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

DEFENDANTS' MEMORANDUM IN OPPOSITION TO
FEDERAL TRADE COMMISSION'S MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

"[A]ntitrust theory and speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the market and its probable future." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116–17 (D.D.C. 2004) (Bates, J.). Despite this clear direction, the Federal Trade Commission ("FTC") now asks this Court to preliminarily enjoin the merger of Evonik and PeroxyChem on the basis of theory, presumption, and labels, rather than the kind of careful "examination of the particular market – its structure, history, and probable future" – that modern antitrust recognizes as providing the *only* "appropriate setting for judging the probable anticompetitive effect of [a] merger." *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974). When tested through careful examination of the market realities of the hydrogen peroxide industry in North America, the FTC's theories collapse and its presumptions and labels prove hollow.

The FTC cannot establish that it is likely to succeed on the merits and therefore is not entitled to a preliminary injunction enjoining the merger. To start, the agency has failed to define properly the relevant product market in this case. Rather than grapple with the complexities presented by the wide variety of hydrogen peroxide products, it carelessly lumps them all together under the expedient but demonstrably erroneous label of "commodity." The FTC's relevant geographic market – which implausibly posits that, for example, competitive conditions facing customers in California are the same as those facing customers in Florida, Delaware, Alabama, Minnesota, and 30 other states across the country – fares no better. These failures deprive the FTC's market share and concentration calculations of any probative value, and deny the FTC the *prima facie* presumption upon which its case entirely depends.

And the FTC's market definition failures infect its case far beyond depriving it of the *Baker Hughes* presumption. When forced to move beyond theory and presumption, the FTC's

fundamental misconceptions of the hydrogen peroxide industry, the businesses of the parties to this merger, and the products they each produce reemerge to undermine the agency's ability to meet its ultimate burden to establish "a reasonable probability that the Acquisition may substantially lessen competition." *Arch Coal*, 329 F. Supp. 2d at 116. Indeed, after a nine-month investigation and additional months of discovery during which it compelled the production of millions of pages of documents and interviewed or deposed more than 50 industry participants, the FTC remains unable to articulate a cogent picture of competition for hydrogen peroxide in North America. Both its Complaint and its brief veer between conflicting factual allegations as the agency seeks to support fundamentally inconsistent theories of harm. On the one hand, the FTC acknowledges that Evonik and PeroxyChem "compete vigorously for customers," and that "customers benefit from head-to-head competition amongst a small handful of hydrogen peroxide suppliers, including the merging parties," because it deems that competition to be helpful to its theory of unilateral effects. Compl. ¶¶ 2, 6. On the other hand, when searching for support for its coordinated effects theory, the FTC claims that "[f]or years, hydrogen peroxide producers have engaged in parallel pricing behavior and other types of parallel accommodating conduct, including refraining from competing aggressively" despite the evidence of vigorous competition that it acknowledges throughout its Complaint. *Id* ¶ 49.

The story is simpler when grounded in market facts and business realities. Hydrogen peroxide is manufactured in a variety of grades for use in a wide array of industries and sold at significantly different prices depending on the end-use application. In the standard grade applications – where Evonik focuses its business – all five major hydrogen peroxide producers compete vigorously to serve sophisticated, powerful customers like International Paper and Georgia Pacific. Those buyers bid out high-value, long-term contracts through carefully

managed bidding procedures in which all five competitors can and do compete and win.

In the specialty grades and applications – where PeroxyChem focuses its business – products are highly differentiated and often tailored to customer requirements. The prices for specialty grade products also are often two or three times (and even greater) higher than standard grade. Specialty grade products require additional manufacturing steps from standard grade, cannot be produced by all hydrogen peroxide competitors, and are not substitutable for other hydrogen peroxide products. Based on these factors, the FTC properly excluded electronics-grade from its "all hydrogen peroxide" market definition. Compl. ¶ 24. Had it taken care to apply these same factors to other specialty products – such as pre-electronics, propulsion, or aseptic food packaging grades – it would have found that those products also should not be lumped together in one market.

The FTC's attempt to articulate any kind of competitive harm from the merger relies on a contrived coordinated effects theory that imagines the loss of one competitor (even when replaced by a new entrant) will somehow transform markets in which it concedes Evonik and PeroxyChem "compete vigorously" today into markets in which coordination dominates. Because the FTC's theory finds no support in today's hydrogen peroxide industry, it concocts what it repeatedly misrepresents as "an extensive history of price-fixing," without ever revealing that the conduct to which it refers ended 18 years ago and has absolutely no bearing on hydrogen peroxide competition today. Instead, the fundamental features that drive hydrogen peroxide suppliers to "compete vigorously" today will not be changed by the merger. Hydrogen peroxide competition is characterized by heterogeneous products and prices, sophisticated customers employing confidential bid processes for long-term, high-value contracts, and a lack of market transparency – all factors that are well understood to impede coordination. The FTC's unilateral

effects theory similarly falls flat. Evonik and PeroxyChem are not close competitors and therefore play no special role in constraining one another's prices. They focus on different products, different customers, and different geographic areas. Analysis of real-world bidding data confirms this irrefutably.

Finally, when faced with Defendants' complete divestiture of PeroxyChem's Prince George business in the alleged Pacific Northwest market, the FTC responds by asking the Court to ignore it. But there is no reasonable basis on which to ask the Court to ignore the divestiture of an on-going business to an experienced chemicals manufacturing firm. The divestiture buyer is a sophisticated and well-funded global manufacturer of organic peroxides and persulfates, and has recently acquired another hydrogen peroxide plant in Europe. It is committed to building its hydrogen peroxide business and competing aggressively to win customers. Given the buyer's strong incentive and ability to maintain and exceed the competitive status quo in Western Canada, the divestiture transforms what would have been a "5-to-4" merger in North America, into a "5-to-5" merger, further undermining the FTC's claim of harm.

Having relied on presumptions and labels to do its work for it, the FTC has failed to present a substantive case of anticompetitive effects. As the D.C. Circuit has made clear: "The Herfindahl–Hirschman Index cannot guarantee litigation victories." *United States v. Baker Hughes*, 908 F.2d 981, 992 (D.C. Cir. 1990). Accordingly, Defendants respectfully request the Court deny the FTC's motion for preliminary injunction.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Hydrogen Peroxide Competition is Highly Differentiated.

Hydrogen peroxide is a chemical with multiple industrial applications, ranging from combustible rocket propulsion to food processing; from microchip fabrication to hospital equipment sterilization; from pulp and paper production to oil and gas exploration; and from fish

farming to contact lens cleansing – among many others. While its basic chemical composition (H_2O_2) is relatively straightforward, industrial use of hydrogen peroxide is complex. Manufacturers must meet exacting customer specifications that often differ significantly by application. To satisfy these different customer requirements, manufacturers have developed a wide range of hydrogen peroxide products that vary according to their purity, stabilizers, concentration, regulatory certifications, and applied technology support, as well as in price. Put plainly, the hydrogen peroxide product used to power rockets cannot also be used to clean contact lenses, and hydrogen peroxide products used in natural gas fracking cannot also be used to clean delicate semiconductor wafers. To address this range of customer needs, hydrogen peroxide suppliers pursue differentiated business strategies, including offering different product mixes and targeting different customers. This differentiation is nowhere more apparent than between Evonik and PeroxyChem.

1. There Are Many Different Hydrogen Peroxide Products.

Historically, hydrogen peroxide in North America has been used predominantly as a bleaching agent in the pulp and paper and textile industries.[1] However, as the pulp and paper industry has stagnated and textile production has largely moved off-shore, some hydrogen peroxide producers have sought out new applications in which hydrogen peroxide products can displace traditional chemicals and grow demand.[2] At the same time, as customers become more environmentally conscious, they increasingly have turned to hydrogen peroxide as a "green" alternative to conventional chemicals, as the only byproducts of hydrogen peroxide decomposition are water and oxygen. Over the last two decades, these changes have increased demand for hydrogen peroxide products to serve new and evolving end-use applications.

[1] Ball (PeroxyChem) IH Tr. 99:6-15 (DX237).
[2] Lerner (PeroxyChem) IH Tr. 181:15-21 (DX229); Ball (PeroxyChem) IH Tr. 65:8-15 (DX237).

Today's broad range of differentiated hydrogen peroxide products defy easy categorization. As a starting point, it is useful to break hydrogen peroxide products into two broad categories based on purity level: (1) "standard grade" and (2) "specialty grade." Both of these broad categories – specialty in particular – comprise multiple different hydrogen peroxide grades or products that are sold into various end-use segments and applications.[3] Products within a grade typically are differentiated by their stabilizers and concentration, among other characteristics.[4] Stabilizers are chemicals added to the hydrogen peroxide to prevent decomposition. However, stabilizers also introduce impurities that are unacceptable in certain applications and therefore must be tailored to the customer's needs.[5] Hydrogen peroxide products also are differentiated based on regulatory certifications and specialized applications technology support, both of which again vary by end-use segment and application.

Standard grade hydrogen peroxide contains the highest level of impurities because it does not undergo an independent purification process. Standard grade originally was designed for general industrial use and today is employed in a variety of end-use segments and applications, including as a bleaching agent to remove ink in wastepaper recycling or to brighten textile fibers, or as an oxidizer to help decompose toxic substances in industrial and municipal wastewater.[6] But standard grade hydrogen peroxide also can be used in specialized applications by selling it with innovative applications technology and know-how, such as in oil and gas fracking.[7]

In contrast, specialty grade hydrogen peroxide describes any hydrogen peroxide product

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3 "End-uses" are broad industries in which a hydrogen peroxide product is used (e.g., food), and "applications" represent the specific context within the segment (e.g., aseptic packaging).

4 Ball (PeroxyChem) IH Tr. 81:4-24 (DX237).

5 Kramer (PeroxyChem) Dep. 98:6-11 (DX232).

6 Lerner (PeroxyChem) IH Tr. 191:13-17 (DX229).

7 Lerner (PeroxyChem) Dep. 8:17–9:16 (discussing use of standard grade combined with technical know-how in applications like downhole fracking) (DX231).

that has been purified one or more times.[8] Specialty grade products are designed to meet precise quality and other requirements that are dictated by the particular application for which they will be used. Specialty grade therefore encompasses a variety of products with differentiated characteristics that are tailored to meet their respective customer requirements. As shown in Figure 1, which depicts PeroxyChem's average prices by product, specialty grades of hydrogen peroxide range significantly in pricing and are sold at much higher prices than standard grade.

