IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

FEDERAL TRADE COMMISSION	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 15-cv-01080-DAP**
	)	
STERIS CORPORATION	)	**FILED UNDER SEAL**
	)	
and	)	
	)	
SYNERGY HEALTH plc	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF
FEDERAL TRADE COMMISSION'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

When Synergy signed the merger agreement with Steris that it now hopes to consummate, Synergy was poised to enter the U.S. market with x-ray technology to compete directly with Steris, one of only two providers of gamma sterilization in the United States. Just two weeks earlier, Synergy's Senior Executive Board ("SEB") approved the U.S. x-ray strategy, and the company's full board of directors ("plc Board") authorized down payments for x-ray machines. Synergy's efforts halted only when Steris agreed to acquire Synergy for $1.9 billion and learned of the FTC's concerns about the merger's elimination of competition between Synergy's x-ray and Steris' gamma sterilization services. The effect of the merger, as the record in this case shows, "may be substantially to lessen competition." 15 U.S.C. § 18. The merger should therefore be enjoined. Defendants make two basic arguments: first, that the bedrock principles underlying the actual potential competition doctrine "make[ ] no sense as a matter of antitrust law or policy;" and second, that Synergy would not have entered the U.S. market. Def. Br. 10. These arguments fail as a matter of law and fact.

Actual potential competition is a well-recognized basis upon which to challenge anticompetitive mergers. Two Supreme Court cases and four circuits have articulated the doctrine. It is also fully consistent with the logic and text of the Clayton Act. Decades of case law, the mandate of the Clayton Act, the Horizontal Merger Guidelines, FTC and DOJ law enforcement actions, and a tremendous amount of literature all support the doctrine—as does the bipartisan Commission that unanimously authorized this suit. Though courts have differed somewhat on the level of proof necessary to establish a probability of entry, none has ever considered, much less adopted, Defendants' "unequivocal proof" standard. And no court has seriously questioned the doctrine's fundamental principle—that the Clayton Act reaches future

anticompetitive effects, as well as immediate ones.

Despite Defendants' refusal to recognize the existence of the actual potential competition doctrine and their attempt to obfuscate the appropriate standard, the evidence demonstrating Synergy's intent and ability to enter the U.S. market is so extensive that it meets any standard. Synergy's vision for U.S. x-ray dates back to 2012,[1] when it concluded that its U.S. business [redacted] Synergy had [redacted] due to its [redacted] Even in the early stages, Synergy was singularly focused on [redacted] in the United States by building five x-ray facilities.[3] Its goal was to ensure that the plan would be [redacted] to [redacted][4] Synergy made clear that [redacted][5]

By the time of the proposed merger with Steris, Synergy's strategy had entered the implementation phase, with a timeline for opening the first two facilities in 2016. [redacted][6] Several months later, [redacted]

[1] PX00092-034.
[2] *Id.*
[3] PX00094-038.
[4] PX00092-036.
[5] PX00093-001.
[6] PX00114-003.

[redacted] Just before the end of the year, Synergy unveiled its U.S. x-ray plan publicly: in a bi-annual financial disclosure, Synergy highlighted the first FDA approval for x-ray for a Class III medical device, its exclusive agreement with IBA for x-ray machines, and announced that x-ray—"the fastest growing of our AST technologies"—would be "deployed in the United States."[9] [redacted]

The Commission has met its burden of proof by providing evidence from Defendants' own documents and testimony, third-party documents and testimony, and the Commission's expert economist demonstrating Synergy's strategy to enter the U.S. market. The documentary evidence is extensive, consistent, and highly probative—consisting of board of director minutes, board materials, and communications by Synergy officers and its highest level executives. Confirming the Commission's relevant market delineation, [redacted]

[7] PX00191-001.
[8] PX00194-002.
[9] PX00580-004.
[10] PX01676-005.
[11] PX00220-002; *see* PX00163-001; PX00275-032.
[12] PX00194-011.
[13] PX00275-014; PX00819-054.

[redacted]

Most importantly, large sterilization customers confirmed their interest in switching from gamma sterilization to x-ray technology. Particularly in light of continuing concerns about the future of gamma, the need for an alternative has become abundantly clear.

Defendants fail to rebut the FTC's *prima facie* case. They advance as their primary legal argument the meritless claim that the actual potential competition doctrine is not cognizable, and in the alternative propose a standard of proof that has no mooring in the case law. Defendants rest their factual case almost entirely on the self-serving testimony of Synergy executives who claim that Synergy never would have entered the United States with x-ray, and on unreliable post-acquisition testimony and documents, in an attempt to recast Synergy's x-ray strategy as an [redacted] But under the case law, and based on the extensive record of contemporaneous business records, such after-the-fact evidence cannot be credited.

Defendants also fail to present any meaningful efficiencies ~~that would~~ flow from their $1.9 billion merger. They merely cite their own vague and unsupported assertions (Def. Br. 43-44) that the merger will result in an "integrated, global company" without any explanation—or support—as to how that will benefit the customers for which they otherwise would have competed.[14] Nor do Defendants demonstrate that there is any likelihood of entry by other competitors. This Court is therefore left with nothing to weigh against the potential competitive harm. As a result, *any* risk that the merger might result in anticompetitive effects should be sufficient to tip the scale in favor of a preliminary injunction.

[14] [redacted]

The merits trial in this case is scheduled to begin on October 28, 2015, before Administrative Law Judge Chappell. Because this proposed merger is likely to eliminate an actual potential competitor in a market that is currently a duopoly, this Court should grant the Commission's motion for a preliminary injunction.

ARGUMENT

Section 13(b) of the FTC Act authorizes this Court to grant preliminary relief when, after weighing the equities and considering the Commission's likelihood of success on the merits, such relief would serve the public interest. 15 U.S.C. § 53(b); *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001); *FTC v. ProMedica Health Sys., Inc.*, No. 3:11-CV-47, 2011 WL 1219281, at *53 (N.D. Ohio Mar. 29, 2011); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1289 (W.D. Mich. 1996), *aff'd* 121 F.3d 708 (6th Cir. 1997). To obtain a preliminary injunction under § 13(b), the Commission "need only show a likelihood of success sufficient, using the sliding scale, to balance any equities that might weigh against the injunction." *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1035, 1041 (D.C. Cir. 2008) (opinion of Brown, J.). Here, both prongs of the Section 13(b) test decidedly favor an injunction. The Commission's suit is likely to succeed on the merits: the Commission challenges an incumbent duopolist's effort to remove a significant competitive threat. Likewise, the strong public interest in effective enforcement of the antitrust laws and in preserving meaningful relief available to the Commission supports an injunction. Defendants fail to present any equities that would support allowing Steris to acquire Synergy before the conclusion of the upcoming merits proceeding.

I. The Commission Is Likely to Succeed on the Merits

A. Elimination of Actual Potential Competition Provides Ample Legal Ground to Grant a Preliminary Injunction

Defendants' assertion that the actual potential competition doctrine is a "legally invalid antitrust theory" that cannot support preliminary relief (Def. Br. 1, 7-10) is easily addressed. Section 7 of the Clayton Act is written broadly to prohibit any merger "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Congress chose "the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." *ProMedica*, 2011 WL 1219281, at *52 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). Section 7 is "intended to arrest anticompetitive tendencies in their 'incipiency.'" *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963) (citing *Brown Shoe*, 370 U.S. at 317, 322). Thus, Section 7 cases require an assessment, not only of the immediate impact of the acquisition, but also "a prediction of its impact upon competitive conditions *in the future*." *Id.* (emphasis added).

In *United States v. Falstaff Brewing Corp.*, the Supreme Court stressed that Section 7 extends to "certain acquisitions of a market competitor by a noncompetitor," such as a merger involving a new entrant "who threatens to . . . upset market conditions," to the detriment of competition. 410 U.S. 526, 531 (1973) (citing *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578-80 (1967)). Following this reasoning and drawing heavily on the Supreme Court's statements in *United States v. Marine Bancorp.*, 418 U.S. 602, 623-25 (1974), multiple lower courts, the U.S. Department of Justice, and the Commission "have applied or commented favorably on the actual potential competition theory." ABA Section of Antitrust Law, Antitrust Law Developments 377 (7th ed. 2012) (citations omitted); *see Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977 n.7 (8th Cir.

1981) (noting that the actual potential competition "doctrine has considerable support among the lower courts and legal commentators") (citation omitted); *see also* Plaintiff's Proposed Finding of Fact and Conclusions of Law (ECF #51) ¶¶ 69-70 (citing cases and agency precedent). Lower courts that have considered the actual potential competition theory have applied it because, as the Fifth Circuit explained, the doctrine "has logical force and is consonant with the language and policy of the Clayton Act." *Mercantile Tex. Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 638 F.2d 1255, 1265 (5th Cir. 1981).

Recent literature and other authority further bolster the potential competition doctrine as a valid theory of antitrust harm. For example, in their leading modern antitrust treatise, Professors Areeda and Hovenkamp explain that "[t]he statutory language of Clayton Act §7, looking at prospective effects, is clearly comprehensive enough to warrant such constraints" as the actual potential competition doctrine. Areeda & Hovenkamp, *Antitrust Law*, ¶ 1124.[15] The 2010 Merger Guidelines, which the federal courts view as instructive, *see ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565 (6th Cir. 2014), specifically recognize the ~~harm~~ that could result from an incumbent's acquisition of a firm that threatens to enter absent the merger. *See* PX00901-006-007 (*U.S. Dep't of Justice & FTC Horizontal Merger Guidelines* (2010) [hereinafter *Merger Guidelines*] § 2.1.5 ("[I]f one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition.")). Accordingly, Defendants' contention that the FTC's claim is legally "invalid" defies the principles that

[15] *See also* John E. Kwoka, *Non-Incumbent Competition: Mergers Involving Constraining and Prospective Competitors*, 52 Case W. Res. L. Rev. 173, 186-202 (2001) (arguing that advances in economic theory and empirical evidence provide significant support for application of the actual potential competition doctrine); Richard D. Friedman, *Untangling the Failing Company Doctrine*, 64 Tex. L. Rev. 1375, 1381 (1986); Richard J. Gilbert and Steven C. Sunshine, *Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets*, 63 Antitrust L.J. 569, 570 (1995).

undergird Section 7 of the Clayton Act, as confirmed by relevant authorities.

