

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**FEDERAL TRADE COMMISSION,**

Plaintiff,

v.

**WILH. WILHELMSSEN HOLDING ASA,**

**WILHELMSSEN MARITIME  
SERVICES AS,**

**RESOLUTE FUND II, L.P.,**

**DREW MARINE INTERMEDIATE II B.V.,**

and

**DREW MARINE GROUP INC.,**

Defendants.

Civil Action No. 18-cv-00414-TSC



**DEFENDANTS' PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

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As set forth below, the FTC's challenge to the proposed merger suffers from several defects. Perhaps the greatest defect is its failure to prove its market definition. The FTC's very narrow proposed market definition is the basis for the FTC's claimed presumption of illegality. Without the presumption, the FTC essentially has no case. Even with the presumption, the FTC has failed to prove that customers will be harmed post-merger..

The FTC's failure to prove its market definition stems in large part to the FTC's reliance on its expert economist, Dr. Nevo, to explain why the focus on a narrow set of products and customers is economically sensible. But Dr. Nevo's analysis is riddled with arbitrary judgments, divorced from commercial reality, and characterized by a failure to consider certain important questions. By way of example, Dr. Nevo defines a relevant market made up of only a fraction of the products defendants sell to a fraction of their customers.<sup>1</sup> None of the defendants, their competitors, or their customers see the market the way Dr. Nevo does.<sup>2</sup> Dr. Nevo also fails to credibly consider the evidence presented by defendants about power buyers and lack of barriers to entry/expansion, choosing instead to look only backwards despite the required analysis being inherently forward looking. Indeed, Dr. Nevo concedes that he did not specifically analyze the impact of buyer power or any potential barriers to entry concluding that the past tells him all he needs to know about the market.<sup>3</sup> This is not the way merger analysis is supposed to be done.

Courts today uniformly hold that consumer harm is the principal focus of merger analysis. Courts are to block mergers only when the government shows that there is a likelihood of significant consumer harm that market forces will not prevent or correct.<sup>4</sup> Simply put, the

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<sup>1</sup> See Israel Report ¶ 28 (DX-0060).

<sup>2</sup> See Thompson tr. test at 293:3–7; *see also* Medina at 184:17 to 186:7.

<sup>3</sup> Nevo tr. test. at 822:4–17.

<sup>4</sup> See *e.g.*, *F.T.C. v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 130 (D.D.C. 2004), case dismissed, No. 04-5291, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004) (explaining that the court must make a



FTC has not come forward with reliable evidence that there is any reasonable prospect of higher prices or other market-wide harm. That failure of proof is enough to defeat the government's request for a preliminary injunction.

Moreover, the FTC's case entirely overlooks the fact that the same powerful customers it is allegedly trying to protect are poised to benefit from substantial cost savings generated by the merger. As the Merger Guidelines explain, efficiency-enhancing mergers are consistent with the goals of proper antitrust enforcement.<sup>5</sup> The FTC's contrary view here should be rejected.

Accordingly, defendants submit these Proposed Findings of Fact and Conclusions of Law. They set forth at the outset a brief statement of fundamental conclusions of law and background facts. They then provide conclusions and findings organized by the key issues before the Court. These conclusions and findings address, among other issues, questions the Court asked the parties to address in closing arguments, including the significance of testimony and declarations from marine chemical customers and other market participants, both with respect to defining the relevant market and the likelihood of anticompetitive effects;<sup>6</sup> lack of barriers to entry;<sup>7</sup> tools and strategies customers might use post-merger to discipline any hypothetical price increase;<sup>8</sup> and efficiencies.<sup>9</sup>

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judgment whether the challenged acquisition is likely to hurt consumers") (quoting *Hosp. Corp. of Am. v. F.T.C.*, 807 F.2d 1381, 1386 (7th Cir. 1986) (internal quotation marks omitted)).

<sup>5</sup> See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), (JX-0288) (hereinafter "HMG") ("Nevertheless, a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.").

<sup>6</sup> See *infra* Sections X-XI.

<sup>7</sup> See *infra* Section XI. B.

<sup>8</sup> See *infra* Section XI. A.

<sup>9</sup> See *infra* Section XII.

**I. SUMMARY OF PROPOSED CONCLUSIONS OF LAW**

1. The FTC has failed to establish the elements of its case.

2. The FTC's gerrymandered market, consisting of boiler and cooling water treatment chemicals, and related equipment sold to "Global Fleets," bears no resemblance to reality and the methodology underpinning it is flawed. Because the FTC has failed to properly define a relevant antitrust market, it is not entitled to the benefit of the burden-shifting presumption of illegality.

3. The FTC has never won a case under Section 13(b) of the FTC Act without the benefit of a presumption of illegality.

4. The FTC's cluster market of boiler water treatment products ("BWTP") and cooling water treatment products ("CWTP") is unsupported by ordinary course business documents.<sup>10</sup> In fact, the analyses of the FTC's expert, Dr. Nevo, to support the proposed cluster market focused on a broader set of products than BWTP and CWTP in all instances.<sup>11</sup>

5. The FTC's limitation of its alleged market to "Global Fleets," a customer group that Dr. Nevo constructed solely for the purpose of litigation, is similarly unsupported in ordinary course business documents.<sup>12</sup>

6. "Global Fleets," here a purportedly vulnerable group, are the largest and most powerful of seagoing fleets—in other words, the customers *most* able to defeat a price increase.

7. "Global Fleets," several of which are multi-billion dollar companies, have and will continue to have numerous and effective tools for securing competitive pricing.<sup>13</sup>

8. Further, there are no material barriers to entry or expansion here, so there can be

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<sup>10</sup> Nevo tr. test. at 733:14 to 738:6.

<sup>11</sup> Nevo tr. test. at 812:2 to 812:18; 844:1 to 850:4. For ease of reference, we use "BWTP" and "CWTP" herein to reference the chemicals and the associated testing equipment and services.

<sup>12</sup> Nevo tr. test. at 716:18 to 717:24.

<sup>13</sup> Medina tr. test. at 188:1–19; Kelleher tr. test. at 500:6–8; PX70035 at 105:12 to 106:11.

no harm to competition.<sup>14</sup>

9. Finally, the evidence is overwhelming that the proposed merger is intended to capture up to and exceeding [REDACTED] of efficiencies that Wilhelmsen Ships Service (hereinafter WSS) plans to share with customers.<sup>15</sup>

10. Accordingly, the FTC's motion for preliminary injunction should be denied.

## **II. PARTIES**

11. Defendant Wilhelmsen Maritime Services AS ("WMS") is a wholly owned subsidiary of defendant Wilh. Wilhelmsen Holding ASA ("WWH"), a publicly traded corporation headquartered in Norway. WSS is a division of WMS that supplies marine customers with a variety of products and services to ships.<sup>16</sup>

12. Defendant Drew Marine Group, Inc. ("Drew") is a supplier of marine products. It is a subsidiary of defendant Drew Marine Intermediate II B.V., which is owned by defendant The Resolute Fund II, L.P., a private equity fund managed by The Jordan Company.<sup>17</sup>

## **III. PROPOSED TRANSACTION**

13. Pursuant to a Share Purchase Agreement dated April 27, 2017, WMS proposes to acquire 100% of the voting securities of Drew for approximately \$400 million in cash.<sup>18</sup>

### **A. The transaction will result in cost savings**

14. The transaction will create substantial efficiencies by combining Drew and WSS.

15. Prior to agreeing to the transaction, WSS undertook a comprehensive study of synergies offered by the combination of the WSS and Drew. WSS retained Cardo Partners

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<sup>14</sup> *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n. 15 (1986) ("[W]ithout barriers to entry into the market it would presumably be impossible to maintain supracompetitive prices for an extended time.").

