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]

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Wilhelmsen and Drew are far and away the two largest suppliers of marine water treatment products and services to fleets of ships that travel all over the world. Marine water treatment products and services are vital to a vessel's boiler and engine cooling systems—core vessel operational systems—and without them, these systems may corrode, operate inefficiently, or even fail altogether. Given their critical nature, owners and operators of these global fleets need reliable access to marine water treatment products and services in the many ports worldwide in which they may call.

Wilhelmsen has been plotting to acquire Drew, its biggest and most significant competitor, for years. Wilhelmsen spelled out its strategic rationale for acquiring Drew as early as 2014: to "take out the one competitor that contributes in 'driving' the global market."[1] The evidence demonstrates that Wilhelmsen's confidence that this transaction will eliminate its only global competitor is well founded.

Wilhelmsen and Drew are each other's only true global rival, so much so that Defendants describe this market as a "duopoly"[2] dominated by Wilhelmsen and Drew. Defendants compete vigorously against each other to reach framework agreements with owners and operators of fleets of 10 or more globally trading vessels ("Global Fleets") that need access to these marine water treatment products and services in dozens of port locations worldwide. This competition between Wilhelmsen and Drew results in customers receiving lower prices, better service, and increased marine water treatment product and service options. Indeed, for many owners and operators of Global Fleets, Defendants are the *only* two suppliers who can meet their global

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[1] PX20329-015. Wilhelmsen internally referenced its proposed acquisition of Drew as "[redacted] PX10052-001; PX10051-011.

needs. Combined, Defendants would control more than 80% of the supply of marine water treatment products and services to Global Fleets, and the illegal merger between them would result in a substantial loss of competition. In the words of a Drew executive, a merger with Wilhelmsen would "take away [our] main competitor."[3]

Neither new entry nor expansion by existing suppliers will be timely, likely, and sufficient to replace the loss of this global competition. Further, Defendants have failed to substantiate their purported efficiencies. Even if they could and did, only a small percentage of Defendants' claimed efficiencies are likely merger specific, and they would not, in any event, offset the clear competitive harm that would result from this merger. The FTC has initiated an administrative proceeding on the merits to decide whether Defendants' proposed merger (the "Acquisition") violates the antitrust laws, with the evidentiary hearing in that merits proceeding set to begin on July 24, 2018. Absent a preliminary injunction, Defendants can merge before the administrative proceeding concludes, and immediately and permanently eliminate the direct head-to-head competition between Wilhelmsen and Drew, competition that benefits owners and operators of Global Fleets. Thus, to avoid the irrevocable harm that would arise from consummation of this Acquisition, the Court should enjoin this illegal merger.

BACKGROUND

Wilhelmsen, based in Norway, employs over 4,500 people throughout 125 countries, and owns or operates 182 warehouses.[4] In 2017, Wilhelmsen's global revenues exceeded [redacted] million for all marine products and services, including approximately [redacted] million specific to

[3] PX10038-006.
[4] PX61000 ¶ 51.

marine water treatment products and services.[5] Wilhelmsen considers its global distribution network "the largest maritime services network in the world."[6]

Drew, headquartered in New Jersey, employs approximately 400 people and operates 81 distribution centers throughout 46 countries.[7] Drew's 2017 global revenues for all marine products and services exceeded $[redacted] million, of which [redacted] million was attributable to sales of marine water treatment products and services.[8]

By comparison, the remaining competitors providing marine water treatment products and services had approximately [redacted] in revenues in 2017 for marine water treatment products and services - *combined*.[9] Indeed, the next largest competitor, Marichem, has just a [redacted] share of the market for the supply of marine water treatment products and services, and is a far-distant third to the more than 80% combined share for Defendants.[10]

Marine water treatment chemicals maintain and enhance the smooth running of a vessel's operational systems. These chemicals serve an important function, as they reduce, remove, and prevent corrosives and impurities from the boiler and engine cooling systems and contribute to the efficient and effective performance of a vessel. Defendants sell these chemicals to customers as part of an overall "program" or "solution" that includes both products and services. The products include the chemicals themselves (marine boiler and cooling system water treatment chemicals) as well as related equipment such as pH meter kits, conductivity meter kits, test kits,

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[5] PX61000 ¶ 54.
[6] PX90045-001.
[7] PX61000 ¶ 56.
[8] PX61000 ¶ 58.
[9] PX61000-033 Ex. 1.
[10] PX61000-038 Ex. 2.

and dosing units.[11] The services include the delivery of the products to vessels in ports worldwide via a global maritime distribution network along with technical assistance, a testing regimen, periodic onboard visits, logistical support, rapid response customer service, and various other services. In short, these "programs" or "solutions" provide a customer with not only the necessary products for a given system, but also the accompanying services needed to ensure that the entire fleet operates as smoothly as possible and without interruption, regardless of where a fleet's vessels may travel.

Defendants primarily target a specific set of customers—Global Fleets. Global Fleets are fleets of 10 or more globally trading vessels.[12] Owners and operators of Global Fleets—ranging from the U.S. Navy's Military Sealift Command to Carnival Cruise Lines—operate in ports in multiple regions of the world, desire to consolidate their purchasing with one or two suppliers, and place a premium on product and supplier consistency. Global Fleets are the core of the Defendants' business, representing nearly all of their top customers for marine water treatment products and services.

Owners and operators of Global Fleets consider high-quality, reliable, and consistent marine water treatment products essential to a vessel's mission and job function.[13] Mismanaged water treatment is costly. Wilhelmsen estimates that "nearly one in ten boilers fail every year due to mismanaged water . . . causing unscheduled downtime and costing $120,000 in repairs on

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[11] PX61000 ¶ 44.
[12] In the ordinary course of business, Wilhelmsen defines a "globally trading" vessel as any vessel above 1,000 gross tons in size that has traded at two ports that are at least 2,000 nautical miles apart in the preceding 12 months. *See* PX61000 ¶¶ 91-92, 105, 160; PX20041-004. We follow the same definition.
[13] *See, e.g.*, PX80000 ¶¶ 8, 10-11; PX80001 ¶ 8.

average."[14] While failures to properly manage a marine water treatment chemicals program may lead to expensive repairs and downtime, the overall cost of such a program is small compared to a ship's total operational expenses.[15] Given the significant costs associated with failure, once a customer settles on a reliable supplier of marine water treatment products and services, the relatively low cost of these products and services makes it less likely that the customer will risk disrupting its boiler and engine cooling systems by switching suppliers. In short, marine water treatment products and services are both highly critical and low cost.