B. The Commission Has Demonstrated that Synergy "Probably" Would Have Entered and Competed in the Relevant Markets

Defendants fare no better with their argument that the doctrine requires "unequivocal proof of entry and heightened proof of anticompetitive effects." (Defs. Br. 11.) To the contrary, Section 7 deals in "probabilities"—nothing more, nothing less. *Brown Shoe*, 370 U.S. at 323; *see Butterworth*, 946 F. Supp. at 1289. Thus, the appropriate standard to apply when determining whether a firm is an actual potential entrant is whether the firm "probably" would have entered the relevant markets. *Yamaha*, 657 F.2d at 977. "Probably" is not only consistent with the text of Section 7 of the Clayton Act and more recent applications of the "actual potential" entrant doctrine, but also with the Merger Guidelines' framework for analyzing the potential impact of new entry by out-of-market firms on the competitive impact of a merger. *See* PX-00901-031 (*Merger Guidelines* § 9 (entry must be "timely, *likely*, and sufficient") (emphasis added)). As the Eighth Circuit explained, "[w]e stress the word 'probably' . . . because the question under Section 7 is not whether competition was actually lessened, but whether it 'may be' lessened substantially." *Yamaha*, 657 F.2d at 977.

Not surprisingly, every court to have applied the doctrine of actual potential competition since *FTC v. Atlantic Richfield Co.*, 549 F.2d 289 (4th Cir. 1977), has applied a standard commensurate with the statutory language of Section 7—"probably," "reasonable probability," or some close variant thereof. *See Yamaha*, 657 F.2d at 977-79 ("probably"); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) ("would likely"); *Mercantile Tex. Corp.*, 638 F.2d at 1268-69 ("reasonable probability"); *see also* Areeda & Hovenkamp, *Antitrust Law*, ¶ 1121b ("The outside merging firm would *probably* have entered the market within a reasonable period

of time.") (emphasis added). As the Second Circuit explained, "[i]n view of the ample express authority, including congressional authority, in favor of a reasonable probability standard [for Section 7] . . . we decline to adopt any more stringent [a] standard [for actual potential competition]." *BOC Int'l Ltd. v. FTC*, 557 F.2d 24, 28 n.7 (2d Cir. 1977); *Mercantile Tex. Corp.*, 638 F.2d at 1268 (noting that "certainty" was "too strict a standard" for actual potential competition in light of Section 7).

Defendants' assertion that the "Supreme Court[,] in *Marine Bancorporation* . . . . presuppose[d] an unequivocal proof standard" is based on a misreading of the case. Def. Br. 11 (citing 418 U.S. at 624). The Supreme Court merely noted in *Marine Bancorp.* that "unequivocal proof" of a potential competitor's plans is "rarely available," in the context of describing the evolution of the perceived potential competition doctrine. 418 U.S. at 624. It did not adopt an "unequivocal proof" standard. Nor do the other cases that Defendants cite. Def. Br. 11-12. In *United States v. Siemens Corp.*, for example, the Second Circuit applied a "reasonable probability" standard. 621 F.2d 499, 506 (2nd Cir. 1980); *id.* at 504 (noting that the district court had made "no finding that entry de novo or by 'toe-hold' acquisition . . . was possible, much less *reasonably probable*") (emphasis added).

Here, regardless of which standard is applied, the facts lead to the same conclusion: at the time of the acquisition, Synergy was poised to enter the U.S. sterilization market with x-ray technology, and its entry would have resulted in substantial deconcentration, lower prices, and an important new technology for U.S. sterilization customers. No developments since the merger announcement explain Synergy's decision to terminate its U.S. x-ray strategy other than its desire to salvage the transaction from antitrust risk. Steris's proposed purchase of Synergy meets all the elements of a merger whose effect "may be substantially to lessen competition" under

Section 7 of the Clayton Act. Synergy (1) "had 'available feasible means' for entering the relevant market," and (2) "'those means offer(ed) a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects.'" *Yamaha*, 657 F.2d at 977 (quoting *Marine Bancorp.*, 418 U.S. at 633).

1. Synergy Had an "Available Feasible Means" of Entering with X-Ray

When determining whether a firm should be characterized as a potential entrant, courts analyze the capability, incentive, and intent of that firm with respect to the relevant market. *See Falstaff*, 410 U.S. at 532-35; *see also Marine Bancorp.*, 418 U.S. at 633. Capability and incentive are assessed by objective evidence, while intent is assessed by subjective evidence. *See United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1239, 1242 (C.D. Cal. 1973).[16] Here, the evidence indicates that Synergy had not only the requisite capability, but also a tremendous incentive to carry out its x-ray strategy. The record, dating back to 2012, amply demonstrates that Synergy would have entered with x-ray, regardless of the ~~standard of proof~~.

a. Synergy Supported X-Ray at the ~~Highest Levels~~

Defendants do not dispute that Synergy's SEB approved the x-ray strategy. *See* Defendants' Proposed Findings of Fact and Conclusions of Law ("Def. FOF") at ¶ 117. Instead, they argue that the plc Board never did and never would approve the project. Def. Br. 13. Asserting that Synergy encourages all of its local team members to "be visionary and entrepreneurial," (Def. Br. 14), Defendants attempt to minimize the significant steps that Synergy took towards x-ray entry. But the reality is that the x-ray project was not an ordinary

[16] Objective evidence includes factors such as the size, financial capabilities, prior history of acquisition or de novo expansion, technological capabilities, management and marketing expertise, and whether entry was an "attractive alternative." *See Yamaha*, 657 F.2d at 978. Subjective evidence includes internal management studies or capital expenditure plans that indicate that the company has studied seriously or considered entry; these are often the "best evidence" of intent. *See Siemens*, 621 F.2d at 508; *Yamaha*, 657 F.2d at 978.

project that originated from, or was pursued by, low-level personnel. It came from the top: x-ray was the CEO's vision for Synergy's future. [redacted]

Defendants now claim, based almost entirely on self-serving post-deal representations, that Synergy's x-ray strategy was nothing more than an "aspiration" or "ambition." Def. Br. 15. These claims, however, are belied by the wealth of contemporaneous evidence detailing the events leading up to the merger. Synergy had long lamented its small U.S. presence and recognized that it needed to become competitive in the U.S. market [redacted].[18] In May 2013, [redacted] Dr. Steeves hired Andrew McLean to serve as Vice President, Global Business Development.[20] Dr. Steeves informed Mr. McLean, before he started his job, [redacted].[21] By mid-2014, Mr. McLean was promoted to CEO of Synergy's Applied Sterilization Technologies and Laboratories ("AST") business, [redacted].[22]

Cobalt-60 supply and U.S. regulatory concerns made x-ray an especially attractive

[17] *See* PX00704 at 109:8-16.
[18] PX00093-001; PX00094-011; PX00791 at 237:10-20; PX00891-005; PX00892-001.
[19] PX00096-005.
[20] PX00707 at 14:25-15:7.
[21] PX00095-002.
[22] PX00114-003; PX00707 at 22:12-19.

strategic alternative.[23] [redacted]

[redacted][24] [redacted]

On September 17, 2014, Synergy's SEB met and evaluated the U.S. x-ray business case presented by Mr. McLean and Gaet Tyranski, President, AST-Americas.[27] The plan presented to the SEB sought "SEB approval to commence two facilities in FY15, then an additional two to commence in FY16."[28] [redacted]

The day after the SEB meeting, Synergy's plc Board met.[30] [redacted]

[23] PX00541-002; PX00092-034; PX00708 at 74:16-76:6; PX00707 at 88:12-25; PX00805-002.
[24] PX01157-004-005.
[25] PX00921-001.
[26] PX00102-002.
[27] PX00602 ¶ 10. Mr. Tyranski was the principal author of the slide deck and presented it at the meeting. PX00707 at 93:24-94:17.
[28] PX00275-002, 037.
[29] PX00221-001; PX00807-001-010; *see also* PX00808-001.
[30] PX00574-002-010.

[redacted][33][redacted]

After the September SEB and plc Board meetings, the U.S. x-ray strategy was named Project Endurance and entered the implementation phase.[35] Synergy held a three-day Project Endurance Kick-Off meeting in Tampa, Florida, from October 7-9, 2014.[36] Twenty-one team members attended.[37] The team consisted of personnel responsible for market development, marketing, sales, competitive response, logistics, technology, engineering, validations, facilities, operations, quality and regulatory, finance, risk, and IT systems.[38] Less than one week later, on October 13, 2014, Steris announced the proposed merger with Synergy.