<sup>15</sup> See JX-0120.

<sup>16</sup> Grimholt tr. test. at 1207:17–1209:24; DX-2625.

<sup>17</sup> See DX-1161.0006; Knowles tr. test. at 1366:2-10.

<sup>18</sup> Amended Comp. [Doc. 43] at ¶ 25.

(“Cardo”), a top tier Norwegian management consulting company with extensive experience in the maritime industry, to assist in due diligence.<sup>19</sup> The goal was to determine whether this would be a good investment for WSS, build a business and investment case, understand the risks of the potential investments, and understand the expected benefits and the timeline for realizing them.<sup>20</sup>

16. The results of this study were presented to the WMS Board of Directors prior to their vote on the proposed merger.<sup>21</sup>

17. The study showed that WSS could expect significant cost savings from the proposed merger, including savings from production, sales costs, back office employee costs and administrative costs, supply chain, and sourcing.<sup>22</sup> In addition, Drew’s assets complement WSS’s production assets, thus allowing for economies of scale and other synergies.<sup>23</sup>

18. These savings will enable the merged entity to compete more effectively and supply customers more efficiently. WSS expects to achieve [REDACTED] in annual cost savings, [REDACTED] of which will be merger-specific.<sup>24</sup>

**B. The transaction will result in price reductions**

19. WSS’s evaluation of the potential merger also concluded that there would be dis-synergies in the form of price reductions and lost customers from the transaction.<sup>25</sup>

20. In particular, WSS anticipates that it will not be able to retain all of Drew’s current customers due to competition, customer preference for dual sourcing, and Drew

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<sup>19</sup> Flaesen tr. at test. at 1278:21–24; 1280:3–19; 1289:6–17.

<sup>20</sup> Flaesen tr. at test. at 1281:9–17.

<sup>21</sup> Flaesen tr. at test. at 1297:6–12.

<sup>22</sup> JX-0121-004; *see generally* Flaesen tr. test. at 1291–97.

<sup>23</sup> JX-0121-003; JX-0121-004.

<sup>24</sup> DX-2630.0041.

<sup>25</sup> JX-0121-035 to -038.

customers who desire not to work with WSS.<sup>26</sup>

21. To try to retain some Drew customers, WSS plans to provide discounts [REDACTED]

[REDACTED].<sup>27</sup>

22. The report submitted to the WMS Board assumed “best case” a [REDACTED] reduction in loss of customers.”<sup>28</sup> WSS recognized that a “price reduction for key customers” would be “an important mitigating action to prevent loss of customers.”<sup>29</sup>

23. There is no evidence stating, suggesting, or assuming that WSS will raise prices after the merger or that the rationale for the merger is related to any plan or desire to raise prices.

24. Instead, a “core tenet” of economics states that some of the cost savings resulting from the merger can be expected to be passed on to customers.<sup>30</sup>

#### **IV. the FTC Investigation**

25. After the parties made filings under the Hart-Scott-Rodino Act, the FTC conducted a lengthy investigation. The investigation included voluminous document production (well over six million pages), written responses by WSS and Drew to the FTC’s Second Request specifications, nine Investigational Hearings (depositions), and several meetings between the merging parties, FTC staff, and the FTC Commissioners.

26. As the investigation proceeded, the FTC did not have competitive concerns significant enough to continue its investigation, or to recommend suit, on various other overlapping products, including cleaning chemicals, fuel additives, and welding and refrigerant

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<sup>26</sup> *Id.*; Grimholt tr. test. at 1226:13–21 (noting that there are a “number of customers who have dual sourcing strategies [who] would . . . find an alternate supplier for Drew” after the merger).

<sup>27</sup> DX-2333 p. 12; *see also* Israel Report ¶ 147 (DX-0060).

<sup>28</sup> JX-0121-035.

<sup>29</sup> *Id.*

<sup>30</sup> Israel tr. test. at 1447:4 to 1448:10.

gases. These products make up the vast majority of each firm's marine product sales.<sup>31</sup>

27. During the course of the investigation, the FTC contacted at least 72 industry participants, including at least 48 customers.<sup>32</sup>

28. The record reflects that none of the testifying customers initiated contact with the FTC; in each case, the FTC reached out to the customer to seek its views.<sup>33</sup> There is no evidence that any customers raised concerns about the transaction without being contacted by the FTC.

29. On February 22, 2018, the two sitting FTC Commissioners voted to challenge the proposed acquisition and to initiate administrative proceedings under Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18, 21, and Section 5 of the FTC Act, 15 U.S.C. § 45.<sup>34</sup>

30. On February 23, 2018, the FTC filed a complaint for a temporary restraining order and preliminary injunction before this Court pursuant to Section 13(b) of the FTC Act. On March 6, 2018, the FTC filed an amended complaint.<sup>35</sup>

31. WMS and Drew have agreed that, if the Court enters a preliminary injunction, they will abandon the transaction without further litigating the administrative proceeding.<sup>36</sup>

32. A ten-day hearing was held before the Court from May 29, 2018 to June 18, 2018.

## **V. THE FTC'S HEAVY BURDEN**

33. When the FTC seeks to enjoin a merger, the "issuance of preliminary injunction prior to full trial on the merits is an extraordinary and drastic remedy" because it may, as here,

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<sup>31</sup> See *infra* Section VII.A.6.

<sup>32</sup> The FTC listed 72 total entities on its initial disclosure list.

<sup>33</sup> See, e.g., Medina (Crowley) tr. test. at 210:24-211:2, Sarro (Teekay) tr. test. at 156:16-18, Thompson (Carnival) tr. test. at 287:4-9, PX70028 Rice (Royal Caribbean) Dep. Tr. at 13:25-14:11, PX70027 Richards (Disney) Dep. Tr. at 110:1-4.

<sup>34</sup> Amended Comp. [Doc. 43] at ¶ 6.

<sup>35</sup> See *generally id.* [Doc. 43].

<sup>36</sup> DX-0071 (Exh. A - Grimholt Decl.).

“prevent the transaction from ever being consummated.”<sup>37</sup> “Given the stakes,” the FTC bears a heavy burden when it requests preliminary injunctive relief.<sup>38</sup>

34. “[A] failure of proof in any respect will mean the transaction should not be enjoined.”<sup>39</sup> Where relied-upon expert testimony is inadequate, the plaintiff’s claim fails.<sup>40</sup>

35. The FTC “is *required to make a robust evidentiary and legal showing that the transaction would likely be anticompetitive in order to obtain a preliminary injunction.*”<sup>41</sup>

36. “[A]ntitrust theory and speculation cannot trump facts.” The FTC must make its case “on the basis of the record evidence relating to the market and its probable future.”<sup>42</sup>

37. The Court must “exercise independent judgment” in assessing the evidence.<sup>43</sup>

## **VI. THE FTC MUST DEMONSTRATE LIKELIHOOD OF SUCCESS ON THE MERITS**

38. To prove a likelihood of success on the merits, the FTC must show that “there is a reasonable probability that the merger will *substantially lessen competition.*”<sup>44</sup> Specifically, the FTC must demonstrate (1) a relevant product market; (2) a relevant geographic market; and (3) probable anti-competitive effects in these markets.<sup>45</sup>

39. As a threshold matter, the FTC must show “that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area.” The Merger

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<sup>37</sup> *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C Cir. 1980).

<sup>38</sup> *FTC v. Arch Coal Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C 2004); *FTC v. Occidental Petroleum Corp.* No. 86-900, 1986 WL 952, at \*13 (D.D.C Apr 29, 1986) (“The Commission’s burden on a preliminary injunction motion is properly heavy . . .”).