It is uncommon for a vessel to mix and match marine water treatment chemicals from two or more different suppliers on a port-by-port (or other regular or semi-regular) basis because each supplier has its own proprietary formulations and the risk of inconsistent, and therefore unreliable, treatment is too high. Indeed, mixing and matching marine water treatment chemicals from different suppliers would run counter to the very essence of the program, which is to maintain consistent chemical properties in the water circulating through important vessel equipment. Customers with Global Fleets confirm that mixing and matching marine water treatment chemicals is "unrealistic"[16] and "may result in boiler failure, which risks vessel damage and the safety of [the] crew and customers."[17]

Switching from one supplier of marine water treatment products and services to another is possible, but is time-consuming, costly, and infeasible to do "on an ongoing basis."[18] Defendants generally recommend—and customers often follow—best practices that entail draining, flushing, and cleaning their systems before switching suppliers, procedures that cost

[14] PX20325-013.
[15] PX10133-015.
[16] PX80000 ¶ 40.
[17] PX80006 ¶ 13.
[18] PX80000 ¶ 40.

money and time for the vessel to be out of service.[19] Switching suppliers also generally necessitates retraining the crew on the proper dosage and testing of the new marine water treatment products,[20] and the replacement of testing and, in some instances, dosing equipment.[21] As a Wilhelmsen consultant noted, [redacted]."[22]

To the extent they do switch, owners and operators of Global Fleets look to other suppliers of marine water treatment products and services. Neither suppliers of land-based industrial water treatment products nor ship chandlers are substitutes for suppliers of marine water treatment products and services. Industrial suppliers focus on producing chemicals for land-based uses such as the circulation of water used in power plants, paper mills, and other industrial facilities. In fact, industrial suppliers lack marine-focused sales forces, marine-specific technical knowledge, and distribution networks to service Global Fleets. One industrial supplier, Nalco Company LLC, previously operated a marine water treatment division but exited in 2010 because its division [redacted]"[23] Indeed, Nalco sold its marine division, Nalfleet, to Wilhelmsen, which already had a well-established worldwide distribution network and tremendous scale. A second

[19] PX61000 ¶¶ 31, 41; PX80000 ¶ 39; PX80006 ¶ 14; PX80005 ¶ 7.
[20] PX80001 ¶ 9; PX80012 ¶ 5.
[21] PX70019 at 177-79; PX70002 at 61-62.
[22] PX20217-154.
[23] PX80003 ¶ 4.

land-based industrial supplier, Ashland, previously owned Drew but divested it in 2009 because marine water treatment products and services was a [redacted]."[24]

As for ship chandlers, they provide a niche service—they typically stock a wide range of consumables (ranging from food and cigarettes to light bulbs and galley equipment) in warehouses close to ports—and do not have expertise in marine water treatment products and services beyond providing the last mile of delivery (that is, the final transfer of goods from the transportation hub to the vessel). Ship chandlers do not—and cannot—offer the full complement of products and services that Defendants offer.

In fact, ship owners and operators rely on marine water treatment suppliers to provide access to highly critical marine water treatment products and services in those locations where they call to port. Owners and operators of Global Fleets value access to marine water treatment products and services that are consistent across all ports, no matter how remote the port. To that end, owners and operators of Global Fleets generally contract with one or two suppliers, each with global capabilities, for the supply of these products and services.

Moreover, the decision on what supplier a Global Fleet will use for marine water treatment products and services can drive other purchasing decisions. As a Drew executive explained, [redacted]" and other products and services.[25] Wilhelmsen's and Drew's ability to offer Global Fleets not only marine water treatment products and services, but also a full line of other marine products and services further differentiates Defendants from other suppliers and

[24] PX80016 ¶ 3. As noted by Drew's Chairman, Drew's former owner, Ashland, had separate divisions for industrial and marine chemicals, and each division "service[ed] a different market" than the other and had their own separate marketing, sales, and supply chains. PX70001 at 29-30.

[25] PX10022-010.

gives Defendants an advantage when competing for business against competitors that lack similar scope of products and services.

For owners and operators of Global Fleets, whose vessels frequently travel the world and require access to consistent, reliable, high-quality marine water treatment products and services in ports worldwide, there are no better options, and often no *other* options, than Wilhelmsen and Drew. Defendants compete to provide these products and services with a focus on their well-established reputations (decades in the making) for top-quality and consistent products. Defendants' industry-leading reputations for reliability, quality, and consistency, along with the strength of their brands, their vast global distribution networks, and the full complement of products and services that each offers its customers, gives each Defendant a significant advantage over all other competitors during contract negotiations with customers—negotiations in which smaller competitors often are not even considered.[26]

Competition is fierce between Wilhelmsen and Drew to win contracts—so-called "framework agreements"—to supply marine water treatment products and services to Global Fleets. These framework agreements typically run from [redacted] and contain various terms, including price, delivery ports, product offerings, and technical services.[27] The specific negotiation process can vary by customer—some use a formal Request for Proposal ("RFP")[28] process in which a customer invites specific suppliers to submit bids, while others skip the formal tender and obtain favorable agreements by negotiating directly with Wilhelmsen or

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[26] *See, e.g.*, PX80001 ¶ 15.
[27] *See, e.g.*, PX40001; PX20251.
[28] In this industry, RFPs are sometimes referred to as RFQs, or requests for quotation. We use the terms interchangeably here.

Drew.[29] Whatever the process, customers will usually engage in intense negotiations, often with multiple rounds of bidding.[30] While framework agreements are generally non-exclusive and do not require the customer to purchase any specific volume, they often offer the customer the best terms, and result in significant sales for the winning supplier.[31]

The negotiation process regularly results in a bidding war between the two Defendants; this leads to lower prices, better services, and a host of other benefits that inure to the customer. One Global Fleet customer, for example, recently pitted Wilhelmsen against Drew in a contract negotiation that resulted in price reductions between [redacted] off existing contracts with both Defendants.[32] A second Global Fleet customer obtained a [redacted] discount off its existing contract after [redacted] of back-and-forth negotiations with both Wilhelmsen and Drew.[33] As Drew's Senior Vice President of Marketing, Technical, and Supply Chain testified, "there's no question that Drew Marine and Wilhelmsen are the two leading suppliers in this area. So we're often competing with Wilhelmsen in the accounts that we're trying to acquire or retain."[34] If this illegal merger is permitted to proceed, customers would permanently lose the benefits of this direct competition.

Defendants do not—and cannot—dispute that they are each other's closest competitor and the two largest firms for the supply of marine water treatment products and services to Global Fleets. Drew's Chairman testified that "[t]oday the biggest competitive threat to

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[29] PX80002 ¶¶ 23-25; PX80005 ¶¶ 19-22; PX80006 ¶¶ 28-30; PX80004 ¶¶ 25-28.
[30] PX80012 ¶ 13.
[31] PX80002 ¶ 22; PX70008 at 212.
[redacted]
[34] PX70003 at 71.

[Drew's] water treatment business comes from Wilhelmsen,"[35] and its Regional Vice President of Sales for Europe testified that "there's no doubt" Wilhelmsen is Drew's biggest competitor.[36] Similarly, in an internal business document, Wilhelmsen identified Drew as its "key global competitor."[37] This is not a recent phenomenon, either; Defendants have dominated this industry for years. In 2013, when Drew was sold to its present owner, documents from two investment banks involved in the sale stated that "Drew Marine essentially has one global competitor – Wilh. Wilhelmsen Holding ASA ('Wilhelmsen')."[38] Owners and operators of Global Fleets,[39] other regional suppliers,[40] and Defendants' own consultants[41] confirm the closeness of competition between Wilhelmsen and Drew.

Owners and operators of Global Fleets will not have the ability to prevent the merged firm from exercising market power. While the record is replete with examples in which customers leveraged one Defendant off the other to secure more favorable framework agreement rates and terms, there is nothing to suggest that these customers are able to use other suppliers as leverage against the Defendants or will be able to do so should Wilhelmsen acquire Drew.

