

**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

**JOINT STIPULATED CASE MANAGEMENT AND
SCHEDULING ORDER**

It is hereby ordered as follows:

- A. **TEMPORARY RESTRAINING ORDER.** The Court entered the Temporary Restraining Order on August 5, 2019. Under that Temporary Restraining Order, the Defendants cannot close their transaction until after 11:59 PM Eastern Time on the fifth (5th) business day after this Court rules on the Plaintiff's motion for preliminary injunction, or the date set by the District Court, whichever is later.
- B. **ANSWER.** Defendants shall answer or otherwise respond to Plaintiff's Complaint on or before August 16, 2019.
- C. **DISCOVERY.**
1. **Fact Discovery.** The parties shall commence fact discovery upon the entry of this proposed order and complete it by September 27, 2019, except that, to the extent a third-party deposition is properly noticed, but the third party's schedule does not reasonably accommodate a deposition before the end of fact discovery, a later deposition may occur.
 2. **Initial Disclosures.** The parties agree that they will not make initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1).
 3. **Production of Investigative Materials.** By August 9, 2019, Plaintiff and Defendants will make a good-faith effort to produce, initially on an "outside counsel eyes only" basis, and at all times in compliance with any Protective Order that may be entered in this matter, the following Investigative Materials: (a) all documents or data in their possession, custody, or control that (i) any non-party provided to any party either voluntarily or under compulsory process preceding the filing of this action in the

course of the parties' assessment of or inquiries into the competitive effects of the proposed merger or (ii) any party, including that party's counsel, provided to any non-party (exclusive of agents or consultants of that party retained for the purposes of the investigation but inclusive of agents or consultants of that party retained for business purposes), preceding the filing of this action in the course of the parties' assessment of or inquiries into the competitive effects of the proposed merger; (b) all draft and final witness statements, including transcripts of testimony, affidavits, declarations, or letters, whether in hard-copy or electronic form, sent or received by any party, including that party's counsel, to or from any non-party, including that non-party's counsel, preceding the filing of this action in the course of the parties' assessment of or inquiries into the competitive effects of the proposed merger; and (c) all transcripts of investigative hearings conducted in the course of the investigation of the acquisition of PeroxyChem by Evonik, FTC File No. 191-0029, along with the exhibits used during those investigative hearings. The parties will conduct good-faith, reasonable, and diligent searches for Investigative Materials; if any Investigative Material is withheld as described in this Paragraph, the parties will meet and confer in good faith to agree on a resolution. Nothing in this Order requires the production of any party's attorney work product, confidential attorney-client communications, communications with or information provided to any potentially or actually retained expert, or materials subject to the deliberative-process or any other applicable governmental privilege.

4. Pre-Trial Discovery Conference. This stipulated Order relieves the parties of their duty under Federal Rule of Civil Procedure 26(f) to confer about scheduling and a discovery plan.
5. Third-Party Discovery. No party issuing a third-party subpoena for the production of documents or electronically stored information shall request a return date sooner than seven (7) calendar days after service. Each party shall produce all materials received pursuant to a third-party subpoena, including any declarations or affidavits obtained from a third party, to the other party in the format in which those materials were received within two (2) business days of receiving those materials. In the event a non-party produces documents or electronic information that are non-Bates-stamped – in addition to producing the materials in the format in which they were received within two (2) business days of receiving them – the party receiving the documents shall promptly Bates-stamp the documents or electronic information and produce them in an appropriate timeframe. The parties shall serve document requests to third parties by September 17, 2019.
6. Limitations on Party and Third-Party Declarations or Letters. No party may submit as evidence a declaration or affidavit from a party or third-party witness if such declaration or affidavit was executed or served less than one week prior to his or her agreed-to deposition date. In any event, no party or third-party declaration or affidavit may be submitted as evidence if it was executed or served less than ten (10) calendar days before the close of fact discovery unless it is a supplemental third-party declaration or affidavit related to a previously given third-party declaration or

affidavit, in which case the parties agree to not oppose any efforts to depose such a declarant or affiant irrespective of any other provisions of this order.

