

24. PeroxyChem admits that the FTC has excluded electronics-grade hydrogen peroxide from its alleged product market definition, but specifically denies that the FTC's alleged hydrogen peroxide market, excluding electronics-grade hydrogen peroxide, constitutes a properly-defined relevant product market. PeroxyChem admits the second sentence of Paragraph 24. PeroxyChem admits that electronics-grade hydrogen peroxide is a specialty grade that requires additional purification capabilities versus standard grade hydrogen peroxide, that electronics-grade hydrogen peroxide purification methods vary by hydrogen peroxide producer, and that not all hydrogen peroxide producers are capable of producing electronics-grade hydrogen peroxide. PeroxyChem states that – just like electronics grade hydrogen peroxide – other specialty grades of hydrogen peroxide that PeroxyChem produces that are included in Plaintiff's alleged relevant product market, such as food grade and water treatment grade, also require additional purification capabilities versus standard grade hydrogen peroxide, that specialty grade hydrogen peroxide purification methods vary by hydrogen peroxide producer,

and that not all hydrogen peroxide producers are capable of producing specialty grades.

PeroxyChem admits that other standard and specialty grades of hydrogen peroxide are not a substitute for electronics-grade hydrogen peroxide, and states further that standard grade hydrogen peroxide is not a substitute for specialty grades and that specialty grades of hydrogen peroxide also are not substitutes for each other. PeroxyChem denies the remainder of Paragraph 24, except to the extent it states legal conclusions to which no response is necessary.

25. PeroxyChem denies the allegations in the first sentence of Paragraph 25. As to the second sentence of Paragraph 25, PeroxyChem admits that the primary raw materials used to manufacture the various grades of hydrogen peroxide are natural gas and hydrogen. As to the third sentence of Paragraph 25, PeroxyChem admits that crude hydrogen peroxide is produced via a three-step process of hydrogenation, oxidation, and extraction. As to the fourth sentence of Paragraph 25, PeroxyChem admits that various grades of hydrogen peroxide are made from crude hydrogen peroxide via dilution, filtration, and stabilization processes designed to meet end-use specific criteria. PeroxyChem denies the remainder of Paragraph 25.

26. This paragraph asserts a legal conclusion to which no response is required. To the extent a response is required, PeroxyChem admits that pulp and paper customers purchase the majority of standard grade hydrogen peroxide in North America, and denies the remainder of the allegations in Paragraph 26.

27. PeroxyChem admits that it competes with all the other suppliers of hydrogen peroxide in North America. PeroxyChem denies the remainder of Paragraph 27, except to the extent it states legal conclusions to which no response is necessary.

28. PeroxyChem denies the allegations in Paragraph 28, except to the extent it states legal conclusions to which no response is necessary. PeroxyChem specifically denies that the

FTC's alleged "Pacific Northwest" and "Southern and Central United States" markets constitute properly defined relevant geographic markets.

29. PeroxyChem admits the first sentence of Paragraph 29. PeroxyChem states that phrases "high transportation costs" and "relative to the value of the product itself" are vague and ambiguous, and that transportation costs and their relationship to the value of the product varies greatly across mode of transport, distance, the customer's storage infrastructure, product type, customer type, and end use application, among many other factors, and on that basis denies the allegations in the second sentence. PeroxyChem admits that there are numerous factors that determine transportation costs, but all else equal, it is often more cost-effective to transport hydrogen peroxide over a shorter distance. PeroxyChem admits that it uses terminals in connection with the transport of hydrogen peroxide. PeroxyChem denies the remainder of Paragraph 29 as they pertain to PeroxyChem. PeroxyChem lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations as they pertain to other hydrogen peroxide producers, and on that basis denies them.

30. PeroxyChem denies the allegations in Paragraph 30 that relate to PeroxyChem. PeroxyChem lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations relating to Evonik or other hydrogen peroxide suppliers, and therefore denies these allegations.

31. PeroxyChem admits that it individually negotiates prices with many of its customers and that customer location is one factor, among many, that can affect the negotiated price. PeroxyChem denies the remainder of the allegations in Paragraph 31 that relate to PeroxyChem. PeroxyChem lacks knowledge or information sufficient to form a belief about the

truth or falsity of the allegations relating to Evonik or other hydrogen peroxide suppliers, and therefore denies these allegations.

32. PeroxyChem lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 32, but notes that many customers of different grades of hydrogen peroxide can and have purchased from producers outside of the artificial “Pacific Northwest” and “Southern and Central United States” markets alleged by the FTC. PeroxyChem specifically denies that the FTC’s alleged “Pacific Northwest” and “Southern and Central United States” markets on which the allegations of Paragraph 32 are based constitute properly defined relevant geographic markets.