In addition to Wilhelmsen and Drew, there are a number of much smaller suppliers of marine water treatment products and services, such as Marichem, Marine Care, UNI Americas, Vecom, Blutec, UNIservice Italy, Chemo Marine, UNIservice Germany, and others.[42] But none of these suppliers possesses the extensive global distribution network and array of products and

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[35] PX70020 at 86.
[36] PX70005 at 293-94.
[37] PX20323-008.
[38] PX10133-027.
[39] PX80001 ¶ 22; PX80012 ¶ 16; PX80007 ¶ 8; PX80006 ¶ 19; PX80005 ¶ 25; PX80004 ¶¶ 29-30.
[40] PX70010 at 161-63; PX80013 ¶ 13.
[41] PX20217-152; PX20026-022, 023, 037.
[42] PX61000 ¶¶ 62, 68, 71.

services that Defendants provide to Global Fleets, nor could they easily expand to do so in a timely fashion. To place this into clear focus, the marine water treatment revenues for the next-largest supplier of such products are [redacted]h the revenues of a combined Wilhelmsen-Drew.[43] These smaller suppliers are not new to the market, either; many have been competing for decades and yet either continue to focus on niche products or operate on a much smaller scale than Wilhelmsen or Drew.

The following chart reflects the 2016 revenues of Wilhelmsen, Drew, and other smaller suppliers of marine water treatment products and services for which data were available:

Marine water treatment revenues by supplier, 2016[44]

Revenue
(in millions)

[redacted]

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[43] PX61000 ¶ 66.
[44] PX61000-033, Ex. 1.

Many owners and operators of Global Fleets do not consider any of these small competitors to be suppliers that can provide product and service offerings comparable to Defendants.[45] Instead, they overwhelmingly choose Wilhelmsen or Drew for their proven ability to deliver high-quality, reliable, and consistent marine water treatment products and services everywhere from Houston to New Zealand, often on short notice and within a tight time window. Moreover, nothing suggests that existing smaller suppliers of marine water treatment products and services could or would expand their global distribution network, improve their reputation and goodwill, and increase their product and service offerings in a timely manner sufficient to replace the competition lost from the elimination of Drew.

ARGUMENT

On April 27, 2017, Wilhelmsen agreed to acquire Drew for approximately $400 million. Following a ten-month investigation, the FTC found reason to believe that the proposed Acquisition violates Section 7 of the Clayton Act and Section 5 of the FTC Act and that "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. As a result, the FTC filed a complaint seeking a temporary restraining order and preliminary injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

The FTC has initiated an administrative action alleging that this transaction would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The merits trial in the administrative action begins on July 24, 2018. The Court entered a stipulated temporary restraining order that prohibits Defendants from merging pending the outcome of the FTC's motion for a preliminary injunction. The FTC has

[45] PX80002 ¶ 12; PX80007 ¶ 2.

requested a preliminary injunction issue pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to halt this merger and preserve the status quo pending the full administrative proceeding on the merits.

Owners and operators of Global Fleets rely on Wilhelmsen and Drew to supply marine water treatment products and services on a global scale. Defendants' shares and revenues in the relevant market reflect that the Acquisition will create a combined firm that is approximately [redacted] larger than the next-largest supplier.[46] The Acquisition will eliminate direct head-to-head competition between the merging parties that leads to customers receiving lower prices, better services, and increased product offerings.

A preliminary injunction should issue under Section 13(b) whenever the relief "would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001). "In sum, the Court 'must balance the likelihood of the FTC's success against the equities, under a sliding scale.'" *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 115 (D.D.C. 2016) ("*Staples II*") (quoting *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008)).

At this preliminary stage, it is not necessary for the FTC to establish, and the Court to decide, whether "the proposed merger would in fact violate section 7 of the Clayton Act." *Heinz*, 246 F.3d at 714; *see also FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67 (D.D.C. 2009). Rather, the FTC's "likelihood of success on the merits" is evaluated by "measur[ing] the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger '*may be* substantially to lessen competition, or to

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[46] PX61000-033, Ex. 1.

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). Courts evaluate Section 7 claims through a burden-shifting framework, under which a plaintiff may establish a *prima facie* case by defining a relevant product and geographic market and showing that the transaction will lead to undue concentration in that market. *Staples II*, 190 F. Supp. 3d at 115 (citing *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990)). That *prima facie* case establishes the presumption that a transaction is unlawful. The burden then shifts to the defendants to rebut that presumption. *Staples II*, 190 F. Supp. 3d at 115; *Heinz*, 246 F.3d at 715. Here, the high market share and concentration levels in the relevant market establish that presumption of illegality beyond any doubt, and Defendants have not—and cannot—meet their rebuttal burden.

Upon finding a "likelihood of success on the merits," the Court must then "weigh the equities" to determine whether injunctive relief is in the public interest. *Heinz*, 246 F.3d at 726. "The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws." *Id.*

I. THE FTC IS LIKELY TO SUCCEED ON THE MERITS

Section 7 of the Clayton Act bars mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or . . . activity affecting commerce in any section of the country." 15 U.S.C. § 18. "Congress used the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties"—even on the ultimate merits. *Heinz*, 246 F.3d at 713 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). Therefore, courts typically assess whether a merger violates Section 7 by determining: (1) the "line of commerce," or relevant product market; (2) the "section of the country," or relevant geographic market; and (3) the merger's probable effect on competition in the relevant product and geographic markets. *See*

United States v. Marine Bancorp., 418 U.S. 602, 618-23 (1974); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1072 (D.D.C. 1997) ("*Staples I*"). A merger's "probable" effects on competition are at issue because Section 7 of the Clayton Act is intended to arrest anticompetitive mergers "in their 'incipiency.'" *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963) (quoting *Brown Shoe*, 370 U.S. at 317). "Congress used the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties" —even on the ultimate merits. *Heinz*, 246 F.3d at 713 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (emphasis in original)).

The FTC bears the initial burden of showing the Acquisition would result in "undue concentration in the market for a particular product in a particular geographic area." *Staples II*, 190 F. Supp. 3d at 115; *Baker Hughes*, 908 F. 2d at 982. By "showing that the proposed transaction . . . will lead to undue concentration [for a particular product in a particular geography], the Commission establishes a *presumption* that the transaction will substantially lessen competition." *Staples I*, 970 F. Supp. at 1083 (emphasis added); *see Heinz*, 246 F.3d at 715; *Staples II*, 190 F. Supp. 3d at 115.

Here, the proposed merger would result in the Defendants having a combined share of greater than 80 percent in the relevant market for the supply of marine water treatment products and services to Global Fleets, with a concentration level and increase in concentration well above the threshold needed to establish a presumption that the Acquisition is unlawful. *Staples II*, 190 F. Supp. 3d at 136. Moreover, additional direct evidence of intense price and non-price head-to-head competition between Wilhelmsen and Drew buttresses the FTC's likelihood of success on the merits. *See FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 61 (D.D.C. 2015); *Staples II*, 190 F. Supp. 3d at 131.

A. The Proposed Acquisition Is Presumptively Unlawful

Wilhelmsen's proposed Acquisition of Drew is presumptively unlawful. The Acquisition would substantially increase concentration and lessen competition in the market for the supply of marine water treatment products and services to Global Fleets.

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

The Supreme Court in *Brown Shoe* established that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. In defining a relevant product market, "courts look at 'whether two products can be used for the same purpose and, if so, whether and to what extent purchasers are willing to substitute for the other.'" *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 51 (D.D.C. 2011) (citation omitted). To do this, courts determine the "practical indicia" of the boundaries of a relevant market, such as "the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices," the existence of special classes of customers who desire particular products and services, "industry or public recognition" of a separate market, and how the defendants' own materials portray the commercial realities of the market. *Brown Shoe*, 370 U.S. at 325; *see also United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966).