7. Document Requests and Production. There shall be no limit on the number of requests for production that the parties may serve. The parties shall serve any objections to requests for the production of documents no later than ten (10) calendar days after the date of service of the document requests to which they assert objections. Within three (3) calendar days of service of any such objections, the parties shall meet and confer in a good faith attempt to resolve the objections. The parties shall substantially comply with requests for production no later than twenty (20) calendar days after the date of service (except to the extent that a particular request results in an objection that cannot be worked out and requires the Court to become involved). In response to any document requests, the parties need not produce to each other in discovery in this case any documents previously produced by Defendants to the FTC in the course of the investigation of the acquisition of PeroxyChem by Evonik, FTC File No. 191-0029.
 - i. Document Productions shall be sent to the attention of:
 1. To the FTC: Steve Santulli and Brittany Hill
 2. To Evonik: Laura Onken and Sarah Melanson
 3. To PeroxyChem: Anna Aryankalayil
8. Requests for Admission. Requests for admission shall be limited to requests for admission related solely to the authenticity of a document or the admissibility of documents, data, or other evidence.

9. Interrogatories. The parties shall serve no more than ten (10) interrogatories per side. The parties shall serve objections and responses to interrogatories (other than contention interrogatories) no later than ten (10) calendar days after the date of service.
10. Contention Interrogatories. When serving interrogatories, the issuing party shall identify any contention interrogatories as such. If the receiving party believes that an interrogatory that is not identified as a contention interrogatory is a contention interrogatory, it will provide notice of this belief no later than three (3) calendar days after it is served. The parties will then meet and confer in good faith to resolve the issue. No party shall seek through a deposition of a party attorney information that it could otherwise obtain through a contention interrogatory. The parties shall respond to contention interrogatories within twenty (20) calendar days after the date of service.
11. Deadline to Issue Written Discovery to Parties. The parties shall serve document requests and interrogatories to parties by September 10, 2019, except that requests for admission related to the authenticity of a document or the admissibility of documents, data, or other evidence may be served no later than October 22, 2019.
12. Expert Reports. Plaintiff shall serve its expert report(s) on September 27, 2019. Defendants shall serve their expert report(s) by noon on October 15, 2019. Plaintiff shall serve any rebuttal expert reports by October 24, 2019. The parties are limited to no more than two (2) experts per side, except that each party may add any number of rebuttal experts.

13. Expert Materials Not Subject to Discovery. Expert disclosures, including each side's expert reports, shall comply with the requirements of Federal Rule of Civil Procedure 26(a)(2), except as modified herein:

- a) Neither side must preserve or disclose, including in expert deposition testimony, the following documents or materials:
 - i. any form of communication or work product shared between any of the parties' counsel and their expert(s) or consultants, or between any of the experts themselves;
 - ii. any form of communication or work product shared between an expert(s) and persons assisting the expert(s);
 - iii. expert's notes, unless they constitute the only record of a fact or an assumption relied upon by the expert in formulating an opinion in this case;
 - iv. drafts of expert reports, analyses, or other work product; or
 - v. data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report, except as set forth in 12(b).

- b) The parties agree that they will disclose the following materials with all expert reports:
 - i. a list by Bates number of all documents relied upon by the testifying expert(s);
 - ii. copies of any materials relied upon by the expert not previously produced that are not readily available publicly; and

- iii. for any calculations appearing in the report, all data and programs underlying the calculation, including all programs and codes necessary to recreate the calculation from the initial (“raw”) data files.