33. PeroxyChem admits that it has hydrogen peroxide production plants in Bayport, Texas and Prince George, British Columbia, Canada. PeroxyChem further admits that Evonik has hydrogen peroxide production plants in Mobile, Alabama; Gibbons, Alberta, Canada; and Maitland, Ontario, Canada. PeroxyChem denies the remainder of Paragraph 33.

34. PeroxyChem denies the allegations in Paragraph 34 and specifically denies that the FTC’s alleged “Pacific Northwest” and “Southern and Central United States” markets on which the allegations of Paragraph 34 are based constitute properly defined relevant geographic markets.

35. PeroxyChem denies the allegations in Paragraph 35 and specifically denies that the FTC’s alleged “Pacific Northwest” and “Southern and Central United States” markets on which the allegations of Paragraph 34 are based constitute properly defined relevant geographic markets.

36. PeroxyChem denies the allegations in Paragraph 36, except to the extent it states legal conclusions to which no response is necessary.

37. PeroxyChem denies the allegations in Paragraph 37 and specifically denies that the FTC's alleged "Pacific Northwest" markets on which the allegations of Paragraph 37 are based constitutes a properly defined relevant geographic market. PeroxyChem also denies the allegations in the second sentence of Paragraph 37 on the grounds that following the proposed divestiture of the Prince George plant, Evonik's market share will remain unchanged.

38. PeroxyChem admits that it competes with Solvay, Arkema, and Nouryon in the purported Southern and Central United States geographic market as defined in the Complaint, and elsewhere. PeroxyChem lacks knowledge or information sufficient to form a belief about the truth or falsity of the remainder of the allegations in Paragraph 38, and on that basis denies these allegations. PeroxyChem specifically denies that the FTC's alleged "Southern and Central United States" market on which the allegations of Paragraph 38 are based constitutes a properly defined relevant geographic market.

39. Paragraph 39 contains characterizations of the Merger Guidelines and court opinions, which speak for themselves and to which no response is required. To the extent a response is deemed necessary, PeroxyChem denies the allegations of Paragraph 39 and specifically denies that the Merger Guidelines are vested with the authority to determine the legality of any acquisition, presumptively or otherwise.

40. PeroxyChem denies the allegations in Paragraph 40, except to the extent it states legal conclusions to which no response is necessary.

41. PeroxyChem denies the allegations in Paragraph 41, except to the extent it states legal conclusions to which no response is necessary. PeroxyChem further denies the allegations in Paragraph 41 on the grounds that concentration in the alleged Pacific Northwest market will remain unchanged following the divestiture of the Prince George plant.

42. PeroxyChem denies the allegations in Paragraph 42, except to the extent it states legal conclusions to which no response is necessary.

43. PeroxyChem denies the allegations in Paragraph 43.

44. PeroxyChem denies the allegations in Paragraph 44.

45. PeroxyChem denies the allegations in Paragraph 45.

46. PeroxyChem states that the phrases “the industry has a history of price fixing” and “substantial fines and settlements” are vague, ambiguous, and misleading, and on that basis denies the first sentence of Paragraph 46. PeroxyChem admits that in the past there have been guilty pleas, private litigation, and fines and settlements relating to one investigation into alleged conduct from about twenty years. PeroxyChem lacks information sufficient to form a belief about the truth or falsity of the allegations in the third sentence, and on that basis denies these allegations. PeroxyChem states that the quoted Solvay plea agreement relates to conduct that allegedly took place over a period of less than three and a half years and ended about twenty years ago, and that neither PeroxyChem nor its predecessor FMC, nor any of their employees, were charged with any crime in the referenced criminal antitrust investigation. PeroxyChem denies the remainder of Paragraph 46.

47. PeroxyChem admits that, like all businesses in a highly competitive industry, it attempts to gather competitive intelligence about its competitors from customers, distributors, and others throughout the industry in order to be as competitive as possible, and that the quality and accuracy of that information is variable and imperfect. PeroxyChem denies the remainder of the allegations of Paragraph 47 as they pertain to it. PeroxyChem lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations as they pertain to other producers.

48. PeroxyChem admits that the major costs to produce hydrogen peroxide include natural gas and electricity. PeroxyChem further admits that, like all businesses in a highly competitive industry, it may factor in estimates of competitors' transportation costs in order to be as competitive as possible, and that those estimates can sometimes inform PeroxyChem's bidding depending on the circumstances. PeroxyChem admits that on occasion certain customers selectively tell it a competitor's price where the customer feels that doing so is to its advantage. PeroxyChem denies the remainder of the allegations of Paragraph 48 as they pertain to it. PeroxyChem lacks knowledge or information sufficient to form a belief about the truth or falsity of the allegations as they pertain to other producers.

49. PeroxyChem denies the allegations in Paragraph 49.

50. PeroxyChem denies the allegations in Paragraph 50.

51. PeroxyChem admits that customers benefit from competition between hydrogen peroxide suppliers, but denies that Evonik and PeroxyChem are particularly close competitors as compared to other producers or that they otherwise have any special role in disciplining the price of one another. PeroxyChem denies the remainder of Paragraph 51.