Figure 1. PeroxyChem's Average Prices in North America[9]

A non-exhaustive list of specialty grade products includes: (1) low-residue or tin-free products manufactured for chemical synthesis applications sensitive to trace metals and other contaminants; (2) chlorate grade products particularly formulated so as not to interfere with electrode performance in chlorate production; (3) cosmetics grade products that are heavily

[8] Defs.' Expert Rebuttal Report of Dr. Nicholas Hill (Oct. 15, 2019) ("Hill Report") ¶ 39 (DX5). Specialty grade that has been purified multiple times can be further subdivided into propulsion, pre-electronics, and electronics grade hydrogen peroxide.

[9] *Id.* at 18 fig.3 (Source: PeroxyChem invoice data).

stabilized to sustain long shelf life for use in products such as hair dyes and household cleaners; (4) aseptic packaging products that are precisely developed for use in high temperature aseptic packaging machines used to clean food and drink containers; (5) antimicrobial products that require approval by federal and state environmental regulators for use as disinfectants; (6) pre-electronics grade products requiring very high purity and low stabilization for use in producing electronics grade products; (7) electronics grade products demanding ultra-high purity with no stabilization for use in cleaning silicon wafers for semiconductors; and (8) propulsion grade products that are highly concentrated (and unstable) for use in commercial and military rocket propulsion.[10] Specialty grade hydrogen peroxide product sales have increased substantially over the last 20 years, and are projected to increase further as demand grows for precisely tailored products for use in a wide range of diverse applications.[11]

2. Hydrogen Peroxide Suppliers Pursue Different Commercial Strategies.

Five global players actively compete in the manufacture and sale of hydrogen peroxide products in North America: Arkema, Evonik, Nouryon, PeroxyChem, and Solvay.[12] These competitors maintain production plants throughout North America, as illustrated in Figure 2 below. Each of these five suppliers produces and sells a unique combination of standard and specialty grade products based a range of strategic factors, including: (1) the supplier's target customers and end-use segments; (2) the production capabilities available at each particular plant; and (3) the supplier's geographic location and logistics network.

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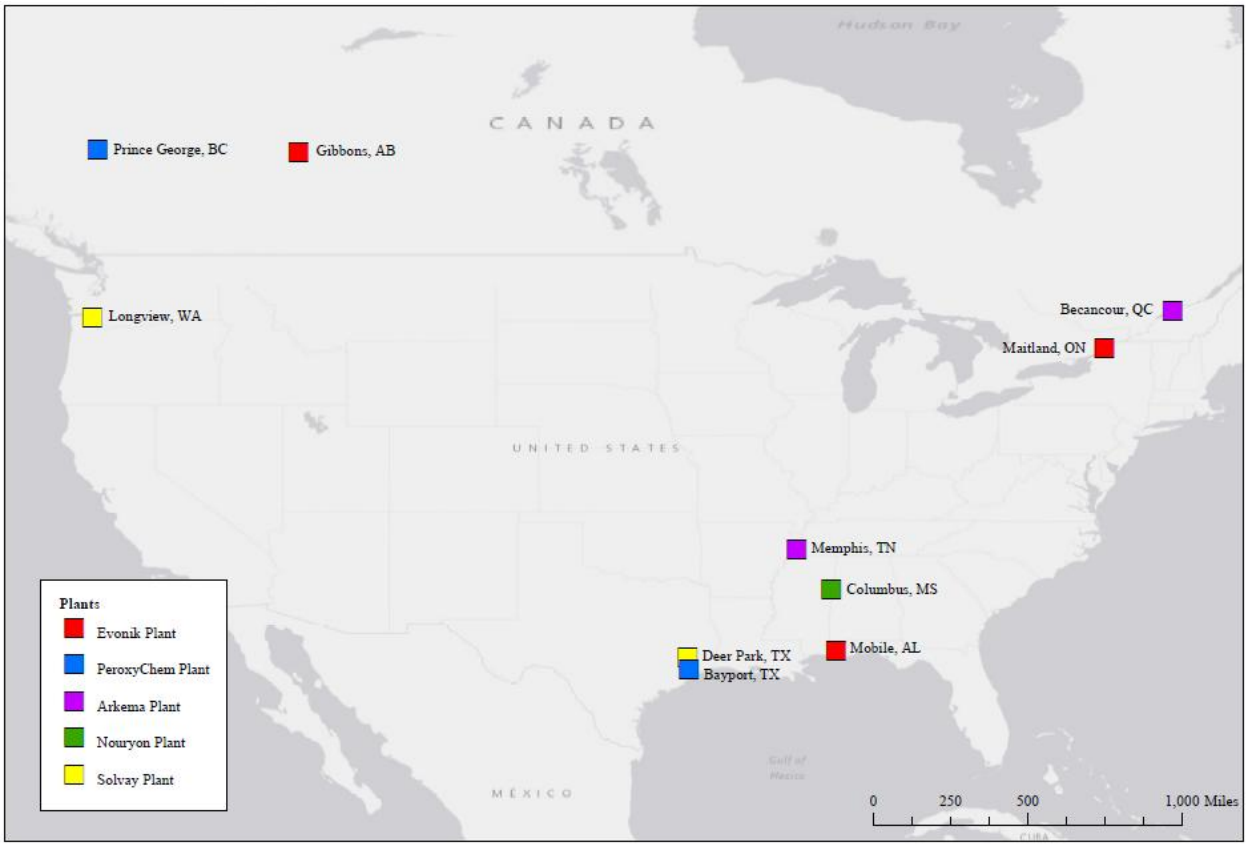
[10] Montag (PeroxyChem) IH Tr. 132:10-23 (DX233); Ball (PeroxyChem) IH Tr. 80:7-22, 81:4-24, 82:3-12, 83:15-18, 85:17-23, 86:20-89:6, 140:9-18 (DX237); Corson (Evonik) Dep. 34:15–35:9 (DX93); Rettig (Evonik) Dep. 43:11-20 (DX94).

[11] *See, e.g.*, Evonik 4C1,"Strategy Dialogue 2018" (Mar. 19, 2018), at 4 (DX50).

[12] A new entrant, Solugen recently opened a hydrogen peroxide plant in Houston, TX. Solugen's patented process uses an enzymatic technology to convert plant sugars into hydrogen peroxide. Although Solugen's hydrogen peroxide production currently is small, Solugen's CEO testified it can expand production to 60 million pounds by 2021. *See* Chakrabarti (Solugen) Dep. 10:8-17; 44:16–45:4 (DX56).

Figure 2. North American Hydrogen Peroxide Plant Locations



For example, PeroxyChem's plant in Prince George, British Columbia, [redacted][13] Similarly, Arkema, Nouryon, and Evonik all are located close to pulp and paper manufacturers in the Southeast United States and [redacted].[14] In contrast, PeroxyChem's plant in Bayport, TX, is located close to chemicals manufacturers and Mexico; [redacted][15] [redacted]

[13] Lerner (PeroxyChem) Dep. 42:2-3 (DX231).
[14] Ball (PeroxyChem) IH Tr. 100:5–101:7 (DX237).
[15] Lerner (PeroxyChem) IH Tr. 88:8-9 (DX229).

[redacted][16] [redacted]

[redacted]

[redacted]

[redacted][17]

Other hydrogen peroxide suppliers have developed their own strategies to best compete in the complex and dynamic hydrogen peroxide landscape. For example, Evonik has taken almost the exact opposite approach of PeroxyChem by investing in becoming [redacted]

[redacted].[18] Arkema, for its part, [redacted].[19] Nouryon has yet a different approach. [redacted]

[redacted][20] Solvay, [redacted]

[redacted][21]

3. Evonik and PeroxyChem Focus on Different Products and Customers.

Differentiation between PeroxyChem and Evonik is especially stark. The two companies have different overall strategies, generally focusing on different products, different customers, and different geographic areas. Figure 3 shows the end-uses PeroxyChem sells into from its

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16 Ball (PeroxyChem) IH Tr. 100:8-25 (DX237).

17 PXC01058346 (describing the strategy [redacted]) (DX298).

18 Costanzo (Evonik) IH Tr. 87:4-17 (DX235); RAG-COSS-7301, at 6-7 (DX242).

19 Costanzo (Evonik) IH Tr. 106:12–107:16 (DX235).

20 *See* Radlinski (Nouryon) Dep. [redacted] (DX87); Hurd (Georgia Pacific) Dep. 74:3-14 (DX82).

21 [redacted]

Bayport, TX, plant, and compares them to the end-uses Evonik sells into from its Mobile, AL, plant. While Evonik focuses overwhelmingly on two end-use segments – pulp and paper and [redacted] – PeroxyChem sells hydrogen peroxide products into a diverse mix of end-uses, none of which substantially overlaps with Evonik's primary focus area.

Figure 3. PeroxyChem (Bayport) vs. Evonik (Mobile) End Use Sales[22]

[redacted]

Figure 3 shows that Evonik's Mobile plant sells almost [redacted] of its volume to pulp and paper manufacturers and nearly [redacted] of its volume into [redacted], while PeroxyChem has no sales of [redacted] and sells only about [redacted] of its Bayport plant volume to pulp and paper customers.[23] Instead, PeroxyChem sells hydrogen peroxide products to a broad array of customers ranging across a wide variety of end-uses. A substantial portion of this volume – approximately [redacted] – is not even sold in competition in the United States but is exported to Mexico. Underscoring the differences between the

[22] Hill Report 18 fig.3 (DX5).
[23] *Id.*; *see* Montag (PeroxyChem) IH Tr. 48:8-12 (DX233).

merging parties, a significant portion of PeroxyChem's production – approximately [redacted] – is sold into applications for which Evonik does not offer a competing product. These include: (i) aseptic packaging, (ii) chemical synthesis requiring low-residue or tin-free product, (iii) electronics, (iv) propulsion, (v) oil and gas fracking, and (vi) FDA-approved antimicrobials. Evonik and PeroxyChem therefore largely focus on different products and have limited overlap.

B. Hydrogen Peroxide Suppliers Compete Vigorously to Supply Customers.

Hydrogen peroxide suppliers compete vigorously in high-stakes bidding contests to serve large, powerful buyers in North America. Those customers run sophisticated bid processes that pit suppliers against one another in hopes of securing long-term contracts.[24] And as the FTC concedes, customers regularly leverage these competing bids to negotiate more favorable terms.[25] Bid winners receive contracts for substantial sales volumes, incenting suppliers to bid aggressively on every opportunity they are capable of supplying.[26]

While each customer is unique, a typical bidding event begins with a request for quotation ("RFQ") providing the: (i) customer location; (ii) precise hydrogen peroxide product specification; (iii) anticipated volume requirements; and (iv) contract duration. The vast majority of Evonik and PeroxyChem's hydrogen peroxide sales are made under contracts with [redacted].[27] One of the most important factors influencing competition for the sale of hydrogen peroxide is transportation cost. Transportation cost comprises a substantial portion of the overall sale price because hydrogen peroxide is sold

[24] *See, e.g.*, Charns (WestRock) Dep. [redacted] (DX79); Senechal (Resolute) Dep. [redacted] (DX81); Hurd (Georgia Pacific) Dep. 27:7–31:6; [redacted] (DX82). A customer also may seek to extend a contract to obtain favorable terms. Kulp (Evonik) IH Tr. 126:1-23 (DX234).