14. Exchange of Lists of Witnesses to Appear at Hearing.

- a) *Preliminary Witness Lists:* The parties shall exchange preliminary witness lists no later than 6:00 p.m. Eastern time on August 19, 2019. Defendants shall jointly submit one list. Preliminary witness lists shall include for each witness: (a) the witness’s name and employer; (b) the name, address, telephone number, and email address of the witness’s counsel (or, if not represented by counsel, the witness’s address, telephone number, and email address); (c) an indication of whether the witness will offer expert testimony; and (d) a summary of the general topics of each witness’s anticipated testimony. In addition, when exchanging their preliminary witness lists, the parties shall provide for each expert witness: (i) materials fully describing or identifying the background and qualifications of the expert; (ii) all publications of the expert within the preceding ten years; (iii) a listing of all prior cases in which the expert has been deposed and/or given in-court testimony within the previous five years; and (iv) all transcripts of such depositions and/or testimony in the possession, custody, or control of such producing party or expert, except that transcript sections under seal in a separate proceeding do not need to be produced. Each party will update its preliminary witness list promptly as it deletes witnesses. The number of

witnesses who may be included on any side's preliminary witness list shall not exceed twenty (20).

- b) *Supplemental Witness Lists:* The parties may supplement their preliminary witness list with up to ten (10) additional third-party fact witnesses by 6:00 pm Eastern time on September 13, 2019, provided that the parties may not disclose more than five (5) such additional third-party fact witnesses after 6:00 pm Eastern time on September 9, 2019. If a side supplements its preliminary witness list, it must strike any witnesses from its preliminary witness list so that the total number of witnesses included on its preliminary and supplemental witness lists does not exceed twenty (20).
- c) *Final Witness Lists:* Final party and third-party witness lists shall be exchanged on or before 6:00 p.m. Eastern time on October 18, 2019. Only a witness who appears on a party's preliminary or supplemental witness list may be included on a party's final witness list. Final witness lists shall include for each witness: (a) an indication of whether the witness will offer expert testimony; (b) a summary of the general topics of each witness's anticipated testimony; and (c) an indication of whether the witness will testify live or by deposition. The preliminary, supplemental, and final witness lists shall represent a good faith effort to identify all witnesses the producing party expects that it may present at the evidentiary hearing, other than solely for impeachment. The number of fact witnesses who may be included on the final witness list shall not exceed 12, which shall include any witnesses one side may call live or present via deposition.

15. Depositions.

- a) Number of Depositions. Each side may depose any individual who is listed on either side's preliminary, supplemental, or final witness list or who provides a declaration. Each side may take a maximum of three (3) depositions of individuals beyond those listed on the parties' preliminary, supplemental, or final witness lists and beyond those who provide declarations. A 30(b)(6) notice counts as no more than one deposition, in the event a party or third party designates multiple individuals. Additional depositions of fact witnesses shall be permitted only by agreement of the parties or by leave of the Court for good cause shown. The parties shall consult with each other prior to confirming any deposition to coordinate the time and place of the deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate the witness's schedule.

- b) Allocation of time. All depositions, including depositions of fact and expert witnesses, shall last no more than seven (7) hours. If both Plaintiff and Defendants notice any third-party fact deposition, the deposition shall count against each side's respective deposition totals, and both sides shall allocate the seven-hour time evenly between the two sides. For any third-party deposition noticed by only one side, the non-noticing side shall be allocated one and a half (1.5) hours of deposition time for cross or re-cross testimony. Unused time in any side's allocation of deposition time may be used by the other side.

- c) For party witnesses or third-party witnesses retained by any party (e.g., as a consultant, agent, contractor, or representative) in connection with the proposed transaction, or any former employees of any party, the other side will have the opportunity to use seven hours for the deposition.
- d) Notice. The parties may not serve a deposition notice with fewer than seven (7) calendar days' notice. The parties shall consult with each other prior to confirming any deposition to coordinate the time and place of the deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate the witness's schedule. If a party serves a non-party subpoena for the production of documents or electronically stored information and a subpoena commanding attendance at a deposition, the deposition date must be at least seven (7) calendar days after the original return date for the document subpoena. No notice for a deposition of a fact witness shall issue after September 17, 2019. If a third-party deposition is properly noticed pursuant to the above, but the third party's schedule does not reasonably accommodate a deposition before the end of fact discovery, a later deposition may occur.
- e) Deposition Designations. The parties need not designate portions of investigational hearings or depositions taken in the litigation. Except as provided in the next sentence, full transcripts of investigational hearings or depositions taken in the litigation shall be admitted, provided that to the extent that a party cites investigational hearing or deposition testimony in

support of a proposed finding of fact, the Court will assess any objections made on the record at the investigational hearing or deposition in determining whether to accept that proposed finding of fact. No portion of a transcript of an investigational hearing of a witness who was not employed by a party at the time of such hearing shall be admitted or offered in support of a proposed finding of fact, unless Defendants have had an opportunity to depose that witness for at least five and a half (5.5) hours.