52. PeroxyChem admits that customers benefit from competition between hydrogen peroxide suppliers, but denies that Evonik and PeroxyChem are particularly close competitors as compared to other producers or that they otherwise have any special role in disciplining the price of one another. PeroxyChem admits that, like all businesses in a highly competitive industry, it sometimes attempts to respond to competitors' pricing by offering lower prices or better terms in certain circumstances depending on a number of different factors. PeroxyChem denies the remainder of the allegations in Paragraph 52 as it relates to PeroxyChem. PeroxyChem lacks

information sufficient to form a belief about the truth or falsity of the allegations in Paragraph 52 as it relates to Evonik, and on that basis denies these allegations.

53. PeroxyChem denies the allegations in Paragraph 53.

54. PeroxyChem admits that Solvay is a competing hydrogen peroxide producer.

PeroxyChem lacks knowledge or information sufficient to form a belief about the truth or falsity of the remainder of the allegations in Paragraph 54, and on that basis denies these allegations.

PeroxyChem further denies the allegations in Paragraph 54 on the grounds that the divestiture of the Prince George plant will fully replace any alleged lost competition in the alleged Pacific Northwest market.

55. PeroxyChem admits that Solvay, Arkema, and Nouryon are competing hydrogen peroxide producers. PeroxyChem denies the remainder of Paragraph 55 and specifically denies that the FTC's alleged "Pacific Northwest" and "Southern and Central United States" markets on which the allegations of Paragraph 55 are based constitute properly defined relevant geographic markets and that the FTC's alleged hydrogen peroxide market, excluding electronics-grade hydrogen peroxide, constitutes a properly-defined relevant product market

56. PeroxyChem denies the allegations in Paragraph 56.

57. PeroxyChem denies the allegations in Paragraph 57.

58. PeroxyChem admits that Solvay significantly expanded production at its Longview, Washington hydrogen peroxide production plant in 2016 and states that this expansion intensified competition in an already highly competitive industry. PeroxyChem lacks information sufficient to form a belief about the truth or falsity of the allegations in the second sentence as to whether other suppliers have increased capacity in the last decade, and on that

basis denies these allegations. PeroxyChem denies the remainder of the allegations in Paragraph 58, except to the extent it states legal conclusions to which no response is necessary.

59. PeroxyChem lacks knowledge or information sufficient to form a belief as to the truth of the allegations as to “other industrial chemical producers” in Paragraph 59, and on that basis denies those allegations.

60. PeroxyChem lacks knowledge or information sufficient to form a belief as to the truth of the allegations the first sentence of Paragraph 60 as they relate to other competitors or customers, and on that basis denies the allegations of Paragraph 60 except to admit that PeroxyChem has not observed significant imports of hydrogen peroxide into North America.

61. PeroxyChem denies the allegations in Paragraph 61.

62. Paragraph 62 states legal conclusions to which no response is required. To the extent a response is required, PeroxyChem denies the allegations in Paragraph 62.

63. Paragraph 63 states legal conclusions to which no response is required. To the extent a response is required, PeroxyChem denies Paragraph 63.

64. PeroxyChem denies the allegations in Paragraph 64.

65. PeroxyChem denies the allegations in Paragraph 65 and specifically denies that the relief sought by the FTC is in any way in the public interest.

## **DEFENSES**

The inclusion of any defense within this section does not constitute an admission that PeroxyChem bears the burden of proof on each or any of the issues, nor does it excuse Plaintiff’s counsel from establishing each element of its purported claims.

### **First Defense**

The Complaint fails to state a claim on which relief can be granted.

**Second Defense**

The relief sought in the Complaint is not in the public interest and the equities favor consummation of the Acquisition.

**Third Defense**

The Complaint fails to allege a plausible relevant product market.

**Fourth Defense**

The Complaint fails to allege a plausible relevant geographic market.

**Fifth Defense**

The Complaint fails to allege any plausible harm to competition.

**Sixth Defense**

The benefits of the Acquisition significantly outweigh any alleged anticompetitive effects.

**Seventh Defense**

The proposed divestiture of the Prince George plant fully addresses any proffered anticompetitive effects in the alleged Pacific Northwest geographic market and ensures that there will be no harm to competition or consumers.

**Additional Defenses**

PeroxyChem reserves the right to assert any other available defenses.

WHEREFORE, having fully answered the Complaint, PeroxyChem respectfully requests that the Court (i) deny the FTC's contemplated relief; (ii) dismiss the Complaint in its entirety with prejudice; (iii) award to PeroxyChem its costs of suit, including expert fees and reasonable attorney fees, as may be allowed by law; and (iv) award to PeroxyChem such other and further relief as the Court deems just and appropriate.

Date: August 16, 2019

/s/ Mike Cowie

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 16, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: August 16, 2019

*/s/ Mike Cowie*

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