<sup>39</sup> *Arch Coal*, 329 F. Supp. 2d at 116.

<sup>40</sup> See *FTC v. Foster*, 2007 WL 1793441 at 18.

<sup>41</sup> Exhibit B, FTC Statement, U.S. Senate Judiciary Committee, S. 2102, The “SMARTER Act of 2015” October 7, 2015 (emphasis added).

<sup>42</sup> *Arch Coal, Inc.*, 329 F. Supp. 2d at 116-17.

<sup>43</sup> *FTC v. Weyerhaeuser Co.* 665 F.2d 1072, 1082 (D.C Cir. 1981).

<sup>44</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (emphasis added).

<sup>45</sup> See, e.g., *United States v. H&R Block Inc.*, 833 F. Supp. 2d 36, 49-50 (D.D.C 2011); *Arch Coal* 329 F. Supp. 2d at 117.

Guidelines consider undue concentration based on whether post-merger the Herfindahl-Hirschman Index (“HHI”) is over 2500 and whether the increase in the HHI is larger than 200.<sup>46</sup> Such a showing of undue concentration establishes a presumption in favor of the FTC.<sup>47</sup>

40. The FTC’s failure to prove its alleged market is fatal to its case because the FTC only presented evidence and analysis focused the alleged market.

41. The converse is not true; establishing an appropriate relevant market does not prove a violation of Section 7 of the Clayton Act. Market shares are the beginning, not the end, of antitrust analysis.<sup>48</sup> The fundamental inquiry in any merger case is whether the transaction will confer or enhance “market power.”<sup>49</sup> That is, an analysis of whether the merged firm will be able to raise prices to customers for a significant period of time without market forces returning prices to competitive levels. If not, there is no basis in Section 7 for blocking a transaction.

42. “The FTC has never won a preliminary injunction in a merger case without first establishing that the deal would cross that threshold of presumption.”<sup>50</sup> If the FTC shows that it is entitled to a presumption, defendants can rebut the presumption by showing that anti-competitive effects are unlikely.<sup>51</sup> Where the FTC’s prima facie case is weak, it “requires less of a rebuttal . . . by defendants.”<sup>52</sup>

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<sup>46</sup> HMG § 5.3 (JX-0288).

<sup>47</sup> *U.S. v. Baker Hughes*, 908 F.2d 981, 982 (D.C. Cir. 1990).

<sup>48</sup> *See Arch Coal*, 329 F. Supp. 2d at 130 (“Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness.”) (quoting *Baker Hughes*, 908 F.2d at 984 (internal quotation marks omitted)).

<sup>49</sup> *See* HMG § 1 (JX-0288-005) (“The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.”).

<sup>50</sup> Ron Knox, ed., *Obama Trials*, 236 (2017).

<sup>51</sup> *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974); *see also Arch Coal*, 329 F. Supp. 2d at 130 (noting that a broad focus on the “effects on competition is required.”).

<sup>52</sup> *Arch Coal*, 329 F. Supp. 2d at 158; *accord, United States v. Baker Hughes, Inc.*, 908 F. 2d 981, 991 (D.C. Cir. 1990); *FTC v. ProMedica Health Sys.*, No. 3:11 CV 47, 2011 U.S. Dist. LEXIS



43. Defendants can “rebut the presumption by producing evidence that market-share statistics produce an inaccurate account of the merger’s probable effects on competition in the relevant market.”<sup>53</sup> Defendants can show this in a number of ways.<sup>54</sup>

44. Importantly, “[i]f barriers to entry are insignificant, the *threat of entry* can stimulate competition in a concentrated market, regardless of whether entry ever occurs.”<sup>55</sup> The parties agree, and case law is uniform, that in the absence of barriers to entry or expansion, high market shares do not establish market power.<sup>56</sup> The underlying rationale for this rule is clear: absent market barriers, competition will defeat any exercise of market power.

45. In this case, in addition to the absence of barriers to expansion, the existence of buyer power strongly weighs against the FTC’s claim that WSS will have market power.<sup>57</sup>

46. To begin with, the FTC defines a market consisting of the largest and most sophisticated purchasers of marine chemicals.<sup>58</sup> In other words, the market consists of those customers best able to take advantage of opportunities to defeat an attempt to exercise market

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33434, at \*157 (N.D. Ohio Mar. 29, 2011) (less of a showing required to rebut the “less-than-compelling” prima facie case).

<sup>53</sup> *Arch Coal*, 329 F. Supp. 2d at 116.

<sup>54</sup> See e.g., *id.* at 158 (unilateral price increase unlikely); *Baker Hughes*, 908 F.2d at 984 (entry and repositioning of competitors); *id.* at 986 (sophisticated customers); *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001) (procompetitive efficiencies).

<sup>55</sup> *Baker Hughes Inc.*, 908 F.2d at 988 (emphasis added).

<sup>56</sup> See, e.g., *H.J. Heinz*, 246 F.3d at 717 (“Low barriers to entry enable a potential competitor to deter anticompetitive behavior by firms within the market simply by its ability to enter the market.”); *Baker Hughes*, 908 F.2d at 987 (citations omitted) (“In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time.”); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997) (“Even a 100% monopolist may not exploit its monopoly power in a market without entry barriers.”).

<sup>57</sup> See *H.J. Heinz Co.*, 246 F.3d at 725 (stating that sophisticated purchasers can render HHI figures unreliable); see also *Baker Hughes*, 908 F.2d at 986 (finding that “sophisticated” buyers can “promote competition even in a highly concentrated market”); *FTC v. R.R. Donnelley & Sons Co.*, 1990 WL 193674, at \*4 (D.D.C. 1990) (explaining that “the sophistication and bargaining power of buyers play a significant role in assessing the effects of a proposed transaction” and finding that such customers “make any anti-competitive consequences very unlikely”).

<sup>58</sup> Nevo testimony at 891:20-892:1.

power. Conversely, the FTC nowhere alleges that globally trading and regional fleets that do not fit the definition of Global Fleets will suffer as a result of the merger.

47. While many firms with existing assets and different degrees of presence in the market have been identified, under the Merger Guidelines, the Court need not identify particular competitors who will enter or expand in order to defeat market power.<sup>59</sup>

48. Where “non-merging firms [are] able to reposition their products to offer close substitutes,” the likelihood of competitive harm is diminished.<sup>60</sup>

49. Where the presumption is rebutted, “the burden of producing additional evidence of anti-competitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.”<sup>61</sup>

## **VII. THE FTC HAS NOT PROPERLY DEFINED A RELEVANT PRODUCT MARKET**

50. A properly defined, relevant product market is essential to the FTC’s claim.<sup>62</sup>

51. “Not only is the proper definition of the relevant product market the first step in this case, it is also the key to the ultimate resolution of this type of case, since the scope of the market will necessarily impact any analysis of the anti-competitive effects of the transaction.”<sup>63</sup>

52. A relevant product market defines the product boundaries within which

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<sup>59</sup> HMG § 9 JX-0288-031 (“If the assets necessary for an effective and profitable entry . . . are widely available, the Agencies will not necessarily attempt to identify which firms might enter.”).

<sup>60</sup> HMG § 6.1 JX-0288-025.

<sup>61</sup> *Baker Hughes*, 908 F.2d at 983; *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal.2004).

<sup>62</sup> *United States v. Marine Bancorp Inc.* 418 U.S. 602, 618 (1974) (“Determination of the relevant product and geographic markets is necessary predicate to deciding whether merger contravenes the Clayton Act.”); *Swedish Match*, 131 F. Supp. 2d at 156 (“Merger analysis begins with defining the relevant product market.”).