In addition to products themselves, the distribution and sale of products may constitute a relevant product market. *See, e.g.*, *Staples II*, 190 F. Supp. 3d at 122 (relevant product market defined as "the sale and distribution of consumable office supplies to large [business-to-business] customers"); *FTC v. Sysco Corp.*, 113 F. Supp. 3d at 48 (relevant product market defined as broadline foodservice distribution and broadline foodservice distribution to national customers); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d. 34, 45-46 (D.D.C. 1998) (product market defined as "wholesale distribution of prescription drugs").

The supply of marine water treatment products and services to Global Fleets constitutes a relevant antitrust market. Marine water treatment chemicals have a distinct purpose—to prevent corrosion, remove impurities, and enhance the operation of a vessel's boiler and engine cooling systems.[47] Customers value and bargain for not only the supply of the chemicals themselves, but also value-added products, technical services, and other offerings that suppliers of marine water treatment products and services provide, including water testing kits optimized to match their chemicals, on-board technical visits, training for the crew, troubleshooting, logistical support, and a worldwide distribution network that allows customers to place orders in one part of the world while receiving delivery of the goods in another.[48] That is why suppliers "should be able to supply a total solution rather than just a product."[49] Customers value the consistent, reliable, and timely provision of these products and services.[50]

Other products and services are not reasonable substitutes for marine water treatment products and services. Marine cleaning chemicals, such as those used to clean decks and cargo holds, and fuel treatment chemicals are not substitutes for water treatment chemicals. Indeed, Defendants view these chemicals as business lines distinct from their water treatment business lines.[51] Similarly, industrial water treatment chemicals are typically used in land-based factories and power plants, and manufacturers of these chemicals lack the global distribution networks and dedicated marine sales forces and technical services necessary to serve Global Fleets.[52] Marine

[47] PX80000 ¶¶ 10-11; PX80001 ¶ 4; PX20014-004.
[48] PX20015-004, 010-17.
[49] PX20217-154.
[50] PX80001 ¶ 8; PX80002 ¶¶ 15, 18; PX80000 ¶ 38.
[51] *See, e.g.*, PX10022-009-10; PX20015-008-10.
[52] PX80003 ¶¶ 2, 8.

water treatment customers almost never turn to industrial water treatment suppliers, and Defendants themselves indicate in their ordinary-course documents that they do not view land-based industrial water treatment firms as meaningful competitors.[53] Finally, while ship chandlers may sometimes act as a "facilitator" and deliver marine water treatment products on board a vessel, they do not blend, mix, or sell marine water treatment chemicals to customers, and they do not provide any of the concomitant technical, training, and troubleshooting services that Defendants provide and that owners and operators of Global Fleets desire.[54]

It is also appropriate to define the relevant product market around a group of targeted customers—Global Fleets. As noted above, Global Fleets are fleets of 10 or more globally trading vessels—vessels above 1,000 gross tons in size that have traded at two ports that are at least 2,000 nautical miles apart in the preceding 12 months. Owners and operators of Global Fleets seek suppliers that can meet their global needs for sales, service, and delivery, often on an expedited basis. These customers prefer standardizing their operations by relying on one or two global suppliers for marine water treatment products and services.[55] Defendants consistently focus their business on attracting Global Fleets; Wilhelmsen views [redacted]"[56] just as Drew focuses its business on vessels with a "[redacted] pattern.[57]

Product markets can be focused on a specific set of customers particularly where, as here, Defendants could "profitably target a subset of customers for price increases." *Sysco*, 113 F.

[53] PX20026 at 007, 047-66.
[54] PX70013 at 128-30.
[55] [redacted]
[56] PX20172-046.
[57] PX70003 at 186-87; PX70001 134-35 [redacted]

Supp. 3d at 38; *see Staples II*, 190 F. Supp. 3d at 117-18. The ability to target a particular subset of customers for different pricing is also known as "price discrimination." Defendants derive their ability to price discriminate because Defendants individually negotiate prices with each customer and customers have a limited ability to arbitrage.[58] *See Sysco*, 113 F. Supp. 3d at 46. Indeed, in internal documents, Wilhelmsen has explicitly discussed how to use the contracting process to [redacted]."[59] Moreover, Defendants can easily target Global Fleets for price discrimination because they know these fleets have distinct characteristics and requirements that limit customer choice, as compared to local or regional fleets. Global Fleets operate in multiple geographic locations; and owners and operators of Global Fleets have particular needs as it relates to centralized negotiation of contracts for delivery to geographically dispersed locations, product consistency, and product availability. *See Staples II*, 190 F. Supp. 3d at 122 (targeted customers were "large [business-to-business] customers"); *Sysco*, 113 F. Supp. 3d 1 at 37-48 (targeted customers were "National Customers"). Thus, it is appropriate to define the market around Global Fleets, and the *Brown Shoe* factors discussed above indicate that the supply of marine water treatment products and services to Global Fleets is a relevant product market. *See Brown Shoe*, 370 U.S. at 325.

In addition to the *Brown Shoe* practical indicia described above, courts frequently rely on the "hypothetical monopolist test," as set forth in the U.S. Department of Justice and the Federal Trade Commission's Horizontal Merger Guidelines ("Merger Guidelines"), to define a relevant market. *Merger Guidelines* §§ 4.1.1-4.1.3; *H&R Block*, 833 F. Supp. 2d at 51-52; *Staples II*, 190 F. Supp. 3d at 121-22. The test "queries whether a hypothetical monopolist who has control over

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[58] *Merger Guidelines* § 3 ("For price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage."); *see also id.* § 4.1.4.
[59] PX20323-030, 013-15, 019.

the products in an alleged market could profitably raise prices on those products," typically a small but significant and non-transitory increase in price ("SSNIP"). *Staples II*, 190 F. Supp. 3d at 121-22; *see also Merger Guidelines* §§ 4.1.1-4.1.3. If so, the products may comprise a relevant product market. *H&R Block*, 833 F. Supp. 2d at 51-52; *Staples II*, 190 F. Supp. 3d at 121-22.

Plaintiff's expert Dr. Aviv Nevo uses this framework to identify a relevant antitrust market. After (i) reviewing industry facts, Defendants' ordinary-course documents, and testimony from various market participants, (ii) analyzing multiple data sources from both merging parties and other suppliers, and (iii) implementing several versions of the hypothetical monopolist test, Dr. Nevo concluded that a hypothetical monopolist supplier of marine water treatment products and services could profitably impose a SSNIP on Global Fleets, thus satisfying the hypothetical monopolist test.[60]

Therefore, the supply of marine water treatment products and services to Global Fleets is a relevant antitrust market.

2. The Relevant Geographic Market Is Global

"The 'relevant geographic market' identifies the geographic area in which the defendants compete in marketing their products or services." *H&R Block*, 833 F. Supp. 2d at 50 n.7 (quoting *CCC Holdings*, 605 F. Supp. 2d at 37); *see also Cardinal Health*, 12 F. Supp. 2d at 49; *Merger Guidelines* § 4.2. The relevant geographic market must "correspond to the commercial realities of the industry" as determined by a "pragmatic, factual approach" to assessing the industry. *Brown Shoe*, 370 U.S. at 336.

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[60] PX61000 ¶¶ 203-240.