16. Expert Depositions. One seven-hour deposition of each expert shall be allowed.

Expert depositions must be conducted between October 28, 2019 and November 1, 2019.

17. Discovery Uses. All discovery taken in the above-captioned litigation can be used in connection with the Part 3 administrative proceeding (FTC Docket No. 9384). Only discovery obtained by a party in the Part 3 administrative proceeding before the close of fact discovery in this proceeding may be used as part of this litigation, except by agreement of the parties or by leave of the Court for good cause shown.

D. MOTIONS AND BRIEFING SCHEDULE

18. Plaintiff will file its memorandum in support of its motion for a preliminary injunction by October 2, 2019. This brief is not to exceed 40 pages.

19. Defendants will file their opposition to the Plaintiff's motion for a preliminary injunction by October 25, 2019. This brief is not to exceed 50 pages.

20. Plaintiff will file its reply memorandum in further support of its motion for a preliminary injunction by November 4, 2019. This brief is not to exceed 20 pages.

21. Any motions *in limine*, including any *Daubert* motions, shall be filed by October 30, 2019. Responses to motions *in limine* shall be filed by November 4, 2019.
22. A pre-evidentiary hearing conference is scheduled for November 8, 2019, at 1:30 p.m. in Courtroom 11.
23. The parties' proposed findings of fact and conclusions of law shall be filed by ten (10) days after the close of the evidentiary hearing. Each party's proposed findings of fact and conclusions of law shall not exceed 100 pages.

E. PRELIMINARY INJUNCTION EVIDENTIARY HEARING

24. The Court has scheduled an evidentiary hearing on Plaintiff's motion for a preliminary injunction to begin on November 12, 2019. Each side will have up to 25 hours of total time to present its case, including opening statements and closing statements. Examination time will count against the side conducting the examination of the witness, with both direct examination and cross-examination of witnesses counting against the side conducting the examination. Plaintiff may reserve a portion of its time for rebuttal. The Court intends to revisit the allotment of time to the parties at the pre-evidentiary hearing conference, at which the parties will be expected to justify with additional specificity that 25 hours per side is necessary.

F. OTHER MATTERS

25. Service. Service of any documents not filed via ECF, including discovery requests, Rule 45 subpoenas for testimony or documents, expert disclosure, and delivery of all correspondence, whether under seal or otherwise, shall be by electronic mail to the following individuals designated by each party:

- i. For Plaintiff:

1. James Rhilinger: jrhilinger@ftc.gov

2. Amy Dobrzynski: adobrzynski@ftc.gov (Principal Designee)
 3. Steve Santulli: ssantulli@ftc.gov
 4. Brittany Hill: bhill1@ftc.gov
- ii. For Defendants:
1. For Evonik:
 - a. Eric Mahr: eric.mahr@freshfields.com
 - b. Andrew Ewalt: andrew.ewalt@freshfields.com
 - c. Laura Onken: laura.onken@freshfields.com (Principal Designee)
 2. For PeroxyChem:
 - a. Mike Cowie: mike.cowie@dechert.com
 - b. James Fishkin: james.fishkin@dechert.com
 - c. Shari Ross Lahlou: shari.lahlou@dechert.com
 - d. Brian Rafkin: brian.rafkin@dechert.com

In the event that any documents are too voluminous for electronic mail, the parties shall serve an electronic version of the papers on opposing counsel via Accellion, an electronic file transfer platform. The serving party will telephone or email the other side's principal designee when the materials are sent to alert them that the materials are being served. Service of court filings by 11:59 PM Eastern Time shall be considered filed on that day. For purposes of this provision, service of all other correspondence, discovery requests, witness lists, exhibit lists, objections, expert reports, and productions from parties and third parties by 5:59 PM Eastern Time shall be considered served on that day, except that Defendants' expert report(s) shall be served by noon on October 15, 2019.