<sup>63</sup> *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 181 (D.D.C. 2001); *see Arch Coal*, 329 F. Supp. 2d at 119 (noting that a relevant product market “is necessary to identify that area of trade within which a defendant allegedly has acquired or will acquire an illegal or monopolistic or oligopolistic position”).

competition meaningfully exists.<sup>64</sup> Without a well-defined product market, “an examination of a transaction’s competitive effects is without context or meaning.”<sup>65</sup>

53. A well-defined product market should include all functionally similar products to which some consumers would switch if defendants imposed a small price increase.<sup>66</sup>

54. “When determining the relevant product market, courts often pay close attention to the defendants’ ordinary course of business documents.”<sup>67</sup> A product market also “must correspond to the commercial realities of the industry and be economically significant,” and should “recognize competition, where, in fact competition exists.”<sup>68</sup>

55. The FTC’s alleged market fails to reflect commercial realities and lacks support from normal course documents. The alleged market, therefore, does nothing to help illuminate the competitive effects of the proposed merger.<sup>69</sup>

56. The FTC and its expert constructed the proposed market with the purpose of calculating high market shares, seeking a presumption of illegality. But “[n]o party can expect to gerrymander its way to an antitrust victory without due regard for market realities.”<sup>70</sup>

#### **A. BWTP and CWTP Do Not Constitute an Appropriate Product Market**

57. Combining non-substitute goods without including all products in that class sold by the same companies is invalid because it obscures the central question: if a buyer were faced

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<sup>64</sup> *U.S. v. Cont’l Can Co.*, 378 U.S. 441, 449 (1964).

<sup>65</sup> *FTC v. Freeman Hosp.* 69 F.3d 260, 268 (8th Cir. 1995).

<sup>66</sup> *See e.g., Arch Coal*, 329 F. Supp. 2d at 119 (“The general question is whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other.”).

<sup>67</sup> *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 52 (D.D.C. 2011).

<sup>68</sup> *See e.g., Brown Shoe*, 370 U.S. at 336-37.

<sup>69</sup> *See HMG* § 4.1.1 (“[T]he overarching principle . . . of defining the market and measuring market shares is to illuminate the evaluation of competitive effects”).

<sup>70</sup> *It’s My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 683 (4th Cir. 2016).

with a price increase, which products would it turn to in order to meet its needs?<sup>71</sup>

58. Although combining distinct products into one “cluster market” may be appropriate where such a “combination reflects commercial realities,”<sup>72</sup> that is not the case here.

59. The Merger Guidelines state that where pricing of one group of products affects pricing of other products such that “the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market,” then it is appropriate to consider the effects of sales of *all* products that affect prices in the relevant market.<sup>73</sup> Dr. Nevo did not do this.

60. Although the FTC’s complaint claimed a relevant antitrust market of all “marine water treatment chemicals and services,”<sup>74</sup> the FTC subsequently clarified that its market includes only boiler and cooling water treatment products, the testing and other equipment related to boiler and cooling water treatment, and related services.<sup>75</sup>

61. The FTC’s alleged market is both too broad because it combines non-substitutable BWTP and CWTP and too narrow because (a) it leaves out products that are manufactured, sold, and delivered along with BWTP and CWTP; (b) it leaves out customers who face the same competitive conditions; and (c) it leaves out suppliers that offer the same products and services.<sup>76</sup>

62. Dr. Nevo stated that he used a BWTP/CWTP cluster market for analytical convenience. However, when performing his market analyses, he actually used data and

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<sup>71</sup> Israel Report ¶ 64-66 (DX-0060); *See generally* HMG § 4 JX-0288-010 to -018 .

<sup>72</sup> *See United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966) (“We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities”).

<sup>73</sup> HMG §4.1.1, n. 4 JX-0288-012.

<sup>74</sup> Complaint [Doc. 3] ¶¶ 34, 38; Amended Comp. [Doc. 43] ¶¶ 13, 33.

<sup>75</sup> Nevo tr. test. at 558:22-559:22.

<sup>76</sup> *See* Israel Report ¶ 63 (DX-0060).

documents that included additional marine water treatment products.<sup>77</sup>

63. In the ordinary course, both parties group boiler water treatment chemicals (“BWTC”) and cooling water treatment chemicals (“CWTC”) with other water treatment chemicals, including evaporator, ballast, potable, and pool/spa water chemicals.<sup>78</sup> Thus, Dr. Nevo’s BWTP/CWTP cluster market is not consistent with ordinary course practices.

# **1. BWTC, CWTC, and associated equipment and services**

64. BWTC are non-patented, standardized blends of chemicals added to boiler water to protect boilers from scaling, corrosion, and pitting caused by untreated boiler water.<sup>79</sup>

65. CWTC are non-patented blends of chemicals added to engine cooling systems (open or contained/closed loop) to protect the cooling systems from corrosion and build-up.<sup>80</sup>

66. Although WSS and Drew’s respective BWTP and CWTP are made with their own formulae and are sold under brand names, they are composed of common commodity chemicals, and the chemistry for effective treatment is well known.<sup>81</sup>

67. For example, Ecolab’s premiere CWTC, Nalcool 2000, is a 40-year-old product based on an older, common blend that is still widely used in the marine industry.<sup>82</sup> “There are thousands of water treatment companies out there and anybody who wants to have a closed system treatment can have this product very easily. It is not protected in any way, shape or form. It’s not hard to make.”<sup>83</sup>

68. There are two types of equipment that are generally associated with marine water

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<sup>77</sup> Nevo tr. test. at 616:11-13.

<sup>78</sup> See Nevo tr. test. at 733:14-738:6; Kelleher tr. test. at 536:21-537:12.

<sup>79</sup> Thompson tr. test. at 259:11-17; Fry tr. test. at 936:23-938:3. Drew does not have patents on any of its chemicals. Kelleher tr. test. at 524:4-5. Fry tr. test. at 937:7-16; Sarro tr. test. at 86:20-87:4.

<sup>80</sup> Thompson tr. test. at 260:9-14; Sarro tr. test. at 82:2-7; Fry tr. test. at 943:12-14.

<sup>81</sup> See, e.g., Thompson tr. test. at 327:5-10; Israel tr. test. at 1458:19 – 1459:2.

<sup>82</sup> Lange tr. test. at 1172:8-15.

<sup>83</sup> Lange tr. test. at 1173:18-22.

treatment chemicals—testing equipment (typically a test kit)<sup>84</sup> and dosing equipment.<sup>85</sup>

69. Water treatment testing is a fairly simple process<sup>86</sup> that is conducted fairly frequently.<sup>87</sup> Ships provide their own maintenance and engineering services, and ship engineers are responsible for regular testing of boiler water and engine cooling water.<sup>88</sup>

70. Drew does not manufacture water treatment test kits purchasing them instead from third parties like Hach and Parker Hannifin and reselling them to marine customers.<sup>89</sup>

71. Certain test kits are designed to be used with particular products, but most can be used with multiple suppliers' products because they test chemicals, not brands of products.<sup>90</sup>

72. Testing equipment and dosing equipment are sometimes sold in connection with sales of the related chemicals but they are also sold separately.<sup>91</sup>

73. Sales of testing and dosing equipment accounted for approximately [REDACTED]  
[REDACTED] sales in the market alleged by the FTC.<sup>92</sup>

74. Hach and other equipment manufacturers sell test kits directly to customers.<sup>93</sup>

75. WSS, Drew, and other suppliers of BWTC and CWTC employ personnel who can assist customers with performing a water test, examining the dosing system, reviewing the maintenance requirements, and training new personnel on how to use the equipment.<sup>94</sup> These

<sup>84</sup> Thompson tr. test. at 263:12-16.

<sup>85</sup> Thompson tr. test. at 263:12-20.

<sup>86</sup> Franzo tr. test. at 388:16-20.