Here, the geographic area where Defendants compete is global. *See Staples II*, 190 F. Supp. 3d at 116. The targeted customers to which the Defendants supply marine water treatment products and services are owners and operators of Global Fleets that seek suppliers with a global distribution network and purchase products and services at ports all over the world. *See Sysco*, 113 F. Supp. 3d at 40-41. It is therefore appropriate to assess the proposed Acquisition's probable effect on competition by analyzing a global market. *See Marine Bancorp.*, 418 U.S. at 618-23.

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

Acquisitions that significantly increase economic concentration are presumptively unlawful. *Phila. Nat'l Bank*, 374 U.S. at 363. Courts assess an acquisition's presumptive illegality by considering the Defendants' shares of the relevant market and employing a simple statistical measure of market concentration called the Herfindahl-Hirshman Index (HHI). *Sysco*, 113 F. Supp. 3d at 52-53*; Heinz*, 246 F.3d at 716; *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 166-67 (D.D.C. 2000). HHIs are calculated by summing the squares of each market participant's individual market share both pre- and post-acquisition.[61] *See Sysco*, 113 F. Supp. 3d at 52-53*; Heinz*, 246 F.3d at 716; *Swedish Match*, 131 F. Supp. 2d at 166-67. If an acquisition increases the HHI of a relevant market by more than 200 points and results in a post-acquisition HHI exceeding 2500, it is presumptively anticompetitive. *Merger Guidelines* § 5.3;[62] *Sysco*, 113 F. Supp. 3d at 52-53*; Heinz*, 246 F.3d at 716; *Swedish Match*, 131 F. Supp. 2d at 166-67.

[61] PX61000 ¶ 248, n.369.

[62] The *Merger Guidelines* state in relevant part: "Mergers resulting in highly concentrated markets [HHI above 2500] that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive

In his report, Dr. Nevo uses sales and revenue data collected from Defendants and other third-party suppliers to estimate the approximate size of the market for the supply of marine water treatment products and services to Global Fleets. Using these data, Wilhelmsen controls approximately [redacted] share of the market, and Drew controls approximately [redacted].[63] These results are consistent with Defendants' own estimates of their market share.[64] The Acquisition would result in a single dominant supplier controlling more than 80% of a market with an HHI in excess of 6,783 and a post-Acquisition increase of at least 3,348.[65] These figures blow past the thresholds that trigger a presumption of illegality—the post-Acquisition increase in concentration alone is more than *sixteen times* the point at which the *Merger Guidelines* and courts presumptively view a combination as one that is "likely to enhance market power." *Merger Guidelines* § 5.3; *Sysco*, 113 F. Supp. 3d at 52. In fact, the market share and concentration levels that would result from the Acquisition easily meet or exceed the levels in other proposed combinations that courts in this Circuit have enjoined.

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evidence showing that the merger is unlikely to enhance market power." *Merger Guidelines* § 5.3.

[63] Using an alternative approach based on a Wilhelmsen internal business analysis tool (called the "Potential Sales Model") that makes projections derived from Wilhelmsen's sales data and other available industry data sources, Dr. Nevo found that Defendants' combined shares were at least 69% in 2017. This alternative approach likely inflates the overall market size in the Defendants' favor, but these shares still easily establish presumption of anticompetitive effects. PX61000-134 Ex. 34, ¶¶ 276-279, Ex. 35.

[64] *See* PX20323-030 (Estimating Wilhelmsen's share of "global-large" customers across all product categories as [redacted], with Drew's share as [redacted]); PX20161-005 (Wilhelmsen's marine chemicals market share estimated at [redacted]; Drew's share estimated at [redacted]).

[65] Dr. Nevo calculated shares and HHIs based on revenue submissions using several different formulations to ensure the robustness of his results. Combined shares for the two merging parties ranged from 75.6% to 85.9%, with post-Acquisition HHIs between 5,751 and 7,415 and changes in HHIs between 2,833 and 3,661, all of which blow past the thresholds that trigger the presumption of illegality. Dr. Nevo had to calculate shares and HHIs using different formulations because some suppliers of marine water treatment products and services did not produce revenue data. *See* PX61000 ¶¶ 254-63.

Case	Combined Share	Post-Merger HHI	Holding
Cardinal Health (D.D.C. 1998)	37-40%	3,079	Enjoined
Swedish Match (D.D.C. 2000)	60%	4,733	Enjoined
Heinz (D.C. Cir. 2001)	32.8%	5,285	Enjoined
H&R Block (D.D.C. 2011)	28.4%	4,691	Enjoined
Sysco (D.D.C. 2015)	75%	5,836	Enjoined
Staples II (D.D.C. 2016)	79%	6,265	Enjoined
Anthem (D.C. Cir. 2017)	47-54%	3,000-3,663	Enjoined
***Wilhelmsen* (D.D.C. 2018)**	**>80%**	**>6,783**	**TBD**

Courts in this Circuit have repeatedly ruled that acquisitions that seek to combine the top two firms in a concentrated market should be enjoined. *Staples II*, 190 F. Supp. 3d at 138 ("There can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market.") (citing *Sysco*, 113 F. Supp. 3d at 88) (quoting *Whole Foods*, 548 F.3d at 1043 (Tatel, J.)).

4. Competitive Effects Evidence Corroborates the Presumption of Illegality

The FTC's strong *prima facie* case is bolstered by corroborating ordinary-course documents and testimony evincing the close competition between Wilhelmsen and Drew that will be lost as a result of the illegal Acquisition. Defendants will be unable to "affirmatively show[] why [the Acquisition] is unlikely to substantially lessen competition, or . . . discredit[] the data underlying the initial presumption in the [FTC's] favor" in order to rebut the presumption of illegality. *Staples II*, 190 F. Supp. 3d at 115-16.

i. Wilhelmsen and Drew Are Each Other's Most Significant Competitor

Defendants are each other's closest competitor for the supply of marine water treatment products and services to Global Fleets.

Wilhelmsen and Drew supply marine water treatment products and services to Global Fleets at a scale far exceeding that of other marine water treatment suppliers. Drew acknowledges that the marine water treatment products and services segment "is dominated by Drew Marine and the market's largest participant, [Wilhelmsen],"[66] just as Wilhelmsen describes Drew as "the one competitor that contributes in driving the global market."[67] Drew refers to Wilhelmsen as Drew's "biggest competitor"[68] and "essentially [its] only one global competitor,"[69] while Wilhelmsen considers Drew its "key global competitor."[70] Defendants consistently describe their competition with one another as "fierce"[71] and "aggressive."[72] In describing a 2016 tender to [redacted], Wilhelmsen described Drew as "the only strong competitor" for the business.[73]

Owners and operators of Global Fleets view Wilhelmsen and Drew as particularly close competitors. [redacted], noted that Defendants "are the only suppliers . . . that can supply [redacted]s vessels with a full range of marine chemicals . . . and services at all key ports where our vessels travel worldwide."[74] [redacted] testified that Defendants "are the only companies . . . that can supply all of the marine products and services that [redacted] requires on a worldwide basis."[75]

Other marine water treatment suppliers acknowledge that Wilhelmsen and Drew are the two dominant suppliers for marine water treatment products and services when competing for

66 PX10126-024.
67 PX20329-015.
68 PX70008 at 97-98; *see also* PX10135-068.
69 PX10133.
70 PX20323-008, 009.
71 PX20049-011.
72 PX10026-001.
73 PX20197-036.
[redacted]

framework agreements for Global Fleets.[76] Wilhelmsen's consultant, SAI, further found that Wilhelmsen and Drew "[redacted])".[77]

ii. The Proposed Acquisition Would Eliminate Significant and Beneficial Price and Non-Price Competition Between the Defendants