[25] Pl.'s Mem. in Support of Mot. for Prelim. Inj. (Dkt. No. 45) ("FTC Br.") 29-32.

[26] *See, e.g.*, Hill Report ¶ 240 n.308 (DX5); Hamman (Evonik) Dep. 17:9-15 (explaining that Evonik [redacted]) (DX236).

[27] Costanzo (Evonik) IH Tr. 70:14-16 ([redacted]) (DX235). *See, e.g.*, Maeder (Verso) Dep. 20:20 (DX95); Charns (WestRock) Dep. [redacted] (DX79).

heavily diluted by water to make it less combustible and more stable.[28] Customers typically prefer to deal with suppliers closer to them to lower transportation costs and suppliers therefore consider their own transportation costs, and the likely transportation costs of potential competing suppliers, when preparing an RFQ response.[29]

After RFQ responses are in, negotiations for hydrogen peroxide contracts become more complex. Customers consider numerous factors, including: (i) product specifications; (ii) quality; (iii) price; (iv) reliability/security of supply; (v) payment terms; (vi) delivery timelines; (vii) method of delivery; (viii) price adjustment terms, and (ix) technical service offerings, among others. Customers do not share information with bidders regarding other suppliers' bids unless it is to leverage the bids against each other.[30] After receiving initial bids, customers often initiate a second round of bidding – leveraging the high-value contracts to maximize competition.

Hydrogen peroxide suppliers compete aggressively for a relatively small number of large-volume contracts. Evonik's top 20 customers accounted for more than [redacted] of Evonik's revenue, and PeroxyChem's top 20 customers accounted for more than [redacted] of PeroxyChem's revenue, in 2018.[31] Given their long-term nature, contracts typically come up for bid only every other year or even less frequently. In addition, fixed costs associated with production of hydrogen peroxide are high, and each supplier has an imperative to "sell out" its available

[28] Ball (PeroxyChem) IH Tr. 102:23–103:23 (DX237); [redacted].

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

[30] *See, e.g.*, Charns (WestRock) Dep. [redacted] (DX79); Senechal (Resolute) Dep. [redacted] (DX81); Hurd (Georgia Pacific) Dep. 30:19-31:6 (noting that Georgia Pacific would not disclose a supplier's bid to another supplier) (DX82).

[31] Hill Report ¶ 240 n.308 (DX5).

capacity in order to cover costs and ensure the efficient operation of its plant.[32] In light of these incentives – and customers' ability to leverage competing bids to secure even more favorable terms – customers frequently are able to achieve price *decreases* via competitive bidding.

C. Evonik is Acquiring PeroxyChem to Diversify into Specialty Products.

Evonik's internal strategy documents make clear that it agreed to buy PeroxyChem because the transaction will combine the two companies' complementary product portfolios, technical capabilities, and logistics networks, and thereby will deliver significant synergies and sales growth.[33] Indeed, in stark contrast to other recent cases brought by the FTC, absent from Evonik's documents are any strategic plans, analyses, or discussions that contemplate increasing prices or reducing output to the detriment of customers.[34] Evonik has not projected any price increases and instead has projected efficiencies that will allow Evonik to build on its reputation as a reliable supplier of hydrogen peroxide and to extend that surety of supply to customers across a broader range of high-growth hydrogen peroxide products and applications.[35] These efficiencies also will lower the variable costs of hydrogen peroxide production and delivery, which is likely to lead both to increased output and lower prices.

Underscoring Evonik's goal of expanding its presence in specialty products, Evonik has agreed to sell PeroxyChem's Prince George, British Columbia, plant – which produces only standard grade – to United Initiators to address any possible competitive issues. Evonik initially offered the divestiture of Prince George to the FTC in May 2019, but received no engagement or feedback from the agency. Undeterred, Evonik and PeroxyChem moved forward with an auction

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[32] *See* Hamann (Evonik) IH Tr. 17:9-15 (Evonik tries to run its plants [redacted]) (DX236).

[33] Evonik 4C14, [redacted] (Aug. 13, 2018) at 1 (DX52).

[34] *See, e.g.*, *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187 (D.D.C. 2018); *In re Superior/Canexus,* FTC Dkt. 9371 (FTC 2016) (DX324).

[35] *See, e.g.*, Evonik 4C28, [redacted] (DX53).

to sell Prince George, contingent on the closing of Evonik's acquisition of PeroxyChem. After due diligence, United Initiators agreed to purchase Prince George on August 11, 2019.[36]

D. Procedural History

On August 2, 2019, the FTC filed both an administrative complaint and this preliminary injunction action seeking to prevent Evonik's acquisition of PeroxyChem. Prior to its complaints, the FTC conducted an investigation spanning nearly nine months. During that investigation, the FTC received more than two million pages of documents and extensive interrogatory and database responses from the Defendants, conducted 12 investigational hearings (i.e., depositions), and contacted at least 46 third parties to gather information regarding the proposed transaction. As part of this case, the FTC has conducted extensive additional fact and expert discovery, receiving more than 100,000 additional pages of documents, including from 26 third parties, and conducting 36 additional party and third-party depositions.[37]

II. LEGAL STANDARD

The FTC brings this action for preliminary injunction under § 13(b) of the FTC Act, 15 U.S.C. § 53(b), ostensibly to preserve its ability to adjudicate the merger's legality under its internal administrative procedures. However, that administrative adjudication is, in practical terms, a fiction. In the words of the FTC's Chief Administrative Law Judge ("ALJ"), it is "an exercise in nothingness."[38] For more than 20 years, no merger in which the FTC has first sought preliminary injunctive relief has ever subsequently completed the FTC's administrative process, and this transaction will not be the first. Instead, the November 12 trial before this Court will be

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[36] *See* [redacted].

[37] FTC maintains that a preliminary injunction is necessary to allow the agency to conduct a full inquiry into the merits. However, an administrative proceeding would not be informed by any additional information beyond that already collected because the discovery periods in this matter and the administrative proceeding were aligned and both are now closed.

[38] *In the Matter of Evonik Indus., et al.*, Docket No. 9384, Pretrial Conference at 8:21–9:34 (Aug. 29, 2019) (DX273).

the only opportunity for Evonik and PeroxyChem to defend their merger before an independent tribunal. The following paragraphs explain the FTC's administrative process; review the applicable legal standards under § 13(b) of the FTC Act and § 7 of the Clayton Act; and set out the *Baker Hughes* burden-shifting framework through which those standards are applied.

The FTC's Administrative Process. Congress has divided responsibility for enforcement of § 7 of the Clayton Act between the U.S. Department of Justice ("DOJ") and the FTC. The DOJ enforces § 7 by bringing actions to permanently enjoin transactions directly in the U.S. District Courts. The FTC's process is different. Though the FTC's brief glosses over them, those differences are worth understanding here, as the claimed purpose of this preliminary injunction action is to preserve the FTC's ability to employ its internal adjudicative process.

Once the FTC Commissioners determine to challenge a transaction, they direct the FTC staff to bring an administrative action under the agency's administrative rules before its ALJ. 16 C.F.R. § 3.11(a) . The ALJ must hold an administrative hearing within five months of the filing of the FTC's administrative complaint. *Id*. § 3.11(b)(4). Following the hearing, the ALJ has 70 days after the proposed findings of fact are filed to issue an "initial decision." *Id*. § 3.51(a). The ALJ's initial decision, however, is not dispositive and does not constitute "final agency action" subject to judicial review. *Id*. § 3.51(b). Instead, in cases like this one, the ALJ's initial decision is automatically referred back to the Commission for review. *Id*. § 3.52. The FTC's rules grant the Commission *de novo* review of both legal and factual issues. *Id*. § 3.54(a). The Commission is not required to give any deference to the ALJ's initial decision, but may adopt, modify, or completely set aside any of the ALJ's findings of fact or conclusions of law. *Id*. § 3.54 (b). If the Commission denies the appeal, only then do the parties to the merger have the right to appeal to

the U.S. Courts of Appeals. 15 U.S.C. § 45(c). On appeal, the court of appeals must treat the Commission's findings of fact, if supported by evidence, as "conclusive." *Id*.

In at least the last 20 years, *no* merger case in which the FTC first sought injunctive relief has *ever* made it through the FTC's administrative process. As the FTC's Chief ALJ explained at the FTC Pretrial Conference for this matter:

> I've been doing this a while. I don't know how many rodeos this has been, but it's been a lot, and only one – actually, no case, no merger case has ever gone to [an FTC administrative] trial where the Government's filed the preliminary injunction request up front. ... [T]hey always go away, one side or the other walks, whether it's the Government or Respondents. ... So what that means, if I haven't said this already, this [administrative] trial we're getting ready to have is moot. It's an exercise in nothingness.[39]

Defendants explain the FTC's administrative process not to challenge it, but to apprise the Court of the context in which this proceeding is taking place and to underscore that it is this proceeding – and not the FTC's administrative process – that will decide the fate of this transaction. If the Court enjoins the transaction, the final date for closing will pass on February 3, 2020, and commercial imperatives will almost certainly force one or both of the merging parties to terminate the transaction.[40] Likewise, if the Court denies the FTC's motion, the FTC will in all probability abandon its administrative challenge, as it has done almost every time it has lost its bid for a preliminary injunction over the last 20-plus years. Current Commission Chair Joseph Simons has testified to Congress that he intends to continue this practice during his tenure:

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[39] *Id.* at 7:19–9:3.

[40] See *FTC v. Lab. Corp. of Am.*, 2011 WL 3100372, *22 (C.D. Cal. Mar. 11, 2011) ("Courts must also carefully consider whether preliminary injunctive relief is appropriate in light of the long time period between preliminary proceedings and a final decision on the merits) (citing *FTC v. Occidental Petroleum Corp.*, 1986 WL 952, at *13 (Because of the "glacial pace of an FTC administrative proceeding," the FTC's burden is a heavy one as "'[e]xperience seems to demonstrate that ... the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger.'") (quotation omitted)) (DX308).