<sup>87</sup> Sarro tr. test. at 126:23-25.

<sup>88</sup> Thompson tr. test. at 270:23-271:8; Franzo tr. test. at 388:1-11.

<sup>89</sup> Kelleher tr. test. at 499:18-500:15.

<sup>90</sup> See Franzo tr. test. at 386-87; Kelleher tr. test. at 501:3-20 ("The testing reagents don't care about the brand. They care about the molecule.").

<sup>91</sup> Israel Report ¶¶ 30-32 (DX-0060); Malhotra (WSS) Depo. Tr. at 128:3-22 (PX70015).

<sup>92</sup> Israel Report ¶32 (DX-0060).

<sup>93</sup> Kelleher tr. test. at 499:22-501:1-20.

<sup>94</sup> Thompson tr. test. at 281:13-19.

employees are not allowed to personally test the systems, as they are typically not allowed to touch the ship's equipment, but they can speak with the engineers about application, review testing history, and make product recommendations.<sup>95</sup>

76. WSS refers to these personnel as "port sales engineers," and both WSS and Drew regard them as having primarily a marketing function.<sup>96</sup>

77. Some ships do not allow "sales engineers" aboard because some vessel owners view them as primarily sales people and do not want them interacting with the crew.<sup>97</sup>

78. Drew employs approximately 45 sales engineers worldwide, including nine in the United States and one in India.<sup>98</sup> WSS has fewer than 50 port sales engineers.<sup>99</sup>

## **2. BWTC and CWTC are not interchangeable**

79. BWTC and CWTC are distinct products, which require distinct testing and dosing equipment.<sup>100</sup> To that end, BWTC cannot be used for cooling water treatment, and CWTC cannot be used to treat boiler water. In other words, the products are not substitutes for one another.<sup>101</sup>

## **3. BWTC, CWTC, and equipment each face different competitive conditions and, therefore, it is not appropriate to cluster them**

80. Customers can and do purchase BWTC from one supplier and CWTC from another – even for use on the same vessel.<sup>102</sup>

<sup>95</sup> Kelleher tr. test. at 505:7-22; PX70015 at 62 ("this presentation is really [a] marketing presentation").

<sup>96</sup> Kelleher tr. test. at 505:20-506:2.

<sup>97</sup> Kelleher tr. test. at 505:23-506:2.

<sup>98</sup> Knowles tr. test. at 1413:1-3.

<sup>99</sup> Grimholt tr. test. at 1252:13-16.

<sup>100</sup> Israel Report ¶¶ 30-32, 66 (DX-0060); DX-0066.008-11.

<sup>101</sup> DX-0066.008-11; *see also* Israel tr. test. at 1480:6-1481:9; Nevo tr. test. at 567:22-24; PX70017 (Fry Dep. Tr.) at 64:25-65:5.

<sup>102</sup> [REDACTED] Grimholt tr. test. at 1262:24-1263:9; Knowles tr. test. at 1390 2-14.

81. Engine manufacturers approve the use of specific CWTC for use in their engines and have approved the use of products from numerous suppliers in addition to Drew and WSS. For example, Wartsila lists Drew, Chevron Marine, GE Water, Marine Care, Maritech/Marisol, Nalco, Vecom, and WSS as companies providing permissible cooling water additives for their closed systems.<sup>103</sup>

82. Unlike CWTC, boiler manufacturers do not typically approve chemicals from specific suppliers, but rather recommend that customers focus on maintaining certain concentration levels for the chemicals used in the boiler water.<sup>104</sup>

83. In addition, Mr. Fry testified that another difference between BWTC and CWTC is that CWTC are purchased less frequently than BWTC.<sup>105</sup>

84. Chevron Marine, a subsidiary of mega-company Chevron, is a global company that sells CWTP in addition to its huge bundle of lubricating products in ports worldwide, but does not sell BWTP at all.<sup>106</sup>

**4. In the ordinary course, BWTC and CWTC are grouped with other water treatment chemicals**

85. The FTC's market does not include other products sold by WSS and Drew that are used to treat water on board ships, including chemicals for the treatment of evaporator water, ballast water, potable water, and pool/spa water or their related equipment.

86. WSS and Drew typically include these products in a "water treatment products" or "water treatment solutions" category that includes but is not limited to BWTP and CWTP.<sup>107</sup>

87. Neither the FTC nor Dr. Nevo has identified any ordinary course documents

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<sup>103</sup> See DX-2599.0007 and PX90141-007.

<sup>104</sup> Israel Report ¶ 67 (DX-0060).

<sup>105</sup> Fry tr. test. at 986:4-17.

<sup>106</sup> Kelleher tr. test. at 537:15-21; Israel Report ¶ 67 (DX-0060); PX80027-001(Thurloway declaration).

<sup>107</sup> See Grimholt tr. test. at 1210:7-1211:2. JX0250-008; JX0279-054.



focused solely on BWTP or CWTP.

88. There is no evidence that anyone in the industry isolates just BWTP and CWTP for purposes of strategy, pricing, sourcing, blending, contracting, or negotiating.<sup>108</sup>

89. BWTC and CWTC are blended with the same equipment, shipped together, and stored in the same warehouse facilities as the other chemicals the merging parties sell.<sup>109</sup>

### **5. Dr. Nevo's analyses do not isolate BWTP or CWTP**

90. Professor Nevo cited four types of evidence as supporting his BWTP and CWTP cluster market. However, on cross-examination he acknowledged that: (1) he had identified no documents from the merging parties that lump just BWTP and CWTP;<sup>110</sup> (2) he did not find that customers were treating BWTP and CWTP separately;<sup>111</sup> (3) the sales data (Salesforce and win-loss data) he used was not specific to BWTP and CWTP;<sup>112</sup> and (4) his hypothetical monopolist test was based on a product group broader than BWTP and CWTP.<sup>113</sup>

### **6. FTC's Product Market Definition Ignores Other Marine Products**

91. WSS and Drew also sell, and the proposed acquisition includes, marine products beyond BWTP and CWTP, including cleaning chemicals, fuel additives, gases and refrigerants, and equipment. These products are not included in the FTC's proposed product market.

92. These products are regularly sold in bundles, a/k/a baskets, of goods that include multiple types of products, including by WSS, Drew, and their competitors.<sup>114</sup>

93. As demonstrated in Dr. Israel's Report and at trial, BWTP and CWTP make up no

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<sup>108</sup> Grimholt tr. test. at 1210:11-1211:1.

<sup>109</sup> Grimholt tr. test. at 1219:2-24.

<sup>110</sup> Nevo tr. test. at 734:17-735:15; 737:16-738:6; 809:10-13.

<sup>111</sup> Nevo tr. test. at 811:13-17.

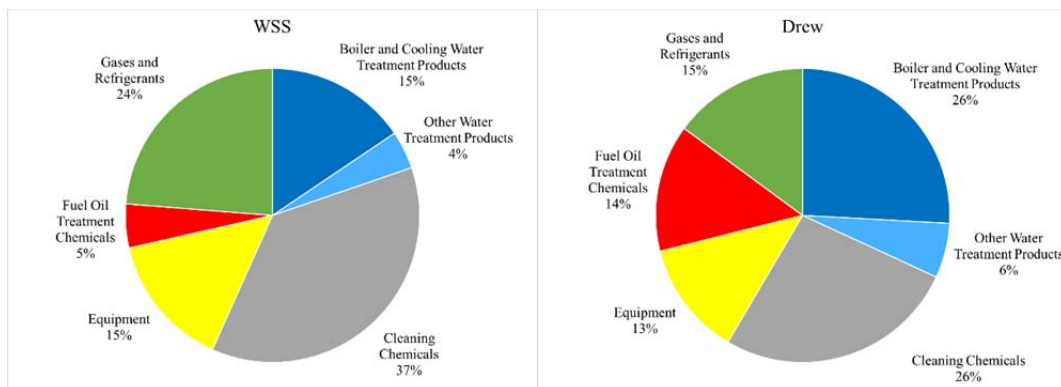
<sup>112</sup> Nevo tr. test. at 722:3-723:13; 812:1-11.