Wilhelmsen and Drew compete aggressively on price and non-price terms to win and retain business, all to the benefit of customers. Defendants are frequently the only competitors bidding on framework agreements for Global Fleets that include the provision of marine water treatment products and services. Even if customers invite other suppliers to bid, other suppliers often either decline to submit a bid or are eliminated from consideration due to higher prices or an insufficient distribution network.[78] A Wilhelmsen executive acknowledged that "[m]ost of the biggest opportunities we lose are to Drew as small competitor[s] often cannot handle the amount of business or the trading pattern of those customers."[79]

Similarly, customers frequently pit one Defendant against the other in competitive RFPs and negotiations for framework agreements. Faced with these scenarios, Wilhelmsen and Drew will generally lower prices,[80] increase discounts,[81] and offer other incentives[82] to take business from each other. Examples of this intense competition are redolent in customer testimony, Defendants' documents, and Defendants' testimony:

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[76] PX70010 at 161-62; PX80013 ¶ 13.
[77] PX20217-152; *see also* PX20026-022-26, 031, 038, 042.
[78] PX80002 ¶ 23; PX80006 ¶ 22; PX80012 ¶ 13.
[79] PX20334-001.
[80] *See, e.g.*, PX20100-003.
[81] *See, e.g.*, PX10206-008.
[82] *See, e.g.*, PX10036-002; PX10208-001; PX70004 at 130-35.

- Defendants competed against each other to win the contract to supply [redacted] entire global fleet in 2016, with Wilhelmsen winning the business.[83] After [redacted] informed the Defendants that the RFP was a winner-take-all scenario and that they were competing against one another, both parties improved their initial offerings.[84] Wilhelmsen won the business after offering substantial price decreases in the [redacted] of bidding.[85]
- In the past two bid scenarios to win the chemical contract to serve [redacted], Wilhelmsen and Drew have flipped as the dominant supplier for [redacted].[86] Again, in the most recent RFP in 2017, Defendants both improved their initial offers, with Wilhelmsen offering prices substantially lower than Drew's and winning the majority of [redacted] business.[87]
- [redacted] negotiated price reductions in 2015 to its marine water treatment products and services contracts with both Wilhelmsen and Drew. [redacted] leveraged "competition between Wilhelmsen and Drew" to secure between [redacted] off its existing contracts.[88]
- [redacted] invited Wilhelmsen, Drew, and Marine Care to bid on its chemical contract in 2016. [redacted] quickly eliminated Marine Care due to its lack of geographic presence, while Wilhelmsen and Drew bid back-and-forth over [redacted] of bidding. [redacted] ultimately selected Drew

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[redacted]

after Drew offered a [redacted] existing chemical contract with Wilhelmsen.[89]

Defendants acknowledge the effect this competition has on price and how the proposed Acquisition will eliminate it. In a strategic planning document, a Drew senior executive concluded that acquiring Wilhelmsen "[redacted]".[90]

Wilhelmsen and Drew also compete on non-price terms to win business for Global Fleets, including improved service and product quality.[91] Defendants currently risk losing business to each other if a customer perceives one Defendant's products or services as inferior or lacking.[92] The Acquisition will eliminate these non-price benefits that pass through to Global Fleets because of competition between the Defendants.

iii. **Other Competitors and Market Participants are Not Comparable Alternatives for Global Fleets**

Other, smaller competitors will not be able to constrain a post-Acquisition Wilhelmsen. Customer leverage in negotiations for framework agreements is largely a function of the viable alternative suppliers available. Customers consistently view Defendants as the two largest and best suppliers of marine water treatment products and services, while viewing Marichem as a distant third.[93] Marichem is significantly smaller than Defendants, with approximately [redacted] in global water treatment revenues for 2016 compared to Wilhelmsen's revenues of

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[89] [redacted]
[90] PX10038-006.
[91] [redacted] (expressing [redacted] concern that the acquisition may result in lower quality service).
[92] PX80001 ¶¶ 8, 17.
[93] *See, e.g.*, PX80002 ¶ 12; PX80000 ¶ 42.

[redacted] and Drew's revenues of [redacted].[94] In general, smaller providers are unattractive to many owners and operators of Global Fleets due to a perceived lack of an adequate distribution network, lack of technical service offerings, higher prices, and lower-quality products.[95] These suppliers' small revenues are indicative of their competitive significance.[96] Additionally, Defendants' own documents reveal that they view small competitors, such as [redacted], as inferior competitors with lower-quality product offerings.[97]

Fringe suppliers of marine water treatment products and services such as Marine Care, UNI Americas, Vecom, Blutec, Uniservice Italy, Chemo Marine, and UNIservice Germany are likewise inferior options to serve the needs of Global Fleets. These smaller suppliers operate more regionally[98] or specialize in niche product portfolios, such as tank cleaning chemicals, with only a tangential presence in marine water treatment products.[99] Due to the importance of marine water treatment products to vessels, customers are often unwilling to use new and untested suppliers.[100] Other suppliers' low revenues reflect their minimal competitive significance.[101]

Even when owners and operators of Global Fleets seek out smaller suppliers as a

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[94] PX30000-001; PX61000-033 Ex. 1.
[95] *See, e.g.*, [redacted]
[96] *Merger Guidelines* § 5.2.
[97] *See, e.g.*, [redacted]
PX30004-002; PX80001 ¶ 15.
[99] PX70000 at 175-76; PX80025 ¶ 3.
[redacted] [redacted].
[101] *Merger Guidelines* § 5.2 ("Revenues 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.")

potential alternative to Wilhelmsen and Drew, they have found these suppliers cannot provide marine water treatment products and services that meet their needs. For example, when [redacted] based ship management company [redacted] recently asked [redacted] for a quote to provide certain water treatment products at a port in Houston as an alternative to [redacted], [redacted] quote fell far short of [redacted] requirements; [redacted] prices were higher than [redacted] prices;[102] they were unable to provide [redacted] with the full complement of products and services that [redacted] could provide;[103] and they could not deliver the products as timely as [redacted], needing to truck the products to Houston, one of the most significant ports in the world, from New Orleans.[104]

Similarly, ship chandlers, including Wrist and Seven Seas, are retail dealers that supply general products to shipping vessels. Ship chandlers are not meaningful alternatives for the supply of marine water treatment products and services for most Global Fleets, as they do not specialize in these products. [redacted] is adamant: it does not (1) mix marine water treatment chemicals, (2) blend marine water treatment chemicals, (3) purchase marine water treatment chemicals, (4) take ownership of water treatment chemicals, (5) resell marine water treatment chemicals, or (6) provide any marine water treatment products or services other than facilitating delivery of the chemicals from a warehouse near a port to a vessel.[105] Similarly, [redacted] confirmed that it does not sell marine water treatment products either.[106] When ship chandlers

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[redacted]

105 [redacted].