The deal affected Synergy's incentives regarding x-ray. Synergy understood the x-ray plan would need to be approved by the "New Steris" after the deal was finalized, and so at the

[31] PX00574-010.
[32] PX00574-002.
[33] PX00574-002, 010.
[34] PX00833-001. [redacted] PX00190-002 [redacted]; PX00707 at 129:5-130:11. [redacted]. PX00859-002-003.
PX00707 at 144:3-17; PX00602 ¶ 10; PX00400-001.
[36] PX00195-001.
[37] PX00544-003.
[38] PX00194-008.

next plc Board meeting, in November 2014, the x-ray strategy was not discussed.[39] Instead, "[i]t was acknowledged that the proposed acquisition by Steris may have significant impact on the Group's strategy, and as such no recommendations were currently being made to the Board for their review or approval."[40] Mr. Tyranski said to the x-ray team, "we've made a difficult, sensible decision to stop any market development expense on X-Ray . . . while we wait for the STE transaction . . . I would like to point out that the X-Ray project in the Americas is still proceeding otherwise as planned."[41] Synergy recognized that it should not locate x-ray facilities where they would compete head-to-head with Steris's gamma facilities: the "obvious 'holds' would be location—not putting a gamma beater next to a Steris facility and taking New Steris market share."[42]

Nevertheless, the Project Endurance team proceeded "full steam ahead" to advance implementation pending the close of the Steris transaction.[43] Site selection,[44] customer outreach,[45] and technical work with IBA[46] all continued.[47] The x-ray team leader created a detailed timeline for each step that was needed to begin operations at the Midwest x-ray facility by November 22, 2016, the new date set for opening the facility after the rollout plan was pushed

[39] PX00811-001.
[40] *Id.* Nor could there have been any significant expenditures or financial commitments without Steris's approval. PX00791 at 261:15-21; PX00775 at 91:16-92.
[41] PX00248-001.
[42] PX00248-001; s*ee also* PX00197 ("Need new Steris to green light once the deal is closed. Top of the list.").
[43] *See* PX00403-002.
[44] *See, e.g.*, PX00407-003-009, 012; PX00084-001.
[45] The team continued to solicit non-binding letters of interest, as well as product testing at Däniken, and did not attempt to generate binding commitments with customers. *See, e.g.*, PX00202 ¶ 12; PX00709 at 136:3-8; PX00211-001; PX00159; PX00164; PX00165; PX00709 at 139:9-141:19; PX00709 at 148:1-8.
[46] *See, e.g.*, PX00105-002; PX00404-001; PX00201-001; PX00415-001.
[47] [redacted] *See* PX00190-002; PX00859-002-003.

back following the merger announcement.[48] The exclusivity agreement with IBA was memorialized in writing and executed on October 30, 2014, and the date for the first two machine orders was pushed back from November 2014 to March 2015 to accommodate the closing of the Steris transaction.[49] Synergy leadership continued to support the x-ray strategy. On November 4, 2014, Synergy announced publicly in its Interim Results:

- "Agreement signed with IBA for X-ray technology to be deployed in the United States;"
- "X-ray services are now the fastest growing of our AST technologies;" and
- "Acceleration of customer transition to X-ray technology underpinned by US FDA approval of first Class III medical device."[50]

The day after Synergy released its Interim Results, Dr. Steeves announced in an earnings call: "Looking forward, there are [a] few further steps we are taking to support growth and including expanding our network in the U.S. . . . We've also reached an agreement with IBA that will allow us to get started with x-ray in the U.S."[51] Even in the months following the acquisition agreement, none of Synergy's after-the-fact justifications for terminating the x-ray project surfaced.[52] [redacted].[53]

By January 2015, it became clear that Synergy's x-ray strategy was the focus of the FTC

[48] PX00899. The three-page timeline includes specific timeframes for R&D, construction, recruitment milestones, and marketing. Mr. McLean called the plan "very well constructed" in response to receiving the timeline. PX00651.
[49] PX00603 ¶ 16; PX00404-003. This change appears to have occurred as a direct result of the announcement of Steris' acquisition of Synergy. PX00404-003 (attaching November 12, 2014 meeting minutes).
[50] PX00580-001-004.
[51] PX01773-005.
[52] In fact, if anything the prospects for the x-ray project only improved. PX00114-003; PX00186-001; PX-00571-003; PX00816-001; PX00897-001; PX00920-001; PX00105-002. Customers continued to test products with, and express interest in, x-ray. PX00110-001; PX01347-004-005. Capital expenditure reductions were identified. PX00407-015. And the other putative rationales—the unlikelihood of customer commitments and the projected IRR—were known long before the SEB approved the x-ray strategy and the plc Board approved the equipment down payments. PX00540-008; PX00819-056 (embedded financial model contains IRR).
[53] PX01267-007, 031.

investigation. On February 19, 2015, Mr. McLean participated in a meeting with FTC staff. In the next few days, he personally solicited letters of *non-interest* in x-ray sterilization from the very customers his team had been cultivating over the previous year.[54] On February 24, Mr. McLean executed a declaration stating that he planned to "disband the U.S. X-Ray marketing team."[55] That evening, Mr. Tyranski wrote to x-ray team leaders: "Gents—this whole FTC inquiry is going down a rat-hole and I am going to have to communicate to IBA soon that we cannot proceed for the Americas."[56] The next day, Synergy informed IBA that it planned to terminate the contract.[57]

The about-face on a project that had so much momentum prior to the deal was a surprise to many people. [redacted] And as recently as March 31, 2015, Synergy sales representatives continued to tout the benefits of x-ray sterilization for U.S. products[60] and solicit U.S. customers to test their products with x-ray at Däniken.[61] To this day, Synergy is promoting x-ray sterilization on its website for other parts of the world.[62]

Thus, the strong weight of the evidence demonstrates that, before the Steris transaction

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[54] PX00202. [redacted] *See infra* Section I.B.1.b.
[55] PX00202 ¶ 20.
[56] PX00863-003.
[57] PX00603 ¶ 18.
[58] PX00788 at 197:13-197:18.
[59] PX00863-001.
[60] PX00764 ¶ 14.
[61] PX00792 at 24:5-8, 31:3-18, 53:12-54:12; PX00618 ¶ 9; PX00764 ¶ 14; PX00777 at 39:19-40:24, 41:9-16.
[62] *See* Synergy Website, *available at* http://www.synergyhealthplc.com/en/applied-sterilisation-technologies/x-ray?region=348&country=US (last visited August 13, 2015).

was announced, Synergy planned to enter the U.S. market with x-ray. Synergy continued implementing its plans even after the merger announcement in anticipation of presenting the x-ray case to the new Steris board. Only after antitrust risks emerged did Synergy halt its efforts in hopes of enhancing its prospects in the FTC's investigation. Defendants cannot point to contemporaneous, ordinary course evidence that suggests otherwise.

b. Defendants' Post-Acquisition "Essential Requirements" Are Unsupported by the Record

Defendants cannot now save the acquisition by claiming that Synergy would have failed in executing its x-ray plans. Neither the law nor the evidence justifies denial of a preliminary injunction on this basis. "[A] company's stated intention to leave the market . . . does not in itself justify a merger." *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984); *accord ProMedica*, 749 F.3d at 572 (characterizing the "weakened competitor" defense as "the Hail-Mary pass of presumptively doomed mergers"). Such claims should be discounted as "inherently self-serving" and viewed with "great suspicion" as Defendants understand that the success of their merger is dependent on their ability to convince a court that they would not have entered the markets at issue. *See Falstaff*, 410 U.S. at 566-70 (Marshall, J., concurring) (explaining that triers of fact are not bound by subjective self-serving company statements, particularly when they are made to justify proposed transactions).

Defendants rely on testimony that, despite the evidence in the contemporaneous business records to the contrary, Synergy would not have progressed the x-ray strategy.[63] In support of this testimony, they point to versions of the SEB's September and November 2014 minutes that were revised in late March 2015, but those were revised to align with Defendants' litigation

[63] *See, e.g.*, Def. Br. 15.

position. The initial version of the September 2014 SEB minutes, accepted by the SEB in November 2014, contained no discussion of the x-ray strategy.[64] Six months after the SEB meeting, after his investigational hearing, Dr. Steeves asked Jonathan Turner, Synergy's Group Company Secretary, to revise the minutes to create "contemporaneous evidence" for the FTC.[65] The revised minutes deviate from Mr. Turner's notes in several key places; most significantly, they add that, "[t]he output appeared to be the same as for a gamma facility but given the unproven nature of the technology it was considerably riskier, and it assume[d] that the group would be able to command a premium price for its services."[66]

Such evidence is "all-but-meaningless," as it was generated well after the announcement of the merger. *See Whole Foods*, 548 F.3d at 1047 (Tatel, J., concurring in judgment); *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 434-35 (5th Cir. 2008); *ProMedica*, 2011 WL 1219281, at *58 (citing *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986)) ("'[P]ost-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight.'"). These principles resonate here, where the purported corporate hurdles that Defendants argue would have halted its x-ray strategy—the requirement that the project forecast a 15% IRR and the requirement of take-or-pay contracts—appear in none of the ordinary course documents related to x-ray. *See Purex Corp. v. Procter & Gamble Co.*, 664 F.2d

[64] The explanation for the absence of the x-ray discussion has evolved. Counsel initially represented that "No such presentation, however, actually took place at the September meeting, as the lack of customer commitments caused the project to be put off indefinitely at the SEB level." *See* PX00906-002. Then Dr. Steeves conceded that x-ray was discussed at the meeting, but that Mr. Turner was absent. PX00704 at 198:20-199:17. Defendants now assert that Mr. Turner was present for a sufficient part of the discussion to include x-ray in the "revised" minutes.

[65] PX00905; *see* PX00718 at 46:18-47:2.

[66] PX00650-18. Mr. Turner based this entire phrase on a few words in his handwritten notes, which state that the x-ray NPV "look[s] the same as Y but riskier." They also omit the phrase: "Potential price wars => diff." PX00655-43. PX00655-47. Synergy's November SEB minutes were created on the same date when the September minutes were revised. *See* PX00718 at 128:6-10. They include a passage that appears nowhere in Mr. Turner's notes of the meeting: "AM advised that despite ongoing efforts no customers had signed binding agreements to support the possibility of launching x-ray in the U.S. . . ." PX00675-019.

1105, 1108 (9th Cir. 1981) ("The district judge found the contemporaneous documents persuasive, and accordingly discounted the testimony of Purex's chief executive.").

i. Customer Commitments Were Never a Prerequisite for Entry

Defendants claim that customer commitments, or "take-or-pay" contracts, were necessary in order for the x-ray project to proceed. Def. Br. 14-15. But there is a simple reason why, as Defendants assert, "*not a single customer*," *id.* at 5 (emphasis in original), indicated a willingness to commit to such a contract—because it was premature for Synergy even to ask for such commitments—and it did not do so. Numerous customers testified that Synergy never asked them to sign take-or-pay contracts or binding volume commitments.[67] Even Synergy's former Director of Market Development for the contract sterilization business[68] testified that she was "never directed to seek binding agreements from customers" and did not believe it was feasible at that time.[69] Similarly, the head of IBA, was never told that customer commitments were a prerequisite for ordering any x-ray machines.[70]

In fact, Synergy understood that it was unlikely to secure binding commitments prior to the construction of the first facility. In July 2014, Mr. McLean informed the SEB that [redacted] ".[71] In the August AST & Laboratories Monthly Management

[67] *See, e.g.*, PX00605 ¶ 16; PX00609 ¶ 26; PX00625 ¶ 20; PX000615 ¶ 21; PX00618 ¶ 10; PX00765 at 173:24-174:6.
[68] PX00602 ¶¶ 2, 5.
[69] PX00602 ¶ 12.
[70] PX00603 ¶ 18. Defendants misleadingly cite [redacted] as if it were [redacted]'s conclusion, but fail to disclose that [redacted]'s statement was based on *Synergy's* representation that it would not enter, not [redacted]'s independent conclusion. *See* Def. Br. 37; PX00788 at 209:9-212:10.
[71] PX00101-013; PX00540-008.