<sup>113</sup> Nevo tr. test. at 812:12-15.

<sup>114</sup> Kelleher tr. test. at 493:16-494:10.

more than 15% of WSS's and no more than 26% of Drew's marine products sales:<sup>115</sup>

**Figure 1 from DX-0060 (Israel Expert Report):  
The Parties' Sales by Marine Product Category 2017**



94. Customers and suppliers generally negotiate and contract for several categories of marine products at the same time.<sup>116</sup>

95. Framework agreements “cover a variety of products, not just water treatment chemical products.”<sup>117</sup> Some framework agreements have fixed fee provisions. A variety of products are also included in the fixed fee “baskets” in those agreements.<sup>118</sup>

96. All of the “Global Fleets” who purchase BWTP and CWTP from WSS also purchase in at least one category of marine products in addition to water treatment products, and 78% purchase from all (100%) four categories (for Drew the shares are 99% and 68%, respectively).<sup>119</sup>

**B. The FTC’s Artificial and Shifting Definition of Global Fleets Should be Rejected**

97. The Merger Guidelines are clear that targeted groups of customers should be

<sup>115</sup> Israel Report ¶ 28 (DX-0060).

<sup>116</sup> Thompson tr. test at 293:3-7; *see also* Medina at 184:17-186:7.

<sup>117</sup> Sarro tr. test. at 140:16-19.

<sup>118</sup> Sarro tr. test at 110:1 to 113:3; Thompson tr. test at 293:3-7; Rice Dep. At 141:03-06 (PX70028); JX-0001-0030.

<sup>119</sup> Israel Report ¶ 29 (DX-0060); *see also* Israel tr. test. at 1539:14-18.

defined only if they produce market shares that are “more helpful in predicting the competitive effects of the merger.”<sup>120</sup> The Guidelines further provide that base market shares on a *broad* group of customers may be used—even when a targeted set of customers could be defined—“if doing so would more accurately reflect the competitive significance of different suppliers in the relevant market” or “when better data are thereby available.”<sup>121</sup>

98. “Defining a market around a targeted consumer, therefore, requires finding that sellers could ‘profitably target a subset of customers for price increases . . . .’”<sup>122</sup>

99. The concept of “Global Fleets” based on 10 globally trading vessels was constructed specifically for this litigation. The concept does not appear anywhere in company documents.<sup>123</sup> This is inconsistent with case law making clear that information in ordinary course documents should be used in defining the relevant market.<sup>124</sup>

#### **1. Dr. Nevo’s “Global Fleets” Construct**

100. The FTC limits its proffered relevant market to a subset of customers, which the FTC calls “Global Fleets.”<sup>125</sup>

101. Dr. Nevo constructed 9407 “fleets” by using certain fields in a database of vessels maintained by Lloyd’s List Intelligence, a shipping and maritime intelligence company (“Lloyd’s”).<sup>126</sup> He did not cross-check his list against the parties’ customer lists, did not consider actual contracts, and did not attempt to determine whether a fleet might be part of a

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<sup>120</sup> HMG § 4.1 JX-0288-016.

<sup>121</sup> HMG § 5.2 JX-0288-020.

<sup>122</sup> *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 118 (D.D.C. 2016) (quoting *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 38 (D.D.C. 2015)).

<sup>123</sup> Knowles tr. test at 1395:13-1396:5; Grimholt tr. test at 1224:13-1226:8; Nevo tr. test. at 763:2-8, 587:20-25.

<sup>124</sup> See e.g., *H&R Block*, 833 F. Supp. 2d at 53-54 (ordinary course documents are “strong evidence” of a relevant product market).

<sup>125</sup> Amended Comp. [Doc. 43] ¶ 3.

<sup>126</sup> Webpage: Lloyd’s List Intelligence – About, PX90066.

group purchasing organization.<sup>127</sup>

102. Dr. Nevo then focused on “Global Fleets” as a subset of the constructed fleets. The FTC defines “Global Fleets” as fleets with ten or more ships that (1) are over 1,000 gross tons and (2) travel over 2,000 nautical miles in a given year as the crow flies.<sup>128</sup>

103. “Global Fleets” is not a concept used anywhere by the merging parties, and there are no ordinary course documents identifying such a subset of customers.<sup>129</sup>

104. Dr. Nevo indicated that he selected 10 globally trading vessels as a cut-off to qualify as a “Global Fleet” as follows: “So then the question is, where’s the cutoff. And I started with ten. Ten is a starting point. I mean, it’s a round number. That’s literally the reason we chose them. That was the original – that was the baseline definition.”<sup>130</sup>

105. Using this arbitrary definition, Dr. Nevo identified 532 “Global Fleets,” or 6% of the 9407 constructed fleets.

106. Some Global Fleets consist of far more regionally trading vessels than globally trading vessels. Crowley, for example, has a fleet of 160 vessels,<sup>131</sup> 73 are tugboats,<sup>132</sup> and no more than 11 of the 160 vessels trade globally.<sup>133</sup> In its current contract with Drew, Crowley did not identify a single port outside the U.S. for product delivery,<sup>134</sup> and in the last 3 years, 97% of all its purchases from Drew were delivered to a vessel in a U.S. port.<sup>135</sup>

107. Some Global Fleets are members of group purchasing organizations along with

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<sup>127</sup> Nevo tr. test. at 778:19-22.

<sup>128</sup> See DX-0223 at 5.

<sup>129</sup> Knowles tr. test at 1395:13-1396:5; Grimholt tr. test at 1224:13-226:8.

<sup>130</sup> Nevo tr. test. at 587:20-25.

<sup>131</sup> Medina tr. test. at 183:6-8 and JX-0118.

<sup>132</sup> Medina tr. test. at 227:7 and JX-0118.

<sup>133</sup> Medina tr. test. at 227:7 - 228:4.

<sup>134</sup> Medina tr. test. at 209:4-11.

<sup>135</sup> Medina tr. test. at 214:23-215:1.

non-Global Fleets, meaning that they are both getting the same pricing and contracts, but are nonetheless treated differently under the model.<sup>136</sup>

## 2. Dr. Nevo's construct is not used in the ordinary course

108. The merging parties and other industry participants do not analyze the market or make pricing decisions in relation to Dr. Nevo's "Global Fleets."<sup>137</sup>

109. WSS has as a sales tool called the Potential Sales Model that includes the concept of global trading patterns, but WSS does not rely on those patterns to estimate sales potentials.<sup>138</sup>

110. The metric of "globally trading vessels" is not used internally for sales, pricing, or strategic decisions at WSS.<sup>139</sup> Indeed, Mr. Grimholt has "never c[o]me across" the idea of ten globally trading vessels owned by a customer "in [his] time at the company."<sup>140</sup>

111. The term "global fleet," when used in the ordinary course by WSS, refers to all vessels worldwide greater than 1000 gross tons.<sup>141</sup>

112. Drew does not differentiate between global and local customers in pricing, and does not use trading patterns in its sales efforts.<sup>142</sup>

## C. The FTC has Improperly Limited the Competitors in the Relevant Market

113. In order to "recognize competition, where, in fact competition exists,"<sup>143</sup> a proper market definition must also account for all suppliers of the product(s) in question.

114. "In determining market share, the entire relevant market must be assessed and

<sup>136</sup> Nevo tr. test. at 780:8-784:3.