106 [redacted].

do sell marine water treatment products, it is often at a much higher price than when Defendants sell them directly.[107]

B. Defendants Cannot Rebut the Strong Presumption of Illegality

Once the FTC establishes a *prima facie* violation of Section 7, the burden shifts to Defendants to rebut the presumption by "produc[ing] evidence that 'show[s] that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)). Defendants bear a particularly heavy burden of production where, as here, they confront a strong *prima facie* case. *See Staples II*, 190 F. Supp. 3d at 115 ("'The more compelling the prima facie case, the more evidence the defendants must present to rebut it successfully.'") (quoting *Baker Hughes*, 902 F.2d at 991); *see also H&R Block*, 833 F. Supp. 2d at 72.[108]

Here, Defendants cannot even begin to rebut the presumption. In the first instance, the size and sophistication of owners and operators of Global Fleets will not obviate the lack of competitive alternatives to a post-Acquisition Wilhelmsen. Entry or repositioning is challenging, as existing market participants and new competitors will face significant hurdles to build global distribution networks and develop the expertise, reputation, brands, and goodwill needed to replace the competitive significance of Drew. Finally, Defendants' purported efficiencies are not substantiated, are unlikely to be passed on to consumers, and will otherwise fall far short of the threshold needed to offset the Acquisition's competitive harm.

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[107] PX70011 at 124-25; PX80001 ¶ 16; PX80006 ¶ 34.

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

1. The Size of Global Fleets Does Not Protect Them From Harm

Defendants may argue that owners and operators of Global Fleets can constrain a post-Acquisition price increase given their size and sophistication. Such an argument, however, fails as a matter of fact and law.

As the *Merger Guidelines* and the case law make clear, even large customers can be harmed by a merger, particularly where, as here, the merger takes away the customers' best alternative for competitive negotiations. *See Staples II*, 190 F. Supp. 3d at 126-27; *Sysco*, 113 F. Supp. 3d at 47-48; *Merger Guidelines* § 8. The "loss of one competitor . . . alters the . . . negotiating dynamic, even with strong advocates on the other side." *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 221 (D.D.C. 2017). That is precisely the situation at issue here.

Owners and operators of Global Fleets today receive substantial benefits from the competition between Wilhelmsen and Drew, as that competition gives customers important leverage in their negotiations.[109] The Acquisition eliminates that leverage, robbing owners and operators of Global Fleets of a tactic that they have effectively used to drive prices down and leaving them with inferior and largely untested options. *See Sysco*, 113 F. Supp. 3d at 48 ("The ability of large buyers to keep prices down, functioning as what is known in antitrust literature as "power buyers," . . . depends on the alternatives these large buyers have available to them."). There is no evidence that, post-Acquisition, owners and operators of Global Fleets would be likely to leverage their size or purported sophistication to sponsor entry or vertically integrate.[110]

[109] *See Merger Guidelines* § 8 ("Even buyers that can negotiate favorable terms may be harmed by an increase in market power. . . . Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.").

[110] *See Cardinal Health*, 12 F. Supp. 2d at 58-60 (power buyer analysis included an analysis of whether customers had "sponsored entry" and "explored entering into joint ventures"); *see also Chi. Bridge & Iron Co. v. FTC*, 534 F. 3d 410, 439 (5th Cir. 2008) (customers could not "assure that a new entrant ha[d] adequate volume and returns for meaningful entry into the market").

As such, any argument Defendants make suggesting that owners and operators of Global Fleets are power buyers, or that their size protects them from harm, is contrary to the evidence and the law.

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

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

Existing suppliers cannot achieve Defendants' size and scale in the near term to provide a meaningful alternative to a post-Acquisition Wilhelmsen.[111] Defendants serve Global Fleets on six continents; own or operate approximately 260 warehouses or distribution centers; employ hundreds of people as part of their production, sales, distribution, and quality control operations; and offer a vast portfolio of products and services.[112] Owners and operators of Global Fleets demand that potential suppliers offer products and services that Defendants have developed over decades, including a global distribution network, a strong reputation for high-quality and consistent products, on-board and remote technical assistance, certifications from engine and boiler manufacturers, and any necessary government safety and regulatory approvals.[113]

[111] *See generally*, PX61000 ¶¶ 345-81.
[112] *See* PX20004-019; PX70003 at 57.
[113] *See, e.g.*, [redacted].

For example, Wilhelmsen and Drew's existing scale and reputation confers incredible competitive advantages over smaller suppliers, as Defendants themselves have recognized.[114] Indeed, Drew's current Chairman and former CEO described Drew as having an "Established Global Presence with Significant Barriers to Entry,"[115] and further noted that Drew's "Expansive Global Logistics and Distribution Network Enables Swift Order Fulfillment and is Difficult and Costly to Replicate."[116] It is unlikely that any of the smaller competitors could expand their services, staff, ports, and revenues to sufficiently replace Drew in a timely manner and serve as a competitive constraint to the colossus that would result from a combined Wilhelmsen/Drew.

Many of the small competitors have been active in the marketplace for decades and yet they still face significant reputational and logistical barriers in competing with Defendants. Many Global Fleet customers view even the largest of these smaller competitors as having a distribution network inadequate to meet their global needs and, similarly, unable to provide consistent high-quality products.[117] Although some small players enjoy a following among their regional shipping companies, and a reputation for one product line, e.g., a tank-cleaning chemical specialist, few customers outside their region would even recognize most or any of these competitors' brand for water treatment products and services.[118] These smaller competitors have fewer employees, fewer resources, and a limited infrastructure, all of which would require significant investments and time to expand.[119] Moreover, there is no evidence that owners and

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[114] PX20027–20; PX20000–10; PX70006 at 143.
[115] PX10265–022; PX70020 at 22–27.
[116] PX10265–022; PX70020 at 27.
[117] [redacted].
[118] *See, e.g.,* [redacted].
[119] For example, the President of [redacted] testified that expansion to the size and scale of Wilhelmsen or Drew would take "major investments and

operators of Global Fleets are likely or able to sponsor new entry or devote resources to help smaller competitors expand sufficiently to be the competitive constraint that Drew is today.

As for new entrants, Wilhelmsen's consultant, SAI, admits that the "[redacted]" presents significant barriers to entry to non-marine and non-global suppliers, such as "[redacted]."[120] Similarly, a document produced by Drew's investment banker during Drew's 2013 sale confirms that "[[redacted]"[121] Customers of marine water treatment products and services tend to stick with products and brands they know because in their experience, an unknown and untested product may result in unscheduled downtime, costly repairs, or other unanticipated issues.[122] And even before beginning to court an already skeptical customer, a new entrant would need to incur substantial fixed costs to purchase or rent warehouse space and contract with raw material suppliers or toll blenders and logistics suppliers.[123]

Additionally, given customers' expectation that their supplier of marine water treatment products also provide a suite of related technical services and equipment, a new entrant would need to develop technical expertise, hire technical service personnel to perform on-board and remote services, and develop or purchase marine water treatment testing and dosing equipment—and all with worldwide scope to serve the global distribution needs of Global Fleets.

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major time" and "lottery winners." [redacted] at 115, 169-71. Other purely local or regional suppliers face regulatory barriers to supply their product in new jurisdictions. PX80011 ¶ 5.

[120] PX20217-105.

[121] PX60002-003.

[122] *See* PX70011 at 109-11; PX80000 ¶ 52; PX80002 ¶ 26; PX80006 ¶ 19.

[123] PX80013 ¶ 10.