Report, provided to the SEB in advance of the September SEB meeting, Mr. McLean reported that Synergy had received letters of interest from medical device manufacturers, and that [redacted][72] The SEB knew that no customers had committed when it approved the x-ray strategy.[73]

The contemporaneous, ordinary course business records compel the conclusion that the x-ray strategy would proceed without customer commitments. As Mr. Tyranski noted in an email to the x-ray team about its customer base, Synergy was "likely [to] invest at risk in X-ray per our strategy."[74] The Project Endurance timeline, created after the September SEB approval, contemplates that Synergy planned to seek letters of intent from customers beginning March 31, 2015, and that it planned to continue seeking such commitments from customers through December 2016.[75] Dr. Roberts testified, "[a]ny claim that Synergy expected to obtain binding commitments from customers prior to constructing x-ray sterilization facilities in the United States is contrary to the evidence and unreasonable as a matter of economics."[76]

Synergy instructed its sales team to acquire as many "letters of interest" as possible[77]—offering bonuses to those who obtained non-binding letters of interest,[78] or those who were able to convince customers to test products at Däniken.[79] While Defendants now disparage the letters of interest as "non-binding," (Def. Br. 21) the fact remains that no incentives were available to

[72] PX00571-005.
[73] PX00101-013; PX00781 at 109:10-14, 109:17-20.
[74] PX001799-001.
[75] PX00899-003; PX00899; *see also* PX00651 (the AST CEO believed that "the plan looks very well constructed.").
[76] PX01732 (Roberts Rebuttal Report) ¶¶ 75, 77.
[77] PX00602 ¶ 12; PX00706 at 74:6-75:10; PX00706 at 56:8-11; PX00130-001; PX00899-003; PX00898-002; PX00126.
[78] PX00708 at 60:5-7; PX00706 at 23:19-24:7; PX00227-004.
[79] PX00706 at 24:19-25:7; 25:16-25.

personnel for obtaining formal, binding, take-or-pay contracts.[80] [redacted] »[81] Synergy's efforts proved successful. Key customers—[redacted]9—all submitted letters of interest. [redacted] also expressed an interest in exploring x-ray. [redacted].[93] Several customers also sent products a great distance to undergo product testing at Däniken, demonstrating their interest in Synergy's plan to enter the United States with x-ray.[94] J&J obtained FDA approval to use x-ray sterilization on its SurgiCel product in September 2014,[95] which Synergy executives characterized in its shareholder presentation as "paving the way for future conversions."[96]

The circumstances surrounding Synergy's solicitation of the letters of *non*-interest raise doubts about the trustworthiness of the letters. In the days following his February 19, 2015

[80] PX00708 at 60:8-10; PX00227-004 (showing that bonus is available for obtaining an LOI but no bonus available for obtaining a take-or-pay contract); PX00706 at 39:17-40:6.
[81] PX00110-001.
[82] *See* PX00601 ¶ 21 [redacted]; PX00880; PX00706 at 145:1-4.
PX00882; PX00706 at 57:07-15.
[84] PX00134-004; PX00706 at 57:7-20.
[85] *See* PX00615 ¶ 23; PX00188; PX00706 at 57: 22; *see also* PX00407-018.
[86] *See* PX00717 at 71:10-14; PX00328-002; PX00299-001; *see also* PX00407-018.
[87] *See* PX00128; *see also* PX00407-018.
[88] *See* PX00706 at 57:7-17; *see also* PX00407-018.
[89] *See* PX00706 at 57:07-58:20; PX00407-018.
[90] *See* PX00407-018; PX00220-001.
[91] *See* PX00706 at 57:07-24.
[92] PX00792 at 54:12-20, 56:8-57:15.
[93] PX01791-003; PX00799 at 132:5-133:17, 135:12-136:17.
[94] *See* PX00407-018; PX00897-001-002.
[95] PX00580-004.
[96] PX00580-004.

meeting with FTC staff, Mr. McLean contacted a number of customers that Synergy had been cultivating over the preceding months to solicit letters of non-interest in x-ray.[97] On February 25, Mr. McLean executed a declaration attesting to his plan to cancel the U.S. x-ray project, articulating the customer non-interest pretext, and attaching as support the letters he had solicited from customers. [redacted]

They are a stark example of why courts deem the "probative value of [post-acquisition] evidence [to be] limited not just when evidence is actually subject to manipulation, but rather is deemed of limited value whenever such evidence *could arguably* be ~~subject to manipulation~~." *Chi. Bridge*, 534 F.3d at 435.

ii. Synergy's Purported IRR Threshold Did Not Exist

Defendants also claim that the x-ray strategy would have failed because it did not meet Synergy's purported 15% ten-year Internal Rate of Return ("IRR") threshold for large projects.

[97] *See* PX00781 at 231:1-9.
[98] PX00634 at 142:9-18 [redacted]
[99] PX00634 at 145:4-146:1 [redacted]

Def. Br. 25-26. First, there is no mention of an IRR hurdle in any of Defendants' documents related to the U.S. x-ray project. In his deposition, Mr. McLean admitted that he was not "aware of any communication related to the x-ray project that says the x-ray project cannot continue without meeting a certain IRR."[100] And the Director of Marketing for the x-ray project testified that she "was not told that [Project Endurance] needed to pass any IRR to continue progressing."[101] Further, the argument that a 15% ten-year IRR was mandatory is inconsistent with Defendants' argument that it was imperative to reduce capital by $1.5 million per facility; such a capital reduction would have increased ten-year IRR by [redacted] and still have left the IRR under some models that, as explained below, improperly excluded terminal value, under 15%.[102] Indeed, [redacted] Importantly, none of the rejected proposals were strategic investments designed to access the lucrative U.S. market.[103] As Synergy recognized, the U.S. x-ray strategy was not like any other investment: it was part of Synergy's global strategy and there would be additional benefits of the U.S. x-ray business on Synergy's ex-U.S. business.[104] X-ray was a strategic investment, and [redacted][105] The x-ray Provisional Business Case acknowledged that the strategy "may lead to short term losses."[106] In fact, Synergy board members have cautioned against overreliance on IRR when determining whether

[100] PX00707 at 158:20-23; *see also* PX00703 at 133:10-13.
[101] PX00602 ¶ 10.
[102] PX01732 (Roberts Rebuttal Report) ¶ 81.
[103] PX00791 at 233:10-19.
[104] PX01732 (Roberts Rebuttal Report) ¶ 79-80; *see also* PX00791 at 237:10-20 (Synergy's plc Board has [redacted] PX00891-005.
[106] PX00819-058.

to invest in a project.[107]

Second, even if the IRR hurdle were to apply to the x-ray project, it is unclear that the x-ray project failed to meet it. Synergy's policy and governance manual does not require that target IRR exclude terminal value.[108] As the Synergy's Group Finance Director, Mr. Hill, testified, "every project is different,"[109] and "[t]he time period to be used should be relevant to the project."[110] Here, the strategic value of the U.S. strategy was particularly high, and the model presented to the SEB in September 2014 assumed an overall 15-year asset life for purposes of estimating depreciation.[111] According to Mr. Hill, the terminal value IRR was greater than 15%.[112] Further, the combined U.S. investment proposal presented to the SEB in September contained a positive Return on Capital Employed ("ROCE") in the United States for year three,[113] greater than [redacted] in year five, and [redacted] by year ten.[114] In comparison, Synergy's overall corporate fiscal-year 2015 ROCE was [redacted]

Relatedly, Defendants rely on post-acquisition testimony to assert that Mr. Hill has oversize over whether projects are approved, and that his review "was a necessary predicate" to implementation. Def. Br. 15. The reality, based on contemporaneous business records, is that Mr. Hill is one of a number of executives who gives opinions but does not appear to dictate

[107] PX00094-012 [redacted] : PX00791 at 56:10-17 [redacted] : PX00791 at 32:18-33:13) [redacted]

[108] PX00791 at 84:13-16.

[109] PX00791 at 84:16.

[110] PX00791 at 88:1-2; Stiroh (Defs.' Expert) Dep. at 240:20-241:6.

[111] PX00875-009; PX00791 at 74:16-19.

[112] PX00791 at 55:13-56. Only by lopping off all revenues beyond year ten does the terminal value fall below 15%, which is particularly inappropriate in a venture that presupposes a gradual ramp-up period and long life span. *See* PX00775 at 129:2-10.

[113] PX00564-224 (Investment proposal for U.S. x-ray combined case); PX00791 at 51:25-52:7, 60:24-61:2.

[114] PX00791 at 63:4-14.

[115] PX00791 at 40:16-19.

outcomes. In fact, it is Dr. Steeves who drives decision-making at Synergy. For instance, Mr. [redacted] Moreover, Mr. Hill recommended turning "our new x-ray strategy . . . into reality" when Synergy learned that Sterigenics had outbid Synergy for Nordion.[117]

iii. Efforts to Lower Capital Expenditures Were Ongoing

Defendants also argue that in order to continue the U.S. x-ray strategy, Synergy needed to lower its capital expenditures ("capex") by at least $1.5 million for each of its first two x-ray facilities. Def. Br. 26-28. While the SEB did communicate an objective for the x-ray team to lower capex, there is no evidence that this was a gating requirement, nor was there any indication that the team would be unable to achieve such a reduction. According to Defendants' documents, Synergy had every expectation that it could readily lower the capex related to the project. Synergy's AST President for the Americas told the SEB that the reduction could be achieved easily.[118] He believed that while "[w]e do have a little more work ~~to do~~ to get the CAPEX down more . . . I think we can work that out in the remainder of this week hopefully and secure the

[116] *See* PX00715 at 144:12-147:9 (discussing the Däniken due diligence report); PX01597-001; PX01421-001; PX01602-001-002. [redacted] PX00782 at 105:20-106:10. PX01597.