<sup>137</sup> Israel tr. test. at 1468:5 – 1469:1-14; Knowles tr. test at 1395:13-1396:5; Grimholt tr. test at 1224:13-1226:8.

<sup>138</sup> Grimholt tr. test. at 1223:17–1224:12; *see also* Israel tr. test. at 1494:8-1497:2.

<sup>139</sup> Grimholt tr. test. at 1224:13–1225:6.

<sup>140</sup> Grimholt tr. test. at 1225:7–15.

<sup>141</sup> Grimholt tr. test. at 1223:6–16.

<sup>142</sup> Knowles tr. test. at 1390:15–25; Israel Report ¶ 88–89, 91 (DX-0060).

<sup>143</sup> *Brown Shoe*, 370 U.S. at 336–37.

whether or not a product goes through a middleman cannot be a determining factor.”<sup>144</sup>

115. Nonetheless, Dr. Nevo excluded testing equipment manufacturers, like Hach and Parker Hannifin, from his market even though they sell in competition with Drew and WSS.<sup>145</sup>

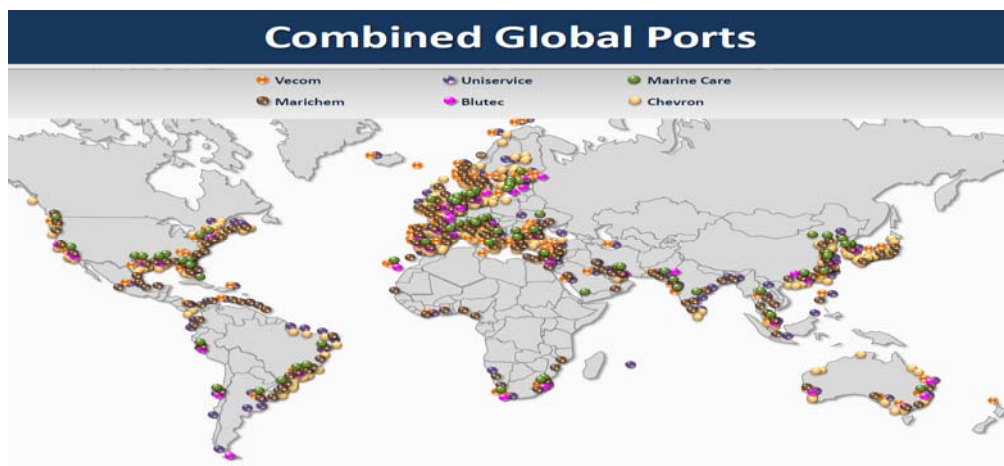
116. Dr. Nevo also excluded industrial water treatment suppliers like Kurita, Solenis, and Ecolab, even though they currently sell BWTC or CWTC to marine customers directly or through distributors.<sup>146</sup>

117. Dr. Nevo similarly omitted global ship chandlers (like Seven Seas and Wrist) and aggregators (like Moscord) who currently do or could easily facilitate the sales of BWTP and CWTP to vessels on a global basis.<sup>147</sup>

**1. There are many competitors currently supplying these products**

118. WSS and Drew appear to be the two largest suppliers of marine BWTP and CWTP. However, the FTC acknowledges that there are a number of other suppliers currently selling these products to Global Fleets, including but not limited to those discussed below.

119. These competitors are not regional, but rather serve ports around the globe:



<sup>144</sup> *Energex Lighting Indus., Inc. v. N. Am. Philips Lighting Corp.*, 765 F. Supp. 93, 102–03 (S.D.N.Y. 1991).

<sup>145</sup> Nevo tr. test. at 848:14-17; 849:14-19.

<sup>146</sup> Nevo tr. test. at 749:20-750:13.

<sup>147</sup> Nevo tr. test. at 744:14-747:3.

a. **Marichem**

120. Marichem is a marine product supply company with its headquarters in Greece.

121. Marichem's website emphasizes its "wide range of products," which "are available at more than 2,100 ports, supplied by a distribution network of 196 stock points."<sup>148</sup>

122. The merging parties compete with Marichem. For example, [REDACTED]

123. Rene Fry, a former employee of Military Sealift Command ("MSC"), testified that his research suggested that Marichem might be able to serve MSC's chemical needs.<sup>150</sup>

124. In a letter to the FTC in March 2018, Marichem stated to the FTC that it has "already expanded, especially when it comes to our worldwide network, [but] continue expanding our sales offices in the major marine markets of the world. We already have a big part of the market in Singapore, Hong Kong, Korea, Germany, Italy, Netherlands, and we are now gaining more and more customers in Japan and the USA. . . . We, as Marichem serve approximately 20,000 port calls per year, we are supplying one delivery every 12 minutes[.]"<sup>151</sup>

b. **Vecom**

125. Vecom is a marine product supply company headquartered in the Netherlands. Vecom provides the full range of marine products through a network that covers 55 countries and approximately 300 ports and can access over 900 ports through working with other suppliers.<sup>152</sup> [REDACTED] UNI Americas [REDACTED]

[REDACTED] allowing Vecom to serve customers in all U.S. ports and

<sup>148</sup> See DX-0011.0006 and DX-0011 (Marichem Video).

<sup>149</sup> See DX-1250 (Email from C. Gomez to M. Ievolo, November 8, 2016) (Noting that the customer "felt that Drew and Marichem were much easier to do business with [than WSS].")

<sup>150</sup> Fry tr. test. at 935:14-936:5.

<sup>151</sup> Marichem Email to FTC, Mar. 9, 2018 DX-0413.

<sup>152</sup> Vecom website shots, DX-0015.0002-03; DX-0016.0001.

everywhere else UNI Americas has a presence, including Singapore.<sup>153</sup>

126. Mr. Fry testified that his research suggested that Vecom might be able to serve MSC's chemical needs.<sup>154</sup>

127. After learning about the proposed transaction between WSS and Drew, [REDACTED] a large marine logistics and transportation company that owns or operates 163 vessels, sent Vecom a request for quotation ("RFQ").<sup>155</sup>

128. Crowley testified that it thought Vecom could cover Crowley's geographic needs and that it might consider Vecom if Crowley "did a major rebid."<sup>156</sup>

**c. UNIservice**

129. UNIservice is a consortium of companies that supply marine chemicals, gases, and safety equipment.<sup>157</sup> According to UNIservice Italy's website, the company uses "an agency model to support the key needs of global shipping companies in more than 900 ports."

130. UNIservice competes with WSS, Drew, Blutec, and Marichem.<sup>158</sup>

131. Christopher Cappelen, Managing Director of UNIservice Germany Marine Products GmbH ("UNIservice Germany") stated in a declaration that "[f]ollowing WSS's proposed acquisition of Drew Marine, we think our water treatment chemicals business will expand considerably if it comes to happen."<sup>159</sup>

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<sup>153</sup> [REDACTED]

<sup>154</sup> See Fry testimony at 935:14-936:5

<sup>155</sup> [REDACTED]

<sup>156</sup> Medina tr. test. at 218:18-22 ; 248:16-19.

<sup>157</sup> Despite the FTC stating in their closing statement that UNIservice Turkey does not have a website (See FTC Closing Statement 1841:24), UNIservice Turkey does in fact have a website: <http://www.uniservice.com.tr/>; See DX-0066.0005-07 (FTC's Second Objections and Responses to Drew's Interrogatories, Response to Interrogatory 3) and PX61000 at 033 (Nevo's Report).

<sup>158</sup> Kelleher tr. test. at 516:25-518:15.