26. Nationwide Service of Process. Good cause having been shown in view of the geographic dispersion of potential witnesses in this action, the parties will be allowed nationwide service of process of discovery and trial subpoenas pursuant to Federal Rule of Civil Procedure 45 and 15 U.S.C. § 23, to issue from this Court. The availability of nationwide service of process, however, does not make a witness who is otherwise “unavailable” for purposes of Federal Rule of Civil Procedure 32 and Federal Rule of Evidence 804 available under these rules regarding the use at trial of a deposition taken in this action.
27. Third-Party Confidential Information. The Protective Order Concerning Confidentiality entered by the Court on August 5, 2019 shall govern discovery and production of Confidential Information. Any Party serving discovery requests, notices, or subpoenas sent to a non-party shall provide the non-party with a copy of the Protective Order.
28. Privilege Logs. The parties agree to suspend the obligations of Federal Rule of Civil Procedure 26(b)(5)(A) to produce a log of privileged materials withheld from discovery taken in this action (excluding Defendants’ productions made during the course of the FTC’s pre-complaint investigation). Notwithstanding the foregoing, the parties shall log withheld materials that are: (1) authored by, addressed to, or received from any non-party; or (2) internal to a party that are not authored by, sent to, or received from the party’s attorneys. For purposes of this paragraph, a “non-party” excludes a party’s retained expert and employees of such expert within the meaning of Federal Rule of Civil Procedure 26(b) or/and Federal Rule of Evidence 804. The parties shall maintain all documents responsive to a discovery request that they withhold pursuant to a claim of privilege or protection.

29. Inadvertent Production of Privileged Material. In accordance with Federal Rule of Civil Procedure 16(b)(3)(B)(iv) and Federal Rule of Evidence 502(d), inadvertent production of documents or communications containing privileged information or attorney work product shall not be a basis for loss of privilege or work product of the inadvertently produced material, provided that the producing party notifies the receiving party within three (3) business days of learning of the inadvertent production. When a party determines that it has inadvertently produced such material, it will notify other parties, who will promptly return, sequester, or delete the protected material from their document management systems. Within two (2) business days of identifying inadvertently produced information or documents(s), the party seeking claw-back of such materials shall provide a revised privilege log for the identified information or documents. A Party may move the Court for an order compelling production of the material, but such Party may not assert as a ground for entering such an order the mere fact of inadvertent production. The Party asserting the privilege must file its opposition under seal and submit a copy of the material in question for in camera review.

30. Electronically Stored Information. The parties agree as follows regarding the preservation and production of electronically stored information (“ESI”)

- a) All Parties have established litigation holds to preserve ESI that may be relevant to the expected claims and defenses in this case. In addition, the Parties have taken steps to ensure that automatic deletion systems will not destroy any potentially relevant information.

- b) All parties will request ESI in the form or forms that facilitate efficient review of ESI. In general, the parties will produce ESI according to the same ESI technical specifications used by Defendants in the FTC's pre-complaint investigation.

31. Evidentiary Presumptions.

- a) Documents produced by non-parties from the non-parties' files shall be presumed to be authentic and admissible. Any good-faith objection to a document's admissibility must be provided with the exchange of other objections to trial exhibits. If a party serves a specific good-faith written objection to the document's authenticity, the presumption of authenticity will no longer apply to that document and the parties will promptly meet and confer to attempt to resolve any objection. The Court will resolve any objections that are not resolved through this means or through the discovery process.
- b) All documents produced by a Defendant either in response to document requests in this litigation or in the course of the FTC's pre-complaint investigation of the proposed acquisition, FTC. File No. 191-0029, or any prior FTC investigation, are presumed to be authentic and admissible. If a party serves a specific good-faith written objection to the document's admissibility, the presumption of authenticity will no longer apply to that document and the parties will promptly meet and confer to attempt to resolve any objection. The Court will resolve any objections that are not resolved through this means or through the discovery process.