[118] *See* PX00655-47.

green light for an initial two facilities very quickly."[119] Mr. Hill testified that reducing capex would increase the IRR.[120]

Moreover, work to lower capex was ongoing as of the time of the merger, but had ceased to be a topic of discussion long before Mr. McLean terminated the x-ray strategy. Synergy and IBA were in the midst of negotiations regarding pricing and machine specifications.[121] According to the head of IBA, Synergy never communicated to him that the price of the machines was too high.[122] In addition, Synergy was in the midst of negotiating lucrative incentives (including tax abatements, grants, and power discounts) with local counties in Indiana, Ohio, and the Dallas Fort Worth area; not all of which were factored into the financial analyses.[123] Although Defendants argue that Synergy received an estimate in October for building and construction costs, that estimate was based on a single loose estimate from one contractor. Synergy still planned to solicit bids for the actual facility from other construction companies once the design was complete, per its usual practice.[124]

c. Synergy Had the Technological Means to Enter

In Defendants' litigation view, the custom configuration requested by Synergy "introduced significant technological uncertainty." Def. Br. 30. But the technical requirements that Synergy communicated to IBA were possible in IBA's view. [redacted]

[119] PX00221-001.
[120] PX00791 at 36:7-10.
[121] PX00788 at 248:8-249:7.
[122] PX00788 at 253:4-7. [redacted] PX00716 at 202:12-203:9.
[123] *See, e.g.*, PX00779 at 29:6-32:23 (Synergy identified tax credits and economic incentives for U.S. x-ray facilities, including, among others, tax abatements, free land, energy incentives, and income tax credits); PX00779 at 47:19-53:17 (Synergy identified over $2 million in economic incentives for an x-ray facility in Decatur, Indiana); PX00866 (includes spreadsheet outlining economic incentives in Fort Wayne and Decatur, Indiana).
[124] PX01316-001.

[redacted][125] [redacted]

[redacted][126]

If anything, the evidence presented by Defendants—documents stating that "the technical configuration needs to be better defined, which impacts the *scope/price*"—supports the proposition that Synergy was concerned about the pricing of the custom machine, not whether the machine could be configured at all. *See* Def. Br. 31 (emphasis added). [redacted][127] In stark contrast to *Tenneco* where the technology in question would have been provided by "a small, struggling domestic firm . . . burdened with aged equipment, a less than complete product line . . . declining market share and a mediocre reputation," 689 F.2d at 354, Synergy's partner in x-ray is an international thought-leader in x-ray machinery.

2. *Synergy's Entry Had a "Substantial Likelihood of Ultimately Producing Deconcentration" and "Other Significant Procompetitive Effects"*

Synergy's entry into the U.S. contract gamma sterilization market would have had a significant competitive impact on the U.S. contract gamma sterilization market. "The crux of the entry effect is that if the company which enters the market by acquisition had entered

[125] PX00788 at 262:13-21; *see also id.* at 156:2-4 ([redacted] PX00788 at 242:16-243:13. [redacted] X00788 at 242:16-243:24.

[126] PX01267-021.

[127] PX00788 at 248:20-249:4.

unilaterally, it would have supplied an additional competitive force. . . ." *Phillips Petroleum*, 367 F. Supp. at 1232 (footnote omitted). Procompetitive effects can be expected if a market is already concentrated. *See Marine Bancorp.*, 418 U.S. at 630; *supra* Part II.A (discussing market concentration). Under conditions where "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Phila. Nat'l Bank*, 374 U.S. at 365 n.42. Here, the contract radiation sterilization market is highly concentrated. As the Second Circuit recognized in *BOC*, "typically in an oligopolistic situation the entry of a large firm as a new competitor necessarily has significant procompetitive effects." 557 F.2d at 27. And as the Eighth Circuit recognized in *Yamaha*, in an analysis equally valid here, "[a]ny new entrant of Yamaha's stature would have had an obvious procompetitive effect. . . . Yamaha is a well-established international firm with considerable financial strength. . . . [T]he Yamaha brand name was familiar to American consumers, and Yamaha had considerable marketing experience in the United States." 657 F.2d at 979. Synergy, as a well-established international firm with marketing experience in the United States and a strong reputation among the most important customers, would have had a significant procompetitive effect by entering the U.S. market.

a. The Relevant Product Markets Are No Broader Than Contract Radiation Sterilization Services and May Be as Narrow as Contract Gamma and X-Ray Sterilization Services Sold to Targeted Customers in Regional Markets

Defendants agree that when defining a relevant product market courts use the "reasonable interchangeability" test and the hypothetical monopolist test. Def. Br. 33. Courts regularly rely on customer testimony as some of the best evidence of whether two products are reasonably

interchangeable.[128] *United States v. Bazaarvoice, Inc.*, No. 13-CV-00133-WHO, 2014 WL 203966, at *61 (N.D. Cal. Jan. 8, 2014) (finding that "customers were the most credible sources of information on their need for, use of and substitutability of social commerce products"); *FTC v. Sysco Corp.*, No. 1:15-CV-00256, 2015 WL 3958568, at *25 (D.D.C. June 23, 2015) (taking into account "customers' needs" when defining a national broadline market); PX00901-006 (*Merger Guidelines*) ("Information from customers about how they would likely respond to a price increase, and the relative attractiveness of different products or suppliers, may be highly relevant."). It is appropriate to analyze the merger's effects in either the narrower market of contract radiation sterilization services sold to customers for whom e-beam sterilization is not an option, or in a market no broader than contract radiation sterilization services (i.e., contract gamma, x-ray and e-beam sterilization services). FTC Br. 8.

While gamma and x-ray are not identical technologies, it is appropriate to group them in a single relevant product market. *See United States v. Cont'l Can Co.*, 378 U.S. 441, 449, 452-53 (1964). Defendants assert that x-ray is not a close substitute ~~for~~ gamma. Neither Synergy's ordinary course documents nor customer testimony support that argument. In reality, Synergy specifically plans to target gamma customers in the U.S. market. *See* FTC Br. 7-8. "[X]-ray could readily replace the gamma service in the US, and that would give us a rather strong

[128] The cases that Defendants cite do not categorically reject customer testimony. In *United States v. Sungard Data Systems, Inc.*, the court determined that customer testimony was unreliable there only because it was difficult to decipher any conclusions based on 7,500 customers who were asked questions using terms that were "consistently unclear" during a very abbreviated discovery schedule. 172 F.Supp. 2d 172, 183 (D.D.C. 2001). In *FTC v. Tenet Health Care Corp.*, the court determined that it did not make sense to rely on testimony that is "contrary to the payers' economic interests and thus is suspect"—which certainly applies to the self-serving testimony of Defendants' executives, but not to concerned customers. 186 F.3d 1045, 1054 (8th Cir. 1999). Here, Defendants have not even made an effort to show how customer testimony is problematic, or how customers have any incentive to skew how they view the interchangeability of products.

competitive advantage."[129] Gamma customers also expect x-ray to provide a viable alternative to gamma and many are willing to switch to x-ray once it becomes available.[130] [redacted]

E-beam, while also a form of radiation sterilization, is not a reasonable substitute for gamma and x-ray sterilization for many products. Although some of the products that can be sterilized with gamma can also be sterilized with e-beam, these two technologies are "fairly distant alternatives."[132] E-beam sterilization uses electrons, not photons, to kill microorganisms; e-beam generally has much lower penetration rates than gamma and x-ray.[133] Thus for some products, such as liquids and other dense materials, e-beam sterilization technology is described as simply "impossible"[134] and "[not] a viable option."[135] Because gamma sterilization offers greater penetration than e-beam,[136] gamma allows customers to sterilize larger box sizes, which can result in significant cost savings,[137] while e-beam sterilization tends to be preferred when faster turn-around times are required[138] or when products cannot withstand prolonged exposure to gamma radiation.[139] *See Brown Shoe*, 370 U.S. at 325; *United States v. Grinnell Corp.*, 384 U.S. 563, 573-74 (1966). Consequently, gamma facilities do not raise or lower their prices in

[129] PX01189-001.
[130] PX00601 ¶ 17-19; PX00614 ¶ 17; PX00605 ¶ 15; PX00606 ¶ 13.
[131] PX00607 ¶ 22.
[132] PX01731 (Roberts Report) ¶ 69.
[133] PX00706 at 69:11-69:25; PX00702 at 119:24-120:5; PX00703 at 84:17-85:7; PX00854-005; ¶ 6; PX00616. ¶ 8.
[134] PX00854-007.
[135] PX00709 at 129:17-130:1.
[136] PX00601 ¶ 9; PX00603 ¶ 7; PX00604 ¶ 3; PX00610 ¶ 6; PX00607 ¶ 12; PX00764 ¶ 4-5; PX00617 ¶ 12; PX00625 ¶ 10; PX00854-005.
[137] *See, e.g.*, PX00607 ¶ 8, 12; PX00603 ¶ 8; PX00614 ¶¶ 7, 10; *see also* PX00601 ¶ 6, 9; PX00703 at 84:17-85:7; PX00890-008; PX00605 ¶ 5; PX00894-009; PX00902-002.
[138] PX00603 ¶ 7; PX00710 at 134:12-135:8.
[139] PX00854-005.

reaction to those set by nearby e-beam facilities.[140] Defendants recognize that e-beam and gamma are not reasonable substitutes for many products,[141] and there is little switching between the two sterilization methods.[142] Customers also agree.[143] E-beam has been available for nearly thirty years and not grown beyond 15% of the contract radiation sterilization market.[144]