> [I]f the FTC is denied a preliminary injunction in a merger matter, I do not believe the Commission should pursue that matter in administrative litigation. The Commission has not pursued an administrative proceeding following the denial of a preliminary injunction in federal court for over twenty years. I agree with this approach.[41]

Section 13(b) of the FTC Act. Section 13(b) of the FTC Act "provides for the grant of a preliminary injunction where such action 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." *Arch Coal*, 329 F. Supp. 2d at 115 (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001)); *see* 15 U.S.C. § 53(b). Courts have interpreted this "public interest standard" to require a two-part analysis to determine whether the FTC is entitled to an injunction: First, the Court must determine that the FTC has a likelihood of success on the merits of its substantive challenge under § 7 of the Clayton Act. Second, the Court must balance the equities. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). The FTC is quick to point out in its brief that it faces a different threshold for preliminary injunctive relief than private parties, but "Section 13(b)'s public interest standard nevertheless demands rigorous proof to block a proposed merger or acquisition" and the issuance of a preliminary injunction remains "'an extraordinary and drastic remedy.'" *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015) (citations omitted). While § 13(b) relieves the FTC from having to establish irreparable harm, it does not reduce the agency's burden to demonstrate a likelihood of success on the merits, which remains the focus of this proceeding. "[A]bsent a likelihood of success on the merits, equities alone will not justify an injunction." *Arch Coal*, 329 F. Supp. 2d at 116 (citing *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508 (D.C. Cir. 1986)).

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[41] Senate Committee on the Judiciary, "Oversight of the Enforcement of the Antitrust Laws" (Oct. 3, 2018), https://www.judiciary.senate.gov/imo/media/doc/Simons%20Responses%20to%20QFRs.pdf.

"Given the stakes, the FTC's burden is not insubstantial, and '[a] showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief.'" *Id.* (quoting *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir.1999)). Instead, "[l]ikelihood of success on the merits in cases such as this means the likelihood that the Commission will succeed in proving, after a full administrative trial on the merits, that the effect of a merger ... 'may be substantially to lessen competition, or to tend to create a monopoly' in violation of Section 7 of the Clayton Act." *Heinz*, 246 F.3d at 715. Put another way, "[f]or relief under Section 13(b), the Commission must establish that 'there is a reasonable probability that the challenged transaction will substantially impair competition.'" *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 196-98 (D.D.C. 2018) (quoting *FTC v. Staples Inc.*, 190 F. Supp. 3d 100, 114 (D.D.C. 2016)). In making this determination, "the Court may not 'simply rubber-stamp an injunction whenever the FTC provides some threshold evidence; it must 'exercise independent judgment' about the questions § 53 commits to it.'" *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 36-37 (D.D.C. 2006) (quoting *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (Brown, J.)).

Section 7 of the Clayton Act. Section 7 of the Clayton Act prohibits a merger between two companies "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition ... may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. Recognizing the inherently predictive nature of § 7, the Supreme Court has explained that § 7 "deals in 'probabilities, not certainties[.]'" *Gen. Dynamics*, 415 U.S. at 505 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). At the same time, however, the Supreme Court and this Court have stressed repeatedly that "Section 7 deals in probabilities not ephemeral possibilities." *Arch Coal*,

329 F. Supp. 2d at 115 (citing *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir.1999)); *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 622–23 (1974). Thus, "[a]lthough certainty is not required, Section 7 does demand that a plaintiff demonstrate that the substantial lessening of competition will be 'sufficiently probable and imminent' to warrant relief." *Arch Coal*, 329 F. Supp. 2d at 115 (quoting *Marine Bancorp.*, 418 U.S. at 618); *see also CCC Holdings*, 605 F. Supp. 2d at 35 (FTC must show a "'reasonable probability' that the acquisition may substantially lessen competition.").

The FTC's brief rushes to claim entitlement to various presumptions of illegality. But the Supreme Court long ago turned away from reliance on presumptions and superficial labels in § 7 analysis. In *General Dynamics*, the Court directed that "only examination of the particular market – its structure, history, and probable future – can provide the appropriate setting for judging the probable anticompetitive effects of the merger." 415 U.S. at 498; *see also Baker Hughes*, 908 F.2d at 989-92 (discussing Supreme Court's movement away from presumptions and structural analysis to focus more on real world facts and economic analysis). As a result, district courts handling these cases have recognized that "antitrust theory and speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the market and its probable future." *Arch Coal*, 329 F. Supp. 2d at 116–17. Justice Thomas, while on the D.C. Circuit, put it more simply: "The Herfindahl–Hirschman Index cannot guarantee litigation victories." *Baker Hughes*, 908 F.2d at 992.

Baker Hughes *Framework.* "To determine the Commission's likelihood of success on the merits, the Court applies the burden-shifting framework established by *United States v. Baker Hughes, Inc*." *Tronox*, 332 F. Supp. 3d at 197. In *Baker Hughes*, the D.C. Circuit articulated the three-step analytical approach through which the FTC must establish a § 7 violation:

First, if it is able to show "that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition." *Baker Hughes*, 908 F.2d at 982. But the FTC is not awarded this *prima facie* presumption simply for showing up. Instead, to gain the presumption, the FTC "bears the initial burden of (1) defining the appropriate product market, (2) defining the appropriate geographic market, and (3) showing that the merger will lead to undue concentration in the relevant product and geographic market." *Tronox*, 332 F. Supp. 3d at 197 (citing *Arch Coal*, 329 F. Supp. 2d at 117). Only if it satisfies that initial burden is the FTC entitled to a *prima facie* "presumption that the merger will substantially lessen competition." *Id.* (citing *Baker Hughes*, 908 F.2d at 982).

Only if the FTC earns a presumption, the second stage of the *Baker Hughes* framework shifts to the defendants the burden of producing evidence to rebut that presumption. The weight of defendants' burden, however, varies with the strength of the FTC's *prima facie* case: "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes*, 908 F.2d at 991. The converse is equally true: a weak *prima facie* presumption requires less evidence to defeat it. *Arch Coal*, 329 F. Supp. 2d at 129 ("Certainly less of a showing is required from defendants to rebut a less-than-compelling prima facie case.") (citations omitted). But in neither case is defendants' burden intended to be "unduly onerous." *Baker Hughes*, 908 F.2d at 991.

> Imposing a heavy burden of production on a defendant would be particularly anomalous where, as here, it is easy to establish a prima facie case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl-Hirschman Index cannot guarantee litigation victories.

Id. at 992.

Consistent with this more substantive analytical approach, the *Baker Hughes* framework does not place artificial limitations on the means defendants may use to rebut the FTC's statistical presumption. Defendants can rebut the presumption by demonstrating that the FTC failed to properly define the product and geographic markets on which competition is alleged to be harmed, or by demonstrating that market-share statistics derived from those markets "produce an inaccurate account of the merger's probable effects on competition in the relevant market." *Arch Coal*, 329 F. Supp. 2d at 116 (citing *Heinz*, 246 F.3d at 715). Other factors defendants can use to rebut the FTC's presumption include the existence of excess capacity, marketing and sales methods, industry structure, product differentiation, or the prospect of efficiencies from the merger, among a host of others. *See Baker Hughes*, 908 F.2d at 985 (collecting examples).

In the final stage, "[i]f the defendant successfully rebuts the presumption [of illegality], the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion which remains with the government at all times." *Heinz*, 246 F.3d at 715 (quoting *Baker Hughes*, 908 F.2d at 983). Plaintiffs thus "have the burden on every element of their Section 7 challenge, and a failure of proof in any respect will mean the transaction should not be enjoined." *Arch Coal*, 329 F. Supp. 2d at 116.

III. ARGUMENT

A. The FTC is Unlikely to Prevail on the Merits of Its Case.

1. The Prince George Divestiture Will Preserve Existing Competition in the Pacific Northwest.

Unable to contest that the complete divestiture of PeroxyChem's Prince George plant and related business to a leading global supplier of specialty chemicals resolves all competitive concerns in the Pacific Northwest, the FTC asks the Court to ignore it. The FTC's desperate

suggestion that this Court "should not even consider"[42] Defendants' proposed divestiture of Prince George is baseless. Section 13(b) of the FTC Act requires the Court to consider the "FTC's likelihood of success on the merits," which necessarily implicates the Defendants' rebuttal evidence, including in this case the Prince George divestiture.[43]

To sufficiently remedy any loss of competition from a merger, a divestiture must "replac[e] the competitive intensity lost as a result of the merger," but it "does not have to replicate pre-merger HHI levels." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 72, 74 (D.D.C. 2015). In evaluating the sufficiency of a divestiture, courts in this district have considered: (i) the certainty of the divestiture; (ii) the experience of the divestiture buyer; and (iii) the scope of the divestiture. *See United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60, 64 (D.D.C. 2017); *FTC, Merger Remedies 2006-2012 Report* (2017). Here, a binding contract provides for completion of the divestiture; the buyer has experience in the manufacture and sale of specialty chemicals, including hydrogen peroxide; and the divestiture includes a complete, on-going business.

Divestiture Certainty. Defendants signed a binding contract with United Initiators to divest Prince George conditioned upon the closing of Defendants' merger.[44] The other conditions precedent noted in the contract [redacted][45] Moreover, United Initiators [redacted]

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42 FTC Br. 37.

43 A previous attempt by FTC to escape a defendant's remedy was soundly rejected. *FTC v. Arch Coal, Inc.*, No. 04-0534, slip op. at 7 (D.D.C. July 7, 2004) (denying motion to exclude divestiture because the "Court's task in determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition ... requires the Court to review the entire transaction in question").

44 [redacted]

45 *Id*. at 440, 443-46.

[redacted][46] *See Aetna*, 240 F. Supp. 3d at 60 (finding a divestiture sufficiently likely to occur because the remaining barriers to close the divestiture were largely within the defendants' and the divestiture buyer's control).

Divestiture Buyer. United Initiators is a sophisticated buyer with sufficient experience to compete effectively in the hydrogen peroxide industry. It is a global supplier of organic peroxides that operates multiple plants,[47] and has the knowledge to ensure supply reliability.[48] United Initiators [redacted][49] Indeed, it currently [redacted].[50] It also will leverage its [redacted].[51] United Initiators' experience [redacted][52] Its experience as [redacted][53] Finally, United Initiators' [redacted][54]

46 [redacted]

47 [redacted]; *Company*, UNITED-INITIATORS.COM (retrieved Oct. 7, 2019) (DX140).

48 [redacted]. United Initiators recently purchased a hydrogen peroxide plant in Turkey. [redacted]; *United Initiators GmbH acquired Hidrojen Peroksit A.S. (HPAS)*, UNITED-INITIATORS.COM (retrieved Oct. 7, 2019) (DX141).

49 [redacted]

50 [redacted]

51 [redacted]

52 [redacted]

53 [redacted]

54 [redacted]

Divested Business. The Prince George divestiture is [redacted][55] After thorough due diligence, United Initiators confirmed that [redacted] [56] [redacted] [57] Defendants also will [redacted] [58]

United Initiators sees growth opportunities and plans to compete aggressively. In particular, United Initiators plans to [redacted] [59] It expects that it [redacted] [60] United Initiators plans to [redacted] [61] United Initiators also plans to [redacted] [62] Contrary to the baseless speculation in the FTC's brief, United Initiators [redacted] [63]

[redacted] *See* Radlinski (Nouryon) Dep. [redacted] (DX87).

55 [redacted]

56 [redacted]

57 [redacted]

58 [redacted]

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

60 [redacted]

61 [redacted]

62 [redacted]

63 [redacted]

Finally, rather than assess the divestiture proposal on its merits, the FTC instead criticizes the purchase price for being too low.[64] The implication is that United Initiators would be comfortable investing [redacted] and committing significant management efforts on the project without a care for its success. [redacted] One significant reason for the purchase price [redacted][65] United Initiators is fully committed to the divestiture transaction and to competing in the sale of hydrogen peroxide.

2. The Merger Will Not Substantially Lessen Competition in the Southern and Central United States.

The FTC claims to benefit from a presumption that the transaction will harm competition. However, the FTC is not entitled to any presumption of anticompetitive harm because it fails to meet its threshold burden of properly defining the relevant product and geographic markets in which this transaction should be evaluated. The FTC's alleged product and geographic markets are contrived to inflate market shares, overstate the closeness of competition between Evonik and PeroxyChem, and present the Court with an inaccurate picture of the competitive landscape. Without a presumption to fall back on, the FTC cannot meet its *prima facie* burden to show that the transaction is likely to substantially lessen competition.[66] The Court should give these market

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64 FTC Br. 39.

65 [redacted]

66 The merger will have no substantial effect on the U.S. portion of the FTC's alleged Pacific Northwest market, and the FTC has no jurisdiction to block a merger based on effects outside the United States. Hill Report ¶¶ 277-279 (showing that, under the methodology used by the FTC's economist, the merger would have, at most, a [redacted]% effect on prices in the U.S. portion of the Pacific Northwest) (DX5); 15 U.S.C. § 18 (Clayton Act prohibition on acquisitions, "where in any line of commerce or in any activity affecting commerce *in any section of the country*, the effect of such acquisition may be substantially to lessen competition") (emphasis

shares little, if any, weight and instead should evaluate the transaction's actual competitive effects. Analysis of the commercial realities demonstrates that competition for the sale of hydrogen peroxide will remain vigorous after the merger.

a) The FTC's Proposed Market Definition Fails to Conform with Commercial Realities.

Properly defining the relevant market is a "necessary predicate" to establishing a violation of § 7 of the Clayton Act. *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (1998) (citations omitted). A *prima facie* § 7 case often "rests on defining a market and showing undue concentration in that market." *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.). But measuring market shares is not the sole purpose of market definition; only in the context of a well-defined market can a court accurately assess the likely effects of a transaction. *Id.* at 1036; *see also FTC and DOJ Horizontal Merger Guidelines* ("*Guidelines*") § 4.1.1. A poorly defined market therefore will prevent an accurate and fair assessment of a merger's competitive effects.

"The FTC bears the burden of proof and persuasion in defining the relevant market." *Arch Coal*, 329 F. Supp. 2d at 119; *see also Baker Hughes*, 908 F.2d at 982 (stating the government must establish a market "for a particular product in a particular geographic area"). "A relevant market has two components: (1) the relevant product market and (2) the relevant geographic market." *CCC Holdings*, 605 F. Supp. 2d at 37. The FTC is unable to bear its burden in this case with respect to either its alleged relevant product or geographic market.

(i) The FTC Cannot Prove Its Proposed Relevant Product Market.

"The 'relevant product market' identifies the product and services with which the defendants' products compete." *CCC Holdings*, 605 F. Supp. 2d at 37. "A market's outer

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added); 15 U.S.C. § 45(a) (FTC Act prohibition on "[u]nfair methods of competition in or affecting commerce); 15 U.S.C. § 44 (defining "commerce" to involve the United States).

boundaries are determined by the reasonable interchangeability or use or the cross-elasticity of demand between the product itself and substitutes for it." *Tronox*, 332 F. Supp. 3d at 198 (internal quotations omitted). In other words, only products that customers consider to be reasonable substitutes for one another belong in the same relevant product market; products that are not reasonable substitutes are in separate markets.

Market definition is inherently a question of customer demand. *Tronox*, 332 F. Supp. 3d at 198. The FTC's "all hydrogen peroxide (except electronics grade)" product market is flawed because it incorrectly groups together multiple products with different characteristics and price points. Customers do not consider different hydrogen peroxide products to be interchangeable and would not use one product when the characteristics of another are required.[67] For instance, a customer that requires food grade hydrogen peroxide cannot switch to standard grade because standard grade would neither meet the necessary purity requirements nor regulatory certifications required by law.[68] Going in the opposite direction, a pulp and paper customer would not switch from standard grade to food grade because, although food grade has the same bleaching properties, it goes through an additional purification process that makes it more expensive than standard grade.[69] The inability to substitute between grades is even starker in other applications, such as pre-electronics grade or propulsion grade: using over 90% concentration propulsion grade to treat a person's minor scrape would result in a medical disaster, and the little brown bottles of hydrogen peroxide sold at the local drug store will not power a rocket.

The FTC, recognizing the facts are not on its side, ignores the question of customer substitutability altogether and instead attempts to justify grouping all hydrogen peroxide

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

68 [redacted]

69 *See* Hill Report 33 fig.9 (DX5).

products together based on supplier considerations, namely the "ability of a production facilities to adjust product mix."[70] However, even from the supplier perspective the FTC's market definition misses the mark and shows a fundamental misunderstanding of the merging parties' production and their products. The FTC completely ignores that in the United States, PeroxyChem sells many hydrogen peroxide products that Evonik cannot sell – indeed, this is Evonik's primary rationale for the transaction. [redacted][71] Evonik cannot sell these products to customers in the United States, and including them in the relevant product market inappropriately inflates market share estimates and distorts the degree of competition between the merging parties.

But even combining those limited number of hydrogen peroxide products that both Evonik and PeroxyChem sell into a single product market is inappropriate. The FTC's expert states that aggregating hydrogen peroxide products for different end uses is appropriate because suppliers can "easily and profitably" shift production capacity between hydrogen peroxide grades.[72] But the FTC's expert never explains how it would be "profitable" for a supplier to swing production from one grade to another. That is because it would not be; instead it would be completely economically irrational because prices and margins vary significantly among different grades of hydrogen peroxide. As a result, whether viewed from a customer demand perspective or a supply perspective, the FTC's proposed relevant market for all hydrogen peroxide is just wrong.

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70 FTC Br. 13.

71 Corson (Evonik) Dep. 14:5–15:9; 18:20-24 ([redacted]) (DX93); *Id.* at 16:11-18; 17:23-25; 18:15-24 ([redacted]); Costanzo (Evonik) IH Tr. 36:13-15 ([redacted]) (DX235); Kulp (Evonik) Dep. 79:2-5 ([redacted]) (DX90).

72 Rothman Report ¶¶ 71-72 (quoting *Guidelines* § 5.1).

The single hydrogen peroxide product the FTC excludes from its proposed relevant market is electronics-grade hydrogen peroxide, which PeroxyChem sells but Evonik does not. The FTC explains that it excludes electronics grade hydrogen peroxide from the relevant market because: (1) electronics grade requires "additional purification capabilities, proprietary technology, and specialized equipment;" and (2) not all hydrogen peroxide producers are capable of producing electronics-grade product.[73] Under the FTC's own criteria, however, pre-electronics grade [redacted] also must be excluded from the relevant market. Pre-electronics grade hydrogen peroxide requires [redacted] as compared with other specialty products, and not all producers are capable of performing [redacted] In addition, as with electronics grade, pre-electronics grade requires [redacted] to maintain the high level of purity.[74]

Rather than confronting these and other examples of real-world, market conditions in North America, the FTC relies heavily on an Evonik submission to the European Commission ("EC") regarding the *European* hydrogen peroxide market.[75] In that submission, Evonik acknowledged [redacted] However, the FTC provides no factual basis to conclude that supply and demand conditions for hydrogen peroxide in Europe are at all analogous to those in North America. The reality the FTC ignores is that the European and North American hydrogen

[73] FTC Br. 16-17.

[74] Costanzo (Evonik) IH 175:8-15 (DX235); Hill Report ¶ 86 (DX5).

[75] The FTC's only other support for its market definition are documents that suggest North American hydrogen peroxide producers broadly compete in all end-use segments where hydrogen peroxide is used. However, even if a producer can compete in a particular segment, it may not be able to compete within each application in that segment. For example, although Evonik can sell food grade hydrogen peroxide into the United States, it is unable to supply hydrogen peroxide for aseptic packaging applications.

peroxide markets differ in terms of competitors,[76] their production capabilities,[77] regulatory requirements,[78] and other material market characteristics.

(ii) The FTC Cannot Prove Its Proposed Relevant Geographic Market.

A relevant geographic market is defined as "the region in which the seller operates, and to which the purchaser can practicably turn for supplies." *Arch Coal*, 329 F. Supp. 2d at 123 (quoting *Cardinal Health*, 12 F. Supp. 2d at 49). The relevant geographic market must "correspond to the commercial realities of the industry and be economically significant." *Tronox*, 332 F. Supp. 3d at 202 (internal quotations omitted). A "failure to sufficiently define the relevant geographic market can be grounds to deny the requested injunction." *Cardinal Health*, 12 F. Supp. 2d at 49.

The FTC previously defined an all-North America market for hydrogen peroxide.[79] The FTC now concludes, and the Defendants agree, that geographic markets can be defined around individual customer locations. This is appropriate because suppliers price differently based on the location of each customer. *Guidelines* § 4.2.2. But despite recognizing that markets should be defined around individual hydrogen peroxide customers, the FTC defines two broad geographic markets: the "South and Central United States" and the "Pacific Northwest."[80] To do so, it asserts that customers in the states comprising each of the proposed markets "face largely the same competitive conditions" and therefore can be aggregated. They cannot.

The FTC's alleged "Southern and Central United States" market includes 35 states, implausibly ranging from California to Delaware and from Wisconsin to Alabama. The FTC

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[76] Lerner IH Tr. 191:18-21 ([redacted]) (DX229).

[76] *See, e.g.*, Hamann (Evonik) Dep. 17:1-5 (DX230).

[78] RAG-RETC-000029013 (DX320).

[79] Compl., *In re Degussa Aktiengesellschaft*, FTC Docket No. C-3813 (1998) ¶ 12 (DX268).