- c) Any party may challenge the authenticity or admissibility of a document for good cause shown, and if necessary may take discovery or obtain declarations related solely to authenticity or admissibility of documents, notwithstanding any discovery limits otherwise imposed by this Order.

- 32. Modification of Scheduling and Case Management Order. Any party may seek modification of this Order for good cause.
- 33. Statements Regarding Local Rules 16.3(c)(2), 16.3(c)(3), 16.3(c)(4), 16.3(c)(5), and 16.3(c)(6). In this action, counsel for Defendants, acting on behalf of Defendants, have accepted service of the Complaint and have waived service of a summons. Defendants do not intend to file any Rule 12(b) motions and they consent, for the purposes of this case only, to personal jurisdiction and venue in this court. The parties do not believe that the case should be assigned to a magistrate judge for all purposes, including trial. Both parties are amenable to settling this case, but despite their pre-complaint efforts, have not been able to resolve their different views on the likely effects of the proposed merger. Presently, the parties do not believe that the case would benefit from the Court's alternative dispute resolution procedures.
- 34. Exhibit Lists. The parties shall exchange final exhibit lists on or before October 28, 2019. Objections shall be filed on or before November 4, 2019. The parties will file their final exhibit lists with the Court on or before November 7, 2019.
- 35. FRCP 6(a)(1)(C) is to be applied when computing the deadlines in this Order.
- 36. Notwithstanding any other provision in this Order, no discovery motions (other than motions to extend time) may be filed without leave of court. In the event that a discovery dispute arises, the parties shall make a good faith effort to resolve or narrow the areas of disagreement. If the parties are unable to resolve the discovery

dispute, the parties shall jointly call chambers, at which time the Court will either rule on the issue or determine the manner in which it is to be handled.

37. Notwithstanding any other provision in this Order, any party seeking to file a document under seal must specifically address the factors laid out by the D.C. Circuit in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980). Any motion for leave to file under seal that fails to address those factors will be summarily denied.

SO ORDERED.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: August 12, 2019

OVERVIEW OF SCHEDULE

Event	Date(s)
Discovery Commences	August 12, 2019
Defendants' Answer to Plaintiff's Complaint	August 16, 2019
Exchange of Preliminary Witness Lists	August 19, 2019
Deadline to Serve Written Discovery [(excluding Requests for Admission for Authentication/Admissibility)] to Parties	September 10, 2019
Exchange of Supplemental Witness Lists	September 13, 2019
Deadline to Serve Written Discovery to Third Parties	September 17, 2019
Deadline to Serve Deposition Notices for Fact Witnesses	September 17, 2019
Close of Fact Discovery	September 27, 2019
Plaintiff's Expert Report(s) Due	September 27, 2019
Plaintiff's Memorandum of Law in Support of Preliminary Injunction Motion	October 2, 2019
Defendants' Expert Report(s) Due	Noon on October 15, 2019
Exchange of Final Witness Lists	October 18, 2019
Deadline to Serve Requests for Admission for Authentication/Admissibility	October 22, 2019
Plaintiff's Rebuttal Expert Report(s) Due	October 24, 2019
Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction	October 25, 2019
Exchange of Exhibit Lists	October 28, 2019
Last day for Motions <i>In Limine</i> to be filed	October 30, 2019
Close of Expert Discovery	November 1, 2019

Event	Date(s)
Exchange Objections to Exhibit Lists	November 4, 2019
Plaintiff's Reply to Defendants' Opposition to Preliminary Injunction Motion	November 4, 2019
Last day for responses to Motions <i>In Limine</i> to be filed	November 4, 2019
Final Exhibit Lists Due	November 7, 2019
Pre-Hearing Conference	November 8, 2019
Evidentiary Hearing Begins	November 12, 2019
Proposed Findings of Fact and Conclusions of Law	10 days following conclusion of hearing