Contrary to Defendants' claims, EO sterilization is distinct from radiation services. Because of the dangerous residue that it leaves behind, EO sterilization is not suitable for liquids or many medical devices that might be implanted into patients' bodies.[145] Moreover, it can only be used for products that do not have sealed packaging.[146] Unsurprisingly, radiation sterilization customers do not view EO as a viable substitute for any of the radiation technologies and would not be willing to switch to EO in response to a 5-10% price increase.[147] Nor, outside of this litigation, do Defendants: Steris does not attempt to sell gamma services to customers who use EO sterilization,[148] or vice versa, and gamma companies do not view the presence of nearby EO facilities as a competitive constraint on their pricing.[149] Defendants admit that, "[a]lthough there is some overlap in capabilities, [EO] facilities generally service different products from either

[140] PX00710 at 169:10-22; *see also* PX00707 at 61:20-62:11.
[141] *See, e.g.*, PX00902-002-004; PX00889 at 15-16, 47-49, 61, 106-110; PX01506-005.
[142] PX00902-004; PX00711 at 99:20-100:5.
[143] PX00601 ¶ 9; PX00610 ¶ 6; PX00616 ¶ 8; PX00617 ¶ 12; PX00625 ¶ 10; PX00732 ¶ 5; PX00733 ¶¶ 5, 7; PX00739 ¶ 4; PX00742 ¶ 7; PX00749 ¶¶ 4, 6; PX00750 ¶¶ 4, 8; PX00752 ¶¶ 5-6; PX00754 ¶¶ 5, 8; PX00759 ¶ 5; PX00760 ¶¶ 6, 11.
[144] PX00894-013; PX01683-007-008; PX01732 (Roberts Rebuttal Report) ¶ 65 (explaining that the 15% share represents customers' "revealed" preferences).
[145] PX00748 ¶ 3; PX00734 ¶ 4; PX00738 ¶ 9; PX00741 ¶ 5; PX00115-001-002; PX00611 ¶ 10; PX00607 ¶ 4; PX00617 ¶ 6; PX00732 ¶ 4; PX00894-012; PX00705 at 86:1-3; PX00902-002; PX00601 ¶ 12; PX00709 at 49:13-50:6.
[146] PX00710 at 101:18-21; PX00716 at 57:2-58:2; PX00894-012; PX00841-004; PX00967-006; PX01664; PX00728 ¶ 8.
[147] PX00601 ¶¶ 6, 12; PX00606 ¶ 7; PX00748 ¶ 3; PX00611 ¶ 10; PX00739 ¶ 4; PX00740 ¶ 3; PX00749 ¶ 4; PX00728 ¶ 8; PX00729 ¶ 5; PX00738 ¶ 9; PX00732 ¶ 4; PX00733 ¶ 6; PX00735 ¶ 4; PX00737 ¶ 5; PX00605 ¶ 12; *see also* PX00862-012; PX00609 ¶ 6; PX00747 ¶ 4.
[148] PX00706 at 77: 6-18; PX00702 at 92:18–20.
[149] PX00710 at 170:7–14; *see also* PX00705 at 58:2-5.

Gamma or Ebeam."[150]

Relatedly, Defendants' attempt to include in-house sterilization services in the relevant product market ignores the limited scope and application of in-house services. As courts have noted, "self-supply" is generally not part of a relevant product market. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 57-58 (D.D.C. 2011) (excluding self-prepared tax returns from the relevant market of tax-preparation services); *accord FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 41-42 (D.D.C. 2009); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 49 (D.D.C. 1998) (finding that the majority of customers could not replicate the wholesale services themselves). Currently, only 20% of all gamma sterilization is performed in-house based on Synergy's internal estimates.[151] This is not surprising: for small customers, building an in-house sterilization facility is prohibitively expensive,[152] and for large customers, the investment often is not cost effective.[153] As Defendants admit, even those companies that operate in-house facilities still need contract sterilization companies to provide back-up services.[154] But even if all customers with in-house facilities were to move all of their business in-house (an impossibility), Dr. Roberts demonstrates that [redacted] Indeed, as sterilization technology has improved over the years, the trend

[150] PX00902-002.
[151] PX00275-003.
[152] PX00702 at 95:5-96:1; PX00854-006; PX01561-020; PX00775 at 53:3-12, 153:10-25.
[153] *See* PX00614 ¶ 14-15; PX00605 ¶ 11. [redacted]. Very few companies produce this much product at a single location to justify the large upfront investment and ongoing expenses of opening and operating an in-house gamma facility. PX00601 ¶ 14; PX00607 ¶ 19; PX00609 ¶ 20; PX00631 at 114:4-18.
[154] Steris Answer ¶ 6; Synergy Answer ¶ 6; *see also* PX00601 ¶ 15; PX00610 ¶ 12; PX00614 ¶¶ 14-15; PX00764 ¶ 8; PX00610 ¶ 12.
[155] PX01731 (Roberts Report) ¶ 59.

toward utilizing contract sterilization services has increased.[156]

One relevant market in which to analyze the effects of the proposed merger is the sale of contract gamma and x-ray sterilization services to targeted customers who cannot switch to e-beam or any other sterilization modality in response to a price increase. Currently, gamma sterilization providers have the ability to price discriminate—that is, they can charge different prices based on a customer's product characteristics, the volume of products that need sterilization, and the customer's competitive alternatives. *See Sysco,* 2015 WL 3958568 at *22; Areeda & Hovenkamp, *Antitrust Law*, ¶ 533d; *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1076-77 (D.D.C. 1997); *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 935 (6th Cir. 2005). Price discrimination markets exist where defendants "engage in individual negotiations" with customers and "possess substantial information about them." *Sysco,* 2015 WL 3958568 at *28.

Similar to *Sysco*, gamma sterilization providers collect detailed information about each of their customers, including the location of each customer's facility, product weight, dimensions, density, packaging dimensions, and minimum and maximum radiation dose.[157] They use this information to adjust pricing and margin levels based on each customer's competitive alternatives, e.g., whether the customer's product can use sterilization modalities other than gamma.[158] In addition, account managers engage in individual negotiations with each customer on a product-by-product basis.[159] [redacted]

[156] PX00366-013; PX00607 ¶ 19; PX00918-005; PX00710 at 179:3-180:3.
[157] PX00772 at 22:10-16, 47:18-49:12, 55:4-11; 57:4-12, 17-22; PX00774 at 102:8-18, 103:3-11, 105:10-106:1, 106:11-19, 112:23-114:9, 115:1-118:11; PX01683-006-007.
[158] PX00772 at 45:2-46:3; *see also* PX00774 at 33:1-16; PX00780 at 38:1-8, 46:10-12; PX00772 at 1:24-21:2; PX00774 at 29:21-30:02;
[159] PX00772 at 21:6-15, 38:14-22.

[redacted] and Defendants' Opposition highlights that [redacted] is because it is one of the few customers with gamma sterilization capacity, a textbook example of how firms target customers today. Def. Br. 35.[161]

Even if the relevant product market were defined more broadly to include all contract radiation sterilization technologies—e-beam, gamma, and x-ray—the merger would cause significant competitive harm. In an all-radiation market, Steris, Synergy, and Sterigenics are still the three dominant players: Steris and Sterigenics are the only U.S. gamma suppliers, while Synergy and Sterigenics dominate the U.S. e-beam market. In a broader market, most customers would benefit from the deconcentrating effects of Synergy's entry with x-ray.[162]

Defendants recognize that most contract radiation sterilization customers seek to minimize transportation costs and turnaround times,[163] and that contract radiation sterilization providers locate their plants close to the customers for which they expect to compete.[164] As Dr. Roberts concludes, the relevant geographic markets are the "trading areas" or "catchment areas" surrounding the five facilities that Synergy planned to introduce between 2016 and 2018.[165] Although Defendants quibble about the specific bounds of each relevant market, the relevant

[160] PX00607 ¶ 20 ([redacted]): PX00710 at 165:1-12 ([redacted] *see also* PX00707 at 62:6-11 [redacted] PX01732 (Roberts Rebuttal Report) ¶ 72.

[162] PX01731 (Roberts Report) ¶ 189.

[163] Synergy Answer ¶ 53; *see also* PX00607 ¶ 21; PX00602 ¶ 6; PX00601 ¶ 8; PX00610 ¶ 10; PX00702 at 195:12-196:1; PX00709 at 57:25-58:10; PX00705 at 148:13-149:2; PX00605 ¶ 8.

[164] Steris Answer ¶ 53; Synergy Answer ¶ 53; *see also, e.g.*, PX00107-001; PX00100-002; PX00802-001; PX00803-004. In fact, Synergy planned to locate its x-ray facilities in areas proximately to key customers. PX00275-022.

[165] PX01731 (Roberts Report) ¶¶ 88-105. [redacted] PX00275-018-035; PX00898-002; PX00407-004-009.

geographic markets "need not . . . be defined with scientific precision," *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669 (1974), or by precise "metes and bounds." *U.S. Steel Corp. v. FTC*, 426 F.2d 592, 596 (6th Cir. 1970) (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 331 (1960)). Each of these relevant geographic markets are far more concentrated than is required for the actual potential competition doctrine to apply.[166] *See* FTC Br. 9-10.

b. Synergy Forecasted Meaningful Market Share for X-Ray

In assessing x-ray's entry, Synergy's ordinary course documents predict the kind of competitive response the actual potential competition doctrine seeks to protect: "X-ray would have entered the US in competition with STERIS/Sterigenics/other [ ] gamma plants."[167] Not only did Synergy expect Steris and Sterigenics to fight back, it expected them to "[e]nter into a pricing war, reducing prices to keep customers."[168] And during the October 2014 X-Ray Kickoff Meeting, Synergy's leadership warned that "[c]ompetitor response is likely to be both formidable and venomous, as X-ray assaults their key market."[169] In fact, [redacted] Not only will Synergy's entry result in significant price savings,[171] it also will provide customers with better quality services and the many benefits of x-ray technology.[172] Synergy devised non-price strategies to attack Steris' and Sterigenics' businesses, including