Nothing suggests that a land-based industrial water treatment supplier would enter the business of supplying marine water treatment products and services.[124] Entering the marine market would require developing a marine distribution and service network, hiring a salesforce devoted to serving marine customers, and building new customer relationships.[125]

The 2010 sale of Nalco's marine water treatment chemical business (to Wilhelmsen),[126] and the 2009 sale of Ashland's marine water treatment chemical business (Drew) to a private equity firm, provides further evidence that participants (and especially industrial firms) are more likely to *exit* the market than enter it.[127] In fact, while Ashland's industrial water treatment chemical business, now operating as Solenis, toll blends for Drew in North America, it views the maritime market as [redacted] and [redacted].[128]

Ship chandlers, including Wrist and Seven Seas, are similarly unlikely to enter the marine water treatment products and services market. Wrist testified it [redacted][129]

Moreover, the Acquisition's $400 million purchase price is inconsistent with any suggestion by Defendants that entry or expansion is easy. If a firm could easily replicate the global distribution network, product breadth, brands, customer loyalty, reputation and goodwill,

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[124] *See* PX80015 ¶¶ 3-5; PX80010 ¶¶ 5-7.
[125] PX20035-003; PX20217-105.
[126] One Global Fleet observed that Wilhelmsen immediately raised prices 3-4% following its acquisition of Nalco's marine water treatment chemical business, Nalfleet. [redacted].
[127] *See* PX80003 ¶¶ 4-6; PX70001 at 41; PX70006 at 323.
[128] PX80016 ¶ 3; *see also* PX70024 at 73-74.
[129] PX70013 at 129-31, 135-37.

and technical expertise of Drew, Wilhelmsen would have had no reason to spend $400 million to acquire Drew. The evidence is clear and irrefutable: entry or expansion are unlikely to be timely, likely, and sufficient to deter or counteract the harmful competitive effects of this illegal Acquisition.

3. Defendants' Efficiencies Defense Fails

Given the "high market concentration levels" that will result from the proposed Acquisition, Defendants must present "proof of extraordinary efficiencies" and must substantiate their claimed efficiencies such that one can "verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific." *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz,* 246 F.3d at 720-21). No court has ever relied on efficiencies to rescue an otherwise unlawful transaction. *See, e.g.*, *CCC Holdings,* 605 F. Supp. 2d at 72; *Heinz,* 246 F.3d at 720-21.

Defendants contend that their proposed Acquisition will result in millions of dollars in efficiencies and cost savings that will lead to lower prices for customers. Defendants have presented the FTC with claimed efficiencies totaling between [redacted], including purported [redacted] and other efficiencies. However, Defendants' substantiation for these efficiencies is opaque at best, and the FTC is unable to verify the likelihood, magnitude, timeframe for achieving, or merger-specificity of any claimed efficiency.[130] Defendants offer "mere speculation and promises about post-merger behavior" without any substantiated proof. *Heinz,* 246 F.3d at 720-22.

[130] *See, e.g.*, PX61001 ¶¶ 10, 25, 29, 31, 39, 53, 63.

Defendants' efficiencies defense also suffers from additional flaws. For example, Defendants suggest the Acquisition will reduce costs in [redacted] but Drew has projected that it could reduce a portion of these costs on its own.[131] *See H&R Block*, 833 F. Supp. 2d at 91 (efficiencies not credited when merging parties could obtain the efficiencies on their own and without the proposed acquisition). Additionally, Defendants' efficiencies defense fails because they have not established that the claimed savings would benefit customers.[132] *See Saint Alphonsus Med. Ctr. – Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 789-92 (9th Cir. 2015); *FTC v. University Health*, 938 F.2d 1206 (11th Cir. 1991); *CCC Holdings, 605 F. Supp. 2d at 74.* Further, most of the claimed efficiencies are out-of-market efficiencies, as they relate to products outside the relevant market or sales to customers who are not owners and operators of Global Fleets.[133] *See* Merger Guidelines § 10 n.14; *see also United States v. Anthem, Inc.*, 855 F.3d 345, 363-64 (D.C. Cir. 2017) (rejecting savings claims that, among other "analytic flaws," were "unmoored from the actual market at issue").

In sum, Defendants have not put forward sufficient evidence to allow for verification of their claimed efficiencies. Significant portions of their claimed cost savings appear to be achievable independent of the merger, and only a small portion of the claimed overall cost savings relate to the relevant market. Defendants' efficiencies defense does not—and cannot—rescue this unlawful Acquisition.

II. THE EQUITIES HEAVILY FAVOR A PRELIMINARY INJUNCTION

Once the FTC has established a likelihood of success, Section 13(b) requires the Court to "weigh the equities" to determine whether injunctive relief is in the public interest. *Heinz*,

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[131] PX61001 ¶ 54.
[132] PX61000 ¶¶ 383, 387-88.
[133] PX61001 ¶¶ 11, 34, 45, 55.

246 F.3d at 726. Defendants cannot prevail based on the equities; indeed, no court has ever denied relief in a Section 13(b) proceeding in which the FTC "has demonstrated a likelihood of success on the merits." *FTC v. ProMedica Health Sys., Inc.*, No. 3:11-cv-47, 2011 WL 1219281, at *60 (N.D. Ohio Mar. 29, 2011); *see also FTC v. PPG Industries*, 798 F.2d 1500, 1508 (D.C. Cir. 1986) (establishment of a likelihood of success "weighs heavily in favor of a preliminary injunction") (quoting *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085 (D.C. Cir. 1981)). In weighing the equities, public equities are "paramount," *ProMedica*, 2011 WL 1219281, at *60, and "only 'public equities' that benefit consumers" can overcome the FTC's likely success on the merits. *CCC Holdings*, 605 F. Supp. 2d at 75-76 (citing *Whole Foods*, 548 F.3d at 1041 (Brown, J.)).

The overriding public equity favoring a preliminary injunction is "the public interest in effective enforcement of the antitrust laws." *Heinz*, 246 F.3d at 726. Without a preliminary injunction, Defendants can combine operations, share competitively sensitive information, raise prices, eliminate services, reduce staff, and close facilities. Any harm that customers suffer in the interim likely would be irreversible. Critically, it would be nearly impossible to unscramble the eggs and restore competition to its previous state if the FTC ultimately finds the Acquisition to be unlawful. *See Weyerhaeuser*, 665 F.2d at 1085 n.31; *Swedish Match*, 131 F. Supp. 2d at 173; *Sysco*, 113 F. Supp. 3d at 87. Private equities are "subordinate to public interests," *FTC v. Illinois Cereal Mills, Inc.*, 691 F. Supp. 1131, 1146 (N.D. Ill. 1988) (citing *Weyerhaeuser*, 665 F.2d at 1083), and any private harm that Defendants can claim, such as a delay in consummating the Acquisition, is outweighed by the strong public interest in allowing the FTC an opportunity to grant full and effective relief if warranted. Accordingly, to protect interim competition and preserve the FTC's ultimate ability to order effective relief, the equities call for a preliminary injunction.

CONCLUSION

Wilhelmsen's proposed acquisition of Drew is presumptively illegal, and would allow Defendants to create a single dominant firm controlling the market for the supply of marine water treatment products and services to Global Fleets. If Defendants merge, owners and operators of Global Fleets would face higher prices, and lower quality and innovation. Defendants cannot rebut the strong presumption of illegality present here. The FTC has met the standard necessary for this Court to issue a preliminary injunction until such time as the full evidentiary hearing on the merits is completed. Therefore, the FTC respectfully requests that the court grant a preliminary injunction to prevent the harm that would flow from consummation of this illegal merger.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of May, 2018, I served the foregoing on the following counsel via electronic mail:

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