[80] FTC Compl. ¶¶ 28, 34, 35.

claims all customers across all of these states face similar competitive conditions because they "receive approximately [redacted] of their shipments from suppliers' plants in the southern United States."[81] But looking at such an average *across all states* ignores the chief question of whether individual customers – or even all customers in a given state – face similar competitive conditions. Given the breadth of the proposed market, they unsurprisingly do not. For instance, customers in California receive more than 60% of their hydrogen peroxide supply from plants outside of the FTC's "Southern and Central United States" market. Customers in Wisconsin receive more than 30% of their hydrogen peroxide supply from plants outside of the FTC's alleged market. Customers in Delaware receive more than 70% of their hydrogen peroxide supply from outside of the alleged market, and customers in Alabama receive *no* hydrogen peroxide supply from plants outside of the alleged market.[82] None of these customers therefore face similar supply options and therefore they should not be aggregated.[83]

Similarly, hydrogen peroxide supplier market shares – which the FTC suggests are indicative of competitive significance – vary substantially across the Southern and Central United States. Solvay's market share is more than [redacted] in California, around [redacted] in Delaware, and [redacted] in Alabama.[84] Arkema's market share is roughly [redacted] in California, more than [redacted] in Delaware, and less than [redacted] in Alabama. Evonik's market share is about [redacted] in California, more than [redacted] in Alabama, and about [redacted] in Delaware. Nouryon's market share is [redacted] in California, but more than [redacted] in Alabama. This wide variation between states makes clear that a

81 FTC Br. 20.

82 Hill Report 45 fig.14 (DX5).

83 The FTC's alleged "Pacific Northwest" market suffers from the same flaw. The data show that U.S. customers in the Pacific Northwest face different competitive conditions than Canadian customers. Hill Report ¶¶ 103-04 (DX5). Moreover, Evonik and PeroxyChem have a combined market share below [redacted] in the U.S. portion of the Pacific Northwest – well below the threshold that may raise competitive issues. *Id.* 45 fig.15.

84 Hill Report 43 fig.12 (DX5).

far more nuanced view is required. Nonetheless, the FTC indiscriminately includes all of these states in the same relevant South and Central United States market.

Finally, sales data confirm that Evonik and PeroxyChem primarily focus on different geographic areas. For example, Evonik's Mobile, AL, plant primarily sells into [redacted].[85] In contrast, PeroxyChem's Bayport, TX, plant primarily sells into [redacted] and very few of which overlap with Evonik's primary service area.[86] Taken together, these commercial realities and real-world data show that competitive conditions vary widely for customers grouped in the FTC's proposed Southern and Central United States geographic market and that the market therefore is improperly defined.

The boundaries of both the FTC's alleged product market and geographic markets are arbitrary and fail to account for how the industry actually functions. Without a properly defined relevant market, the FTC is not entitled to benefit from any presumption of anticompetitive harm. *Baker Hughes*, 908 F.2d at 982 (the FTC bears the initial burden of "showing that a transaction will lead to undue concentration in the market *for a particular product in a particular geographic area*." (emphasis added)). It will be unable to do so in light of the market dynamics of the hydrogen peroxide industry, which will continue to be highly competitive after the merger.

b) The Transaction Will Not Facilitate Coordinated Interaction Because the Industry Is Not – and Will Not Become – Vulnerable to Coordination.

Despite recognizing that Evonik, PeroxyChem, Arkema, Nouryon, and Solvay all compete aggressively to win business from each other, the FTC posits that the transaction will make coordination substantially more likely. Coordination involves firms reaching a common understanding about how they "will compete or refrain from competing" in an industry in order

[85] *Id.* 54 fig.19 [redacted].
[86] *Id.* 55 fig.20 [redacted]

to increase their joint profits. *Guidelines* § 7. The archetypal example of coordinated interaction involves two gasoline stations on opposite street corners that monitor and mirror each other's daily price changes. Such an intersection – with transparent pricing, frequent sales, weak buyers, and product homogeneity – may well be susceptible to coordination. But this archetypical example is vastly different from the industry under examination in this case. In the hydrogen peroxide industry, suppliers compete to sell a broad array of differentiated products, at widely varying price points, through blind bidding processes with large, sophisticated buyers that offer valuable, long-term contracts. All of these factors render it infeasible for hydrogen peroxide suppliers to engage in coordination, and the transaction will not make it any easier for them to do so. As a result, the industry will remain at least as competitive post-merger as it is today.

(i) The Hydrogen Peroxide Industry is Intensely Competitive Today

The FTC asserts that the hydrogen peroxide industry is vulnerable to coordination today, but this claim is at odds with actual market performance. There is no evidence that coordination is occurring today. To the contrary, the FTC cites several examples of Evonik and PeroxyChem competing head-to-head, and competition is not limited to those two firms. Witnesses from the parties, their competitors, and their customers will describe how Arkema, Nouryon, and Solvay also compete aggressively to sell hydrogen peroxide. Defendants' economic expert, Dr. Nicholas Hill, analyzed specific recent examples of real-world bidding competition and found that customers saved about [redacted]% by pitting rival suppliers against each other.[87] If hydrogen peroxide suppliers were coordinating today, those savings never would have materialized. In fact, one would expect that firms engaging in coordinated conduct would bid similar prices and for those prices to hold steady, or even increase. Conditions in the hydrogen peroxide industry

[87] Hill Report ¶ 218 & fig.46 (DX5).

are exactly the opposite: suppliers charge widely varying prices, and the average price of hydrogen peroxide has fallen industry-wide over the last three years.[88]

Yet another example of the intense competition among hydrogen peroxide suppliers is Solvay's expansion of its Longview, WA, plant in 2017. Solvay expanded by 45 million pounds of capacity and immediately put suppliers on their heels.[89] Mere weeks after Solvay announced its plans, the head of PeroxyChem's hydrogen peroxide business reported [redacted][90] – with good reason. The expansion intensified competition for hydrogen peroxide sales – not just in the Pacific Northwest, but throughout the United States. Competitors responded by lowering prices and aggressively bidding to retain their customers.[91]

Faced with irrefutable evidence of that this industry is intensely competitive today, the FTC falls back on what it calls an "extensive history of collusion."[92] In fact, there was a single episode of alleged collusion in North America and that episode ended in 2001. The conduct did not involve PeroxyChem (or its predecessor), and was exposed when Evonik's predecessor (Degussa) – upon becoming aware of it – reported the conduct to the DOJ. In the nearly two decades that have passed since, there has been no recurrence. This stands in contrast to the *Tronox* case, in which the FTC relied on recent history of overt collusion in the titanium dioxide industry, with allegations of price fixing and corresponding litigation taking place within the five years preceding the merger. 322 F. Supp. 3d at 209 n.12. One of the reasons the North American hydrogen peroxide industry has been free from collusion since 2001 is that the industry has changed in important ways since then. Indeed, even the FTC concedes that the "swap agreements

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88 *Id.* ¶¶ 216-17 & figs.44 & 45.
89 *See* PXC01112631 (DX299).
90 PXC00331788 (DX290).
91 *See, e.g.*, Montag (PeroxyChem) IH. Tr. 191: 8-14 (DX233); Radlinski (Nouryon) Dep. 79:1-7 (DX87).
92 FTC Br. 1, 7, 24, 25.

and exchanges of price increase announcements" that suppliers allegedly used to collude in the 1990s "are currently less frequent."[93] And the agency never asserts that the transaction will cause a resurgence in swap agreements or public pricing announcements, and it offers no theory as to what modern mechanisms would possibly allow suppliers to collude post-merger, now that the tools of the past have been abandoned. Nor does the FTC acknowledge that increased differentiation among hydrogen peroxide products and suppliers would make coordination far more difficult today than it was 20 years ago. These substantial changes mean that allegations about conduct that ended at the turn of the century fail to demonstrate that today's hydrogen peroxide industry is at all vulnerable to coordination.

(ii) Today's North American Hydrogen Peroxide Industry Is Not Vulnerable to Coordination

Absent from the FTC's allegations is any attempt to describe how hydrogen peroxide suppliers actually would facilitate coordination. The FTC fails to explain at even a rudimentary level how suppliers would reach a common understanding on price, output, quality, service, customer allocation, or some other dimension of competition. Further, the FTC fails to explain how, having reached some theoretical common understanding, suppliers would then be able to effectively monitor and punish deviations in order to sustain their coordinated scheme – the essential predicates to coordination. The absence of any kind of plausible means of coordination distinguishes this case from other recent coordinated effects merger challenges. *See Tronox*, 332 F. Supp. 3d at 209 (alleging the merging firms would coordinate on withholding output); *United States v. H&R Block*, 833 F. Supp. 2d 36, 78 (D.D.C. 2011) (alleging the merging firms would coordinate to not offer free tax services). The reason for this omission is simple: the features that

[93] FTC Br. 7-8.

characterize today's hydrogen peroxide industry frustrate coordination under any possible theory, making coordination difficult and unlikely.

Both the relevant case law and the FTC's own *Guidelines* identify several industry features that are well-accepted as hindering coordination. The presence of any one of these features alone could be sufficient to prevent firms from coordinating. However, in this case, the presence of several of features undermines the plausibility of coordination.

Bidding Markets. Coordination in the hydrogen peroxide industry is unrealistic in light of the sophisticated and confidential bid processes run by hydrogen peroxide customers. This court has concluded that "sealed bids and confidentiality is an important aspect of market structure and dynamics that would frustrate coordination among producers." *Arch Coal*, 329 F. Supp. 2d at 144. The *Guidelines* also recognize that the "nature of the procurement process" can hinder firms' ability to coordinate effectively. *Guidelines* §7.2. The FTC's own examples of hydrogen peroxide customers extracting favorable terms from suppliers through the bid process exemplify this point. The FTC fails to explain how a supplier could coordinate with its competitors when it has little to no insight into the price, delivery, payment, and other competitive terms those competitors are offering.

Customers design their bid processes precisely to engender intense competition – and they do so successfully. Through blind bidding, hydrogen peroxide suppliers are forced to bid aggressively in order to win the contract. Even after initial bids are submitted, customers achieve additional savings by narrowing the number of bidders in subsequent rounds and leveraging competing bids against each other to obtain more favorable terms.[94] Customers generally do not

[94] Kulp (Evonik) IH Tr. 60:2-3 [redacted] (DX234); Radlinski (Nouryon) Dep. [redacted]

disclose the details of the competing bids, including the final price and other competitive terms.[95] Such confidential bidding gives suppliers a strong incentive to submit aggressive bids because they cannot detect how other suppliers are bidding and it protects customers from any threat of coordination. *Arch Coal*, 329 F.Supp.2d at 145 ("Due to the nature of the confidential bidding and contracting process that gives producers incentives to submit aggressive bids to capture long term contracts, cheating would not be detected until well after the fact, if ever, and any punishment would come well after the fact as well.").

Large and Long-Term Contracts. The use of large and long-term contracts adds yet another complexity that hinders hydrogen peroxide producers' ability to coordinate effectively. This court has recognized that coordination is frustrated when customers offer large and long-term contracts rather than seek small and more frequent spot sales because they increase the reward, and thus incentive, to cheat. *CCC Holdings*, 605 F. Supp. 2d at 64 ("'Where large buyers likely would engage in long-term contracting, so that the sale covered by such contracts can be large relative to the total output of a firm in the market, firms may have the incentive to deviate' from the terms of coordination.") (quoting 1997 Merger Guidelines); *see also Guidelines* § 7.2.

That is precisely how sales occur in the hydrogen peroxide industry. First, hydrogen peroxide contracts tend to be for large volume and therefore are extremely valuable to producers.[96] For instance, Evonik's top 20 customers account for nearly [redacted] of its revenue in

[redacted] (DX87); [redacted]; Niessner (Graphic Packaging) Dep. [redacted] (DX80).

95 *See, e.g.*, Hurd (Georgia Pacific) Dep. 30:19-31:6 (DX82).

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

the United States.[97] PeroxyChem also has most of its business tied up in long-term contracts, with its top 20 customers representing over [redacted] of its revenue in the United States.[98] That makes the stakes for each customer contract high, as winning or losing one contract could make or break a supplier's year. Second, hydrogen peroxide customers award long-term contracts in order to have a secure source of supply.[99] The vast majority of hydrogen peroxide contracts have a term of [redacted][100] The *average* length of Evonik's top 20 contracts is [redacted] months and the average length of PeroxyChem's top 20 contracts is [redacted] months.[101] The FTC ignores these market realities and fails to tackle the difficult question of explaining how suppliers could coordinate when the possibility of winning a large, long-term contract would tempt them to defect from any theoretical common understanding.

Sophisticated and Powerful Buyers. Hydrogen peroxide suppliers predominantly serve large, sophisticated customers, such as International Paper and Georgia Pacific. The *Guidelines* appreciate that "a large buyer may be able to strategically undermine coordinated conduct . . . by choosing to put up for bid a few large contracts rather than many smaller ones." *Guidelines* § 7.2. But the FTC ignores that hydrogen peroxide customers are powerful buyers with dedicated procurement arms that are experienced at running bid processes geared toward minimizing costs, and deft at leveraging competing bids to extract the best possible terms. These customers are capable of navigating supply dynamics to achieve the best terms and frustrating attempts at

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97 Hill Report ¶ 240 n.308 (DX5).

98 *Id.*

99 *See, e.g.*, [redacted] *See also* Charns (WestRock) Dep. [redacted] (DX79); Senechal (Resolute) Dep. 50:9-17 (DX81); Maeder (Verso) Dep. 22:13–23:14 (DX95).

100 Hill Report ¶ 241 (DX5). *See, e.g.*, Maeder (Verso) Dep. 39:11-13 ("[W]e leave it open to do one year or multiple year agreements.") (DX95); Johnston (Rayonier) Dep. [redacted] (DX86).

101 Hill Report ¶ 241 (DX5).

coordination. *See CCC Holdings*, 605 F. Supp. 2d at 64 (noting that "'[a] sophisticated customer base makes price coordination more difficult'") (internal citations omitted).

Lack of Transparency. Hydrogen peroxide suppliers do not know their competitors' specific prices, costs, or output levels, and they have only imperfect information about capacities.[102] Prices are confidential bid terms that buyers rarely reveal to competing suppliers.[103] Even when leveraging a competing bid to prompt a better offer, customers will not always reveal the price of the competing bid or how far off the original bid was.[104] And even if they do, suppliers have no way to know whether the competing bid number is real or a negotiating tactic; nor can they know how that number relates to other contract terms in the competing offer.[105]

As in any competitive industry, hydrogen peroxide suppliers seek to gather market information from customers and third party data providers so as to best serve their customers. But this information is often incomplete and inaccurate.[106] Indeed, suppliers are often wrong regarding competitors' contracts, prices, output, capacities, and costs. For example, Dr. Hill undertook a systematic analysis of Evonik's own competitive intelligence database – in which Evonik attempts to record information about customer bids and competitors – and compared it against the sales data collected from all five suppliers. What he found is that Evonik's efforts have proven wildly unsuccessful. Evonik identifies the wrong supplier for a customer in more

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102 *See, e.g.*, Niessner (Graphic Packaging) [redacted] (DX80); Gripp (Harcros) 39:18-20 ("[A]s far as any one company's share versus another, no, we don't share that information.") (DX78).

103 [redacted]

104 [redacted].

105 Kyte (Evonik) Dep. 107:16-21 ([redacted]) (DX91).

106 Kulp (Evonik) IH Tr. 94:17–95:21 (DX234).

than [redacted] of observations (excluding those for which Evonik itself is the supplier).[107] Even when Evonik correctly identifies the supplier, its [redacted] estimates are nearly always inaccurate.[108] Indeed, Evonik no longer bothers trying to track [redacted] because its efforts have proven so unsuccessful.

This lack of industry transparency makes it impossible for suppliers to keep tabs on each other. As a result, they could not detect or punish any deviations from the terms of coordination. *See Arch Coal*, 329 F. Supp. 2d at 145 ("[D]elays in detection or punishment generally mean that deviations are likely and that coordinated interaction is unlikely to succeed.").

Product Differentiation. When the relevant products are homogenous, prices tend to be more uniform and it may be easier for firms to reach a common understanding not to compete. By contrast, where products and prices are differentiated, coordination is very challenging. *CCC Holdings*, 605 F. Supp. 2d at 61 ("In addition to product heterogeneity, coordination may be impeded by a lack of 'standardization of pricing or product variables on which firms could compete.'" (quoting 1997 Merger Guidelines)). Despite the FTC's repeated mischaracterization of hydrogen peroxide as a single "commodity," suppliers manufacture and sell a variety of hydrogen peroxide products that have distinct characteristics tailored to the particular end uses and that are sold at vastly different prices.[109] One need only look at Figure 1 above to understand this intuitively. *See Arch Coal*, 329 F. Supp. 2d at 140 ("heterogeneity of products ... limit[s] or impede[s] the ability of firms to reach terms of coordination") (citation omitted). The FTC offers no mechanism for how suppliers could coordinate over such widely varying products and prices.

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[107] Hill Report ¶ 230 & 98 fig.49 (DX5).

[108] *Id.* ¶ 228 & 97 fig.48 [redacted]

[109] *See* Section I.A.3; *see also* Hill Report 17 fig.2 & 18 fig.3 (DX5).

(iii) The FTC Does Not Present Any Evidence Showing the Hydrogen Peroxide Industry is Vulnerable to Coordination.

To support its claim that hydrogen peroxide suppliers recognize their mutual interdependence, the FTC misconstrues statements from a handful of the hundreds of thousands of documents produced in this case. For example, the FTC cites to years-old price increase announcements, which are silent as to absolute pricing levels,[110] despite knowing that: (i) the price increase announcements had no effect on actual prices (which are set by long-term contracts);[111] and (ii) hydrogen peroxide suppliers have ceased issuing such announcements.[112]

[redacted][113] The FTC also cites to fears of "price wars," but any business would prefer to charge higher prices. And in the hydrogen peroxide industry, such hopes are dashed with regularity, as rivals bid aggressively to steal business from each other.[114] *See Arch Coal*, 329 F. Supp. 2d at 138, 146 (finding that "the structure and dynamics of the … market are not conducive to an increased likelihood of tacit coordination as a result of the proposed transaction," despite "a stated interest by some … producers in production discipline.").

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[110] FTC Br. 27 n.124; Montag (PeroxyChem) IH Tr. 158:1-22 (DX233).

[111] *See* [redacted]; Ball (PeroxyChem) IH Tr. 193:13-21 (DX237).

[112] *See* Kulp (Evonik) IH Tr. 125:14-17; 161:15-21 (DX234).

[113] *See* Kyte (Evonik) Dep. 133:22-24 ([redacted]) (DX91); *Id.* at 53:10-19 ([redacted]).

[114] *See, e.g.*, PXC01054397 ([redacted]) (DX323); Costanzo (Evonik) IH Tr. 153:9–21 (DX235); Kulp (Evonik) IH Tr. 127:20-128:2 (DX234); Costanzo (Evonik) IH Tr. 106:14-24 (DX235); [redacted] Shirley (International Paper) Dep. [redacted] (DX84).

Again shirking away from commercial realities in the relevant market it has alleged, the FTC instead looks to Eastern Canada – a region with only two hydrogen peroxide plants, one of which Evonik acquired from Kemira in 2011. Despite the relatively small number of hydrogen peroxide suppliers in the region, the same characteristics of vigorous competition typify hydrogen peroxide sales there as elsewhere in North America. Nonetheless, the FTC points to a [redacted] However, the FTC fails to note that the same [redacted] In 2011, [redacted] The FTC cannot show that Evonik increased its prices as a result of "reduced competitive intensity." To the contrary, consistent with the competitive nature of the industry, [redacted]

(iv) The Transaction Will Not Increase Vulnerability to Coordination

The transaction will not change *any* of the defining characteristics of the industry that render coordination unlikely today. Large and powerful customers will still pit suppliers against each other in procurement auctions. Hydrogen peroxide will still be sold under long-term contracts. Suppliers will still not know how much product each customer is buying from a rival or what price the rival is charging. And hydrogen peroxide products will still be highly differentiated. Obviously the transaction will combine Evonik and PeroxyChem; every merger results in greater market concentration. But that does not mean that every merger substantially reduces competition. Here, in fact, the structure of the North American hydrogen peroxide industry post-merger will be even less conducive to coordination, as suppliers will be less

similarly sized, rendering it even more difficult for them to coordinate.[115] *Contrast with Tronox*, 332 F. Supp. 3d at 195 (post-merger, Chemours would have 37% share, and Tronox would have 36% share).

The FTC cannot overcome that reality by relying on a few select snippets from other suppliers' documents. The FTC points to [redacted][116] No more persuasive is the FTC's reliance on a document [redacted][117] [redacted][118]

c) The Transaction Will Not Have Unilateral Anticompetitive Effects Because Evonik and PeroxyChem Are Not Close Competitors.