[166] PX01731 (Roberts Report) ¶¶ 141-143.
[167] PX00112-037.
[168] PX00395-014.
[169] PX00194-011; *see also* PX00708 at 214:20-215:15, 220:5-23 (explaining that if Synergy had entered with x-ray, its competitors would begin "noticing lost market share" and that Steris was one company from whom he would expect price cuts and discounts, new facilities, and attempts to lock current customers into long-term contracts). At the time of the deal, little was publicly known about Synergy's U.S. x-ray plan. PX00775 at 82:3-84:2.
[170] PX00607 ¶ 22.
[171] *See* PX00601 ¶ 20; PX00614 ¶ 22; PX00609 ¶ 23.
[172] *See, e.g.*, PX00605 ¶ 15; PX00625 ¶¶ 16, 17; PX00611 ¶ 13.

plans to exploit recent Steris quality problems and "highlight [the] responsiveness [of] Synergy and X-ray over Sterigenics."[173] Customers, including some of the world's largest medical device manufacturers, have expressed concern that they will lose the benefits of lower prices and better quality services if the merger proceeds.[174]

Had Synergy achieved its goal of capturing 15% of the total contract gamma sterilization sales,[175] Dr. Roberts predicts that its entry would have decreased concentration substantially, regardless of whether the market is defined to include e-beam or not.[176] These reductions are significantly higher than the 200-point change[177] that would ordinarily create a presumption of harm under the Merger Guidelines. FTC Br. 13. Defendants challenge Synergy's estimate that it could take a 15% share of the gamma market. But Synergy's ordinary course documents show that, if anything, this estimate was "highly" conservative.[178]

According to Synergy's ordinary course documents, it had every expectation that customers would be willing to undergo switching costs in order to benefit from the advantages that x-ray had to offer.[179] Synergy analyzed the potential ~~costs associated with~~ switching

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[173] PX00544-005.
[174] *See, e.g.*, PX00601 ¶ 22; PX00625 ¶ 22; PX00605 ¶¶ 15, 17; PX00611 ¶ 17; PX00609 ¶¶ 24, 27; PX00606 ¶ 15; PX00617 ¶ 18.
[175] PX00275-003; PX00544-004.
[176] PX01731 (Roberts Report) ¶¶ 145-152. Dr. Roberts estimates that by 2025, in an all contract radiation market the HHIs will be reduced by more than 200 points in the Midwest and Northeastern regions, by more than 300 points in the Southeastern Region, by more than 400 points in the Western Region, and by more than 4,000 points in the Southwestern Region. *See id.* at Appendix C, Tables C.15, C.19. In addition, Dr. Roberts concluded that in the relevant markets for contract radiation sterilization services sold to targeted customers the introduction of an x-ray sterilization option will result in significant de-concentration in all relevant regional markets by 2020. *See id.* at Appendix C, Tables C.14, C.16, C.17. By 2020, the HHIs will be reduced by more than 200 points in the Northeastern Region, more than 400 points in the Midwest, Western, and Southeastern regions, and by more than 3,000 points in the Southwestern Region. *See id.* at Appendix C, Tables C.14, C.16.
[177] Market concentration is measured by the HHI, or Herfindahl-Hirschman Index. PX00901-021-022 (*Merger Guidelines*) § 5.3; *ProMedica*, 749 F.3d at 568. A market is considered to be "highly concentrated" under the Merger Guidelines when the HHI is above 2500.
[178] PX00215-001.
[179] PX00275-003, 005, 022, 028-029, 033-035, 045-046. Some of Defendants' attempts to suggest that customers

products from gamma (and other forms of sterilization) to x-ray, as well as the potential cost of validating new products for x-ray.[180] It determined that it would be "easiest" to first target existing customers with new products,[181] which undergo the validation process anyway.[182] Some customers expected that [redacted].[183] In any event, Synergy expected the process of converting customers to x-ray would take time, and as a result planned to build dual x-ray/e-beam machines so Synergy's existing e-beam customers and non-medical x-ray customers could serve as an initial customer base.[184]

Synergy's ordinary course documents also demonstrate that Synergy's x-ray strategy was to target gamma customers who cannot switch to e-beam.[185] As Synergy's Director of Global Business Development for the sterilization business explained, only [redacted][186] One of Synergy's key goals in a July 2014 "President Update" was to [redacted]

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would be unwilling to switch from gamma to x-ray technology are misleading. For instance, Defendants' expert's cherry-picked example of a customer who has a contracted gamma price that is lower than Synergy's anticipated entry price is not representative. *See* Stiroh (Defs.' Expert) Dep. at 222:8-19; PX01732 (Roberts Rebuttal Report) ¶ 78. Moreover, the particular customer noted by Defendants' expert explained that it would also consider non-price benefits of x-ray—including faster turnaround times, dosing flexibility, and less discoloration. *See* PX00605 ¶ 14.

[180] PX00275-008-009, 015, 017, 040, 056-057, 065, 067.

[181] PX00275-056, 065.

[182] PX00625 ¶ 22.

[183] PX00764 ¶ 12; *accord* PX00610 ¶ 14.

[184] PX00819-005, 058; PX00275-008; PX00602 ¶ 9.

[185] PX00709 at 129:17-130:1; PX00714 at 91:4-14.

[186] PX00827-001; *see also* PX00113-003 [redacted]").

[redacted][187] And as part of Synergy's strategy it intended to "build close to existing, ageing gamma sites as appropriate,"[188] selecting x-ray sites in the Midwest and Texas with an eye toward stealing customers from the established gamma providers nearby.[189]

Customers would have every incentive to switch their products to x-ray sterilization. Synergy planned to price x-ray at or below the prevailing price of gamma technology, and expected that x-ray would present a whole host of advantages over gamma, including faster turnaround times and less harm to certain types of materials.[190] Moreover, for many customers, merely having a plant located closer to their locations would increase the appeal of switching in order to lower their transportation costs.[191] Recognizing these potential benefits, a number of large customers indicated an interest in using x-ray, and some sent products to Synergy's European x-ray facility for testing.[192] Many signed letters of interest for Synergy,[193] and a number of firms expressed the view that Synergy's x-ray entry would enhance their negotiating position with Steris or Sterigenics.[194] In fact, the Commission alone has been able to identify customers representing at least $40 million in gamma business that remain interested in potential Synergy x-ray offerings in the United States.[195]

Synergy's experience with its x-ray facility in Däniken, Switzerland is instructive—not

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[187] PX00258-003; *see also* PX00708 at 72:2-76:6.
[188] PX00112-037.
[189] PX00708 at 110:20-25; PX00275-022, 033; *see also* PX00812-001.
[190] *See* PX00601 ¶ 16; PX00625 ¶ 22; PX00611 ¶ 16.
[191] PX01731 (Roberts Report) ¶¶ 176-181.
[192] PX00605 ¶ 14; PX00611 ¶ 16; PX00610 ¶¶ 13, 18; PX00601 ¶ 16; PX00625 ¶ 17; PX00792 at 54:12-57:15; *see also* PX00607 ¶ 17; PX00163-001; PX00172-001.
[193] PX00880-001; PX00299-001; PX00328-002; PX00407-018; PX00134-004; PX00128-001; PX01521-010; PX01522-003; PX01523-003; *see also* PX00706 at 57:7-58:20 [redacted]
PX00601 ¶ 22; PX00606 ¶ 15; PX00605 ¶ 15; PX00609 ¶¶ 23, 27; PX00625 ¶ 22; PX00610 ¶ 18.
[195] *See* [redacted]

because Synergy's U.S. entry would mimic precisely what happened at Däniken, but because contrary to Defendants' assertions, Däniken is far from a failure. Synergy's Däniken facility was the first of its kind, and will recoup its investment costs by 2016.[196] It was growing and becoming increasingly profitable throughout 2014,[197] and in October 2014 the company had achieved [redacted] By November 2014, Synergy reported to its shareholders that its "[x]-ray services are now the fastest growing" of its sterilization technologies.[199] And Synergy's 2016 projections anticipated approximately 25% growth next fiscal year.[200] Synergy purchased Däniken specifically "for its technology—to learn it, stabilize it, get acceptance and then adapt that and proliferate the technology."[201] Synergy concluded that the [redacted] To the extent that Däniken represents "something of a natural experiment,"[203] as Defendants' expert characterizes it, Däniken is a successful one.

There are many reasons why Däniken is not entirely representative from a customer conversion or cost perspective compared to what Synergy will experience in the United States. Synergy fully anticipates that its U.S. facilities—which would be built from the ground up—can

[196] *See* PX00714 at 65:15-20, 66:11-19.
[197] PX00186-001-002 (noting that Däniken was profitable in April and May 2014); PX00113-003 (noting that in July, [redacted]); PX00571-003 (reporting that in August, "Däniken sales accelerated in P5 by 56% to provide YTD growth over 55%. The business is now profitable. Significant work has been undertaken assessing the most optimal model for the new x-ray sites that will be proposed during the SEB."); PX00897-001 [redacted] PX00105-002 (emphasis added).
[199] PX00580-004; PX00769 at 29:10-29:23, 30:2-5.
[200] PX00482-002.
[201] PX01500-003.
[202] PX01408-006 (emphasis in original).
[203] Defendants' Expert Report ¶ 41.

be built more efficiently than Däniken, which was purchased by Synergy several years ago. Synergy's plan to use e-beam/x-ray machines in the United States rather than gamma/x-ray machines meant that the U.S. facilities will be able to sterilize a wider range of products since e-beam and x-ray are complementary.[204] Synergy also anticipated that the x-ray/e-beam machines will run more efficiently.[205] Electricity, which is one of the [redacted] for an x-ray facility,[206] is [redacted] cheaper in the United States than in Europe,[207] affording x-ray significantly "lower operating costs" than gamma.[208] Various states have reached out to Synergy and offered lower electricity rates and cheap land in order to entice Synergy to build facilities in their states; hence, the investment in a new, greenfield x-ray facility in the United States will be substantially more affordable than Däniken.[209]

c. Synergy is One of a Few Likely Entrants

Having shown that Synergy's entry with x-ray would have a substantial likelihood of producing deconcentration and other procompetitive benefits, ~~the remaining question~~ is ~~whether~~ Synergy is "one of but a few likely entrants" into the market. *~~Siemens~~*, 621 F.2d ~~at~~ 509; *accord* Areeda & Hovenkamp, *Antitrust Law*, ¶ 1121b ("The number of equally likely new entrants, including the outside firm, does not exceed three (or, at most, four)"). Here, Synergy is not only one of a few likely entrants, it is the "most likely entrant" into the markets at issue. *Phillips Petroleum Co.*, 367 F. Supp. at 1246-47 (finding the requirement satisfied where the potential entrant was one of four likely entrants into the California petroleum market); *Yamaha*, 657 F.2d

[204] PX00819-018.
[205] PX00703 at 114:11-115:4; PX01138-015 (stating that "[b]y using existing e-beam business to justify a large-scale e-beam facility, the cost of a small- to medium scale X-ray facility can be reduced to the cost difference between a dedicated e-beam facility and a dual e-beam/X-ray facility.").
[206] *See* PX00073-051.
[207] *See* PX00275-052; PX00094-036; PX00073-077; PX00788 at 233:18-237:14; PX00603¶ 11.
[208] PX00093-002.
[209] *See* PX00073-041; PX00275-020.

at 974 (finding procompetitive effects from the potential entry of a new competitor where "[t]he outboard motor industry, though productive of rapid growth in sales and high profits, has not attracted new entrants.").