<sup>159</sup> Uniservice Germany GmbH Decl., DX-0004.



d. **Marine Care**

132. Marine Care is a marine chemical supply company with its headquarters in the Netherlands. Marine Care's website lists a network of 107 ports across 41 countries.<sup>160</sup>

133. Marine Care competes globally.<sup>161</sup>

134. [REDACTED]

135. Royal Caribbean Cruise Lines ("Royal Caribbean" or RCCL) currently buys more water treatment chemicals from Marine Care than from Drew or WSS, and Marine Care also bid for RCCL's other chemicals.<sup>163</sup>

136. The CEO of Marine Care stated in a declaration, "Marine Care strongly believes by this merger going through there will actually be an opening in the market for us smaller suppliers and we are in favor of it. . . . It is our strong opinion that if the merger goes through, the market will be moving a lot more towards diversification and get a more level playing field."<sup>164</sup>

e. **Blutec**

137. Blutec is an Italian-based supplier of marine chemicals.<sup>165</sup>

138. According to Blutec's homepage, the company is "capable of responding [to] every technical and commercial need in all major ports, worldwide."<sup>166</sup>

139. Blutec serves Mediterranean Shipping Corporation,<sup>167</sup> the second largest container company in the world. Mediterranean Shipping Company operates cruise vessels

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<sup>160</sup> Marine Care Ports Served, DX-0012.

<sup>161</sup> Kelleher tr. test. at 518:4-5.

<sup>162</sup> Thompson tr. test. at 303:14-17.

<sup>163</sup> PX70028 (Rice Deposition) at 51:2-6; 60:6-9.

<sup>164</sup> Marine Care Decl., PX80013.

<sup>165</sup> Kelleher tr. test. at 515:12-16; 516:9-10.

<sup>166</sup> Blutec Website Screen Shots, DX-0008.

<sup>167</sup> Kelleher tr. test. at 515:17-24.

globally and is Blutec's largest customer.<sup>168</sup>

f. **UNI Americas**

140. UNI Americas is a U.S.-based supplier of water treatment chemicals, tank cleaning chemicals, maintenance chemicals, fuel treatment chemicals, and technical services.<sup>169</sup>

141. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

142. This distribution model allows UNI Americas to serve "[REDACTED]"

[REDACTED]

[REDACTED]

g. **Chevron Marine**

143. Chevron Marine, a subsidiary of one of the largest companies in the world, has an extensive, worldwide distribution network of 500 ports.<sup>173</sup>

144. Chevron Marine principally sells lubricants, but also sells marine chemicals, including two well-positioned premier cooling water treatment products.<sup>174</sup>

h. **Other Marine Global Distributors**

145. Other suppliers of marine chemicals that the FTC conceded in discovery are in the market alleged by the FTC include: Alpha Marine, Chemo Marine, EazyChem, Ertek, Marisol Marine Chemicals, and Star Marine.

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<sup>168</sup> Kelleher tr. test. at 515:15-516:8.

<sup>169</sup> Kelleher tr. test. at 515:15-16; 516:9-10.

<sup>170</sup> Franzo tr. test. at 363:18-364:22; 416:20-25.

<sup>171</sup> Franzo tr. test. at 364:5-22; 416:20-417:23.

<sup>172</sup> Franzo tr. test. at 417:24-418:11.

<sup>173</sup> Chevron Marine Screen Shots, DX-0009.

<sup>174</sup> Kelleher tr. test. at 529:13-530:2.

**2. Manufacturers of testing equipment who sell in competition with Drew and WSS should be included in the relevant market**

146. Hach is the largest water treatment testing provider in the world. It sells equipment to Drew, Drew's competitors, and directly to vessels, making it a competitor.<sup>175</sup>

147. This is also true of Parker Hannifin, a global company that makes equipment for Drew, its competitors, and sells directly to ships.<sup>176</sup>

**3. Industrial Suppliers of water treatment chemicals are included within the relevant market**

148. Industrial water treatment chemical companies (e.g., Kurita, Ecolab, and Suez Water) manufacture BWTC and CWTC that can be (and are) used in marine equipment.<sup>177</sup>

**a. Kurita**

149. Kurita is a large, Japan-based industrial water treatment company with approximately [REDACTED] in total water chemical sales.<sup>178</sup> Kurita has sold marine water treatment chemicals since shortly after World War II.<sup>179</sup> Today, its presence is largest in the Japanese fleets, which, like the commercial fleets of other nations, travel the globe.<sup>180</sup>

150. Kurita is already a strong industrial water chemical competitor in Asia and Latin America, and it is expanding with recent acquisition in Europe, the Middle East, and the U.S.<sup>181</sup>

151. [REDACTED]  
[REDACTED].<sup>182</sup> There is no constraint on the ability of Kurita to increase its sales to "Global Fleets."

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<sup>175</sup> Kelleher tr. test. at 499:25-500:10.

<sup>176</sup> Kelleher tr. test. at 500:11-23.

<sup>177</sup> See Lange tr. test. at 1141:10-1142:12; 1165:21-1166:4; 1169:21-1170:4.

<sup>178</sup> PX80010 (Declaration of Mark Pincumbe).

<sup>179</sup> Kurita Website Screen Shots, DX-0010; Kelleher tr. test. at 525:17-526:5; 527:5-13.

<sup>180</sup> Kelleher tr. test. at 526:2-19.

<sup>181</sup> Lange tr. test. at 1183:1-13; DX-0010.0002; *see also* Kurita Press Release <http://www.mediaoffice.ae/en/media-center/news/27/7/2017/jafza.aspx>.

<sup>182</sup> JX-0283.

**b. Solenis**

152. Solenis is a global chemical manufacturer that produces the full range of BWTP and CWTP sold by Drew in the U.S.<sup>183</sup>

153. Solenis produces similar formulas for their industrial customers and for Drew. If Drew stopped buying Solenis products, Solenis could readily supply another distributor.<sup>184</sup>

154. Solenis recently announced a merger with BASF, “which will make them even a stronger global competitor” and Ecolab “consider[s] Solenis as a competitor.”<sup>185</sup>

**c. Ecolab**

155. Ecolab is a multi-divisional \$14 billion multi-national company and the premier supplier of chemicals to the cruise industry.<sup>186</sup>

156. Ecolab owns the largest water treatment company in the world: Nalco.<sup>187</sup>

157. Nalco is roughly a \$3 billion company with a presence in over 170 countries.

158. Nalco’s NALCOOL 2000 is the leading product in closed-loop cooling water treatments for both land and marine customers, even though the chemistry is over 40 years old and well known.<sup>188</sup>

159. Nalco has “a very well-known brand” in industrial water treatment and has been in existence for at least 75 years.<sup>189</sup> Nalco is so well known that “people will phone in and buy [NALCOOL 2000] and continue to buy it because it has worked for them in the past.”<sup>190</sup>

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<sup>183</sup> Knowles tr. test. at 1370:25-1371:6.

<sup>184</sup> Knowles tr. test. at 1380:7-24.

<sup>185</sup> Lange tr. test. at 1183:14-18.

<sup>186</sup> Kelleher tr. test. at 528:14-18; Lange tr. test. at 1129:3-25.

<sup>187</sup> Kelleher tr. test. at 527:17-21; Lange tr. test. at 1129:3-1130:13

<sup>188</sup> Kelleher tr. test. at 528:3-13; Lange tr. test. at 1168:24-1169:12, 1172:8-15.

<sup>189</sup> Lange tr. test. at 1178:21-1179:9.

<sup>190</sup> Lange tr. test. at 1141:10-1142:5.

160. Nalco Water sells water treatment chemicals to the marine business.<sup>191</sup>

161. [REDACTED]

d. **Suez**

162. Suez Water, which recently bought GE Water, is at least a \$1 billion company<sup>193</sup> that offers BWTC and CWTC.<sup