The FTC's second attempt to meet its burden rests on showing that the merger will result

[115] *See* Hill Report ¶¶ 244-46 (DX5).
[116] *See* [redacted]
[117] [redacted]
[118] [redacted].

in unilateral effects, *i.e.*, allowing the acquiring firm to independently increase prices as a result of eliminating important direct competition between the two merging firms. *See FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000) (finding unilateral effects likely where merger would eliminate a "primary direct competitor"); *FTC v. Staples, Inc*., 970 F. Supp. 1066, 1083 (D.D.C. 1997) (finding unilateral effects likely where "merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms"); *H&R Block*, 833 F. Supp. 2d at 81 (finding unilateral effects likely where merger would combine two of three online tax services). But the conditions that support a finding of unilateral effects – that the merging firms are close competitors – are absent here. *See Guidelines* § 6.1 (stating "unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice").

Unilateral effects are unlikely to arise if the products sold by the merging firms are not close substitutes or customers can turn to other suppliers in response to a price increase. *See CCC Holdings*, 605 F. Supp. 2d at 68 (D.D.C. 2009) (citing *United States v. Oracle Corp.*, 331 F Supp. 2d 1098, 1117-18 (N.D. Cal 2004)); *Guidelines* § 6.1 (stating unilateral price effects are unlikely "if non-merging parties offer very close substitutes for the products offered by the merging firms"). In industries where customers solicit bids and seek to play sellers off one another, any "[a]nticompetitive unilateral effects ... are likely in proportion to the frequency or probability with which, prior to the merger, one of the sellers had been the runner-up when the other won the business." *Guidelines* § 6.2. Unilateral effects are especially unlikely in bidding markets – such as the hydrogen peroxide industry – if customers can seek (or threaten to seek) to obtain bids from alternative suppliers.

Because Evonik and PeroxyChem do not frequently bid for the same customers and

several other suppliers offer very close substitutes, there is no reasonable basis upon which to conclude that the transaction will result in unilateral effects. It is not sufficient, as the FTC seems to suggest, merely to point out that Evonik and PeroxyChem are competitors. Instead, the FTC must demonstrate that the transaction will remove an important competitive constraint that will allow Evonik to raise prices substantially post-merger. The FTC cannot meet this burden. Evonik and PeroxyChem are not particularly close competitors in the FTC's alleged South and Central United States market because they have differentiated products, customers, and geographic focuses. Moreover, even following the transaction, four independent suppliers of hydrogen peroxide will continue to compete vigorously to the benefit of customers.

(i) Evonik and PeroxyChem Are Not Close Competitors Because They Focus on Different Products and Customers.

Evonik and PeroxyChem are not close competitors because they have developed fundamentally different business strategies over the last 10 years and, as a result, today primarily focus on different products and customers. Evonik prides itself on being the most reliable supplier of large volumes of standard grade hydrogen peroxide to the pulp and paper industry.[119] [redacted][120] Together the pulp and paper and [redacted] end-use segments represent nearly [redacted] of Evonik's sales from its Mobile, AL, plant.[121]

In contrast, PeroxyChem has differentiated itself from other hydrogen peroxide producers by prioritizing the sale of specialty grade hydrogen peroxide into new and growing end-uses. More than a decade ago, PeroxyChem recognized that [redacted]

[119] Kulp (Evonik) Dep. 53:10-19 (DX90); RAG-KATR-000001666 at 690 (DX285).
[120] Rettig (Evonik) Dep. 43:11-20 (DX94); *see* Corson (Evonik) Dep. 34:15–35:9 (DX93).
[121] Hill Report ¶ 126 & 57 fig.22 (DX5).

[redacted].[122] In contrast to Evonik, only about [redacted] of PeroxyChem's sales from its Bayport, TX, plant are into the pulp and paper industry.[123] [redacted] Instead, PeroxyChem has developed a diversified product mix that includes sales into a wide range of end-uses. Among these specialty hydrogen peroxide products are several for which Evonik cannot offer a competing product, including [redacted].[124] These specialty products sell at a much higher price than products to pulp and paper customers, and customers do not consider them to be substitutes for standard grade.[125]

(ii) Evonik and PeroxyChem Are Not Close Competitors Because They Focus on Selling Into Different Geographic Areas.

Another reason Evonik and PeroxyChem are not close competitors is that they are geographically differentiated. As a result, the majority of their customers are concentrated in different states. In the Southeast, Evonik primarily sells hydrogen peroxide products into the [redacted] surrounding its Mobile, AL, plant.[126] In contrast, PeroxyChem's Bayport, TX, plant primarily sells hydrogen peroxide products into [redacted] states, only three of which overlap with Evonik's primary service area.[127] PeroxyChem is better positioned to serve the Western United States, and it ships its higher priced specialty products from Bayport throughout North America.

Plant location is a critical factor in competition to sell hydrogen peroxide because, as discussed above, transportation costs are a significant component of the overall cost.[128] In fact, most customers are served by the closest plant or a plant that is less than 250 miles farther than

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[122] PXC01058346 at 347, 353 (DX 298); PXC00246853 at 854, 857 (DX 296).
[123] Hill Report ¶ 126 & 57 fig.22 (DX5).
[124] *See, e.g.*, Hamann (Evonik) IH Tr. 65:3-11 ([redacted]) (DX236); Corson (Evonik) Dep. 14:10-12 ([redacted]) (DX93); Hamann (Evonik) Dep. 58:6-9 ([redacted]) (DX230).
[125] Hill Report ¶ 48 & 17 fig.2; *Id.* ¶ 49 & 18 fig.3 (DX5).
[126] Hill Report ¶ 121 & 54 fig.19 (DX5).
[127] *Id.* ¶ 122 & 55 fig.20.
[128] Kulp (Evonik) IH Tr. 35:46-12 (DX234); Costanzo (Evonik) IH Tr. 58:21-25 (DX235).

the closest plant.[129] Evonik's Mobile, AL, plant and PeroxyChem's Bayport, TX, plant are nearly 500 miles apart and are each surrounded by more proximate competitor plants.[130] The closest rivals to Evonik's Mobile plant are Nouryon's plant in Columbus, MS, and Arkema's plant in Memphis, TN. PeroxyChem's Bayport, TX, plant, and is only 10 miles away from Solvay's plant in Deer Park, TX. As a result, Evonik and PeroxyChem rarely are the two most freight logical (i.e., closest) suppliers for a particular customer. Customers only infrequently consider Evonik and PeroxyChem to be close substitutes, and almost always can purchase hydrogen peroxide more cost effectively from an alternative supplier that is closer. Evonik's and PeroxyChem's different geographic focuses are also borne out in their customer mix: Evonik focuses heavily on [redacted] whereas PeroxyChem's sales primarily [redacted][131]

(iii) Real-World Sales Data Confirms Evonik and PeroxyChem Compete More Closely Against Other Rival Than Each Other.

If Evonik and PeroxyChem were particularly close competitors, and thus important competitive constraints on one another, industry sales data would show that the merging firms won and lost customers from each other more frequently than from rival suppliers. That is not the case. [redacted] Evonik both wins and loses an overwhelming majority of its business in competition with [redacted][132] PeroxyChem loses most of its business to [redacted]

[129] Hill Report ¶ 53 & 21 fig.4 (DX5).
[130] *Id.* ¶¶ 123-25 & 41 fig.11.
[131] Hill Report 57 fig.22 (DX5); *see also* Lerner (PeroxyChem) IH Tr. 114:3-18 ([redacted]) (DX229).
[132] [redacted]

[redacted] PeroxyChem also loses a large percentage of its business to [redacted] Similarly, PeroxyChem wins most of its business from [redacted][133]

(iv) Dr. Hill's Economic Analysis Demonstrates the Transaction is Unlikely to Have Substantial Unilateral Effects.

Dr. Hill's economic analysis of the transaction confirms that it is unlikely to have substantial unilateral anticompetitive effects.[134] In fact, Dr. Hill's analysis shows that the transaction is likely to result in savings to customers by optimizing the combined firm's plant network and reducing transportation costs by allowing the merged firm to serve customers from closer plants. Enjoining the transaction would deprive customers of these likely benefits.

Dr. Hill first employs econometric tools to estimate how the price that a customer pays for hydrogen peroxide might change following the transaction. Dr. Hill's analysis shows that, consistent with competitor and customer testimony, transportation costs and the distance between customers and suppliers have a significant influence on price.[135] The analysis shows further that a merger will meaningfully affect price only for those few customers (1) that are served by Evonik or PeroxyChem, (2) that have as the next closest alternative supplier the other party, and (3) for which the next nearest supplier is relatively distant.[136] Dr. Hill's analysis finds that the market-wide average potential price increase is a mere [redacted]%, which in a market totaling roughly $275 million represents an increase of less than $[redacted].[137] By any measure, this is not a substantial effect. Once adjusted for logistics savings – which could be as high as almost $[redacted] – Dr. Hill estimates that the merger would have no price effect.[138]

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[133] Hill Report ¶ 130-131 & 59 figs. 23-24 (DX5); [redacted]
[134] Hill Report ¶¶ 116-19 (DX5). Dr. Hill also demonstrates that the FTC's expert's analysis is flawed because it relies on flawed inputs. *Id.* ¶¶ 176-210.
[135] *Id.* ¶¶ 147-50.
[136] *Id.* ¶ 151.
[137] *Id.* ¶¶ 154-55.
[138] *Id.* ¶¶ 156-162.

Dr. Hill tests his findings using data from real-world bidding events for customers in the FTC's alleged Southern and Central United States. These bidding events are biased in favor of the FTC – and thus in favor of finding a unilateral price effect – because they were collected from customers the FTC hand-selected for declarations or depositions.[139] Even using the FTC's best evidence, and applying its own expert's assumptions, Dr. Hill's analysis of the bidding data confirms the average potential price effect is [redacted]% (again before logistics savings, which wipe that out).[140] These findings corroborate Dr. Hill's econometric analysis and provide confidence for his prediction that the merger is unlikely to result in substantial unilateral effects.

B. The Equities Weigh Against Entry of a Preliminary Injunction.

Not surprisingly, the equities prong of the § 13(b) preliminary injunction standard typically follows the Court's determination of the FTC's likelihood of success on the merits. "[A]bsent a likelihood of success on the merits, equities alone will not justify an injunction." *Arch Coal*, 329 F. Supp. 2d at 116 (citing *PPG Indus., Inc.*, 798 F.2d at1508). Here, the public has no interest in the Court preliminarily enjoining this merger merely to protect the FTC's ability to bring a case in which it has no reasonable likelihood of success or to preserve its ability to conduct an agency proceeding that has no reasonable likelihood of taking place. The equities therefore favor denial of the agency's motion.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny the FTC's motion for a preliminary injunction.

[139] *Id.* ¶ 163.
[140] *Id.* ¶ 170.

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