The likelihood that any firm other than Synergy will enter the market with x-ray technology is low.[210] Steris and Sterigenics already have made significant investments in Cobalt-60 rods,[211] and any x-ray sales would cannibalize their current gamma business.[212] With respect to the U.S. market, Synergy recognized early on that it held [redacted]"[213] Synergy's Däniken facility, beyond providing Synergy with a two-year head start, also provides Synergy with a testing facility for potential customers.[214] Moreover, Synergy had extensive dealings with IBA, giving it a head start in considering the appropriate x-ray equipment to purchase.[215] [redacted]"[216]

The e-beam providers that Defendants' expert claims will expand in the U.S. market with

[210] Like Defendants' interpretation of the appropriate potential entrant standard, Defendants' suggestion that the Commission must demonstrate that Synergy is a "unique" or the "only" potential entrant is also misplaced. Def. Br. at 39-40. The Commission need only demonstrate that Synergy was "one of but a few equally likely entrants." *Siemens*, 621 F.2d at 509. Moreover, Defendants assert that the Commission must demonstrate that Synergy has proprietary technology, but that assertion has no basis in the case law—or, for that matter, common sense or logic (proprietary technology may be a barrier to entry, but it does not follow that it is the only one).

[211] PX00603 ¶ 17; PX00607 ¶ 16. Sterigenics owns Nordion, the supplier of Cobalt-60, and Steris has a long-term contract for Cobalt-60 supply from Nordion. PX00775 at 122:11-124:10.

[212] *See* PX00603 ¶ 17. Similarly, there is unlikely to be entry into gamma. As Synergy stated in its 2014 annual report, its businesses "enjoy significant barriers to entry which make it difficult for customers or potential competitors to achieve our low costs and efficiencies." PX00895-007.

[213] PX00092-034.

[214] When Däniken was built, customers wanted to see its x-ray sterilization technology demonstrated before they would commit any business. *See* PX00714 at 61:01-25, 71:16-72:03.

[215] *See* PX00711 at 141:08-142:10; PX00607 ¶ 14.

[216] PX00603 ¶17.

x-ray are unlikely to do so—even in response to a price increase.[217] Several of these firms do not offer sterilization services at all: [redacted].[218] Electron Technologies, according to its website, offers only crosslinking services; Beta Beam, as far as the Commission staff are aware, does not have a website and may not even exist anymore; and [redacted].[219] Several others appear to offer very limited services: Hawaii Pride only sterilizes fruit in Hawaii, and SADEX offers niche sterilization services for "food, agriculture, and animal health industries."[220] The remaining two—[redacted].[221] And [redacted].[222] "The mere existence of other providers is insufficient to mitigate the ~~transaction~~'s ~~anticompetitive~~ effects: it's really not the number of bidders; it's their quality and attractiveness to customers that matters." *Bazaarvoice*, 2014 WL 203966, at *38 (internal quotations omitted).

[217] PX00612 ¶ 2, 10; PX00608 ¶ 12; PX00711 at 147:02–25, 148:14–149:04; PX00580-001; PX 00833-001.
[218] *See* PX00604 ¶ 1, 7, 8, 11.
[219] *See* PX00613 at 8:22-9:25. [redacted] PX00613 at 10:11-19, 33:5-15. [redacted]
[220] *See* PX00612 ¶ 2, 10; PX00608 ¶ 11-12.
[221] PX00620 ¶¶ 2, 7-9. Defendants also identify Neutron Products as a gamma supplier, but the company's facility has been under a permanent injunction relating to the use of radioactive materials since 2004. *See* Environmental Protection Agency, Superfund Sites, Maryland, Cerclis ID #MDN00305785, *available at* http://www.epa.gov/reg3hscd/npl/MDN000305785.htm (last visited Aug. 13, 2015).

Even if existing e-beam providers were to acquire the technology to compete with x-ray, they would still face significant reputational hurdles before being able to generate a meaningful number of sales.[223] Large medical device manufacturers prefer to work with contract sterilization providers that are national or global in scope because it ensures consistency in sterilization and better pricing.[224] Smaller sterilization providers typically lack the technical expertise and the network of facilities needed to ensure uninterrupted service.[225] Considering these obstacles, new entry or fringe expansion cannot possibly avert the anticompetitive effects of this merger.

As a practical matter, the proposed acquisition eliminates the only well-positioned alternative to contract gamma sterilization from entering the U.S. market, which would have prevented Steris from exercising market power.[226] *See FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000). As the Supreme Court has recognized, "[t]he existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 174 (1964). Synergy, however, is not merely a "well equipped and well financed corporation" that is waiting in the wings, anxious to enter. Synergy is a "well equipped and well financed corporation" that has taken affirmative steps to enter, and, in fact, was poised to do so until this proposed transaction and ensuing Commission investigation.

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[223] *See* PX00714 at 71:21-72:03; PX00601 ¶ 11; PX00610 ¶ 9.
[224] *See, e.g.*, PX00601 ¶ 8, 11; PX00631 at 174:14-25; PX00610 ¶ 9.
[225] *See* PX00601 ¶ 10; PX00631 at 174:14-175:7.
[226] *See* PX01731 (Roberts Report) ¶¶ 187-194 (noting that "[the] adverse effects of the proposed acquisition on competition would likely increase over time as Synergy's plan to develop x-ray service into a viable alternative sterilization technology progressed and the number of x-ray service facilities it operated in the United States increased.").

II. The Equities Weigh Heavily in Favor of Preliminary Relief

"No court has denied relief to the FTC in a [Section] 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits." *ProMedica*, 2011 WL 1219281, at *60; *see also FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508 (D.C. Cir. 1986) (establishment of a likelihood of success "weighs heavily in favor of a preliminary injunction . . . .") (quoting *FTC v. Weyerhaeuser*, 665 F.2d 1072, 1085 (D.C. Cir. 1981)). Defendants fail to articulate any legitimate basis for denying preliminary relief. *See, e.g., Whole Foods*, 548 F.3d at 1041 (opinion of Brown, J.) ("[A] 'risk that the transaction will not occur at all,' by itself, is a private consideration that cannot alone defeat the preliminary injunction."); *Heinz*, 246 F.3d at 726-27.

Allowing this merger to close before the completion of the administrative proceeding would cause irreparable harm by allowing the combined firm to begin altering Synergy's operations and business plans, accessing Synergy's sensitive business information, and eliminating key Synergy personnel. FTC Br. 15. Any risk of potential competitive harm should easily outweigh the anticipated benefits of the merger as Defendants fail to assert any meaningful competition-enhancing savings in their $1.9 billion deal.[227] If any figures should be considered "pie-in-the-sky," it is Defendants' vague assertion of the benefits they will provide customers from a "globally integrated sterilization company."

Defendants bootstrap Synergy's made-for-litigation termination of x-ray into a reason not to enjoin the transaction, claiming that "Synergy will not enter the U.S. market with x-ray in the foreseeable future *now*," Def. Br. 31 (emphasis in original)—i.e., now that Synergy has put its

[227] PX01731 (Roberts Report) ¶ 244. The minimal cost-savings Defendants envision is a function of the general corporate overhead reductions and tax inversion savings. Less than $2 million in synergies are attributable to contract sterilization, and even those are not a function of the merger, as they stem from speculation that the combined firm will grow Synergy's U.S. e-beam business, something Synergy can do on its own.

own project on hold in an attempt to consummate its merger with Steris. But to the extent that Synergy claims it is no longer poised to enter independently, it has no one to blame but itself. The "problems" that Synergy asserts are based on its own voluntary actions: Synergy let the IBA agreement lapse, Synergy ended its marketing efforts with interested customers, and Synergy disbanded its x-ray project team. "To allow such conduct to be used to justify an otherwise anti-competitive merger seems to be bad policy." *United States v. UPM-Kymmene Oyj*, No. 03-C-2528, 2003 WL 21781902, at *11 (N.D. Ill. July 25, 2003). In addition, Synergy's ordinary course documents suggest that it was [redacted][228] A preliminary injunction, however, would allow this Court to preserve whatever x-ray assets Synergy might have left. Therefore, *any* risk that the merger might result in anticompetitive effects should tip the scale in favor of a preliminary injunction. FTC Br. at 15.

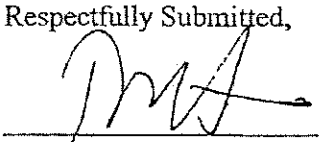
CONCLUSION

For the reasons described above, the Commission ~~respectfully requests that this~~ Court grant the preliminary injunction.

[228] PX00574-010.

Dated: August 14, 2015

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby **CERTIFY** that, on the 14th day of August, 2015, I filed the foregoing Reply Memorandum in Support of a Motion for Preliminary Injunction with the Clerk of the Court.

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I hereby **CERTIFY** that, on the 14th day of August, 2015, I served the foregoing Reply Memorandum in Support of a Motion for Preliminary Injunction on the following counsel for Defendants via electronic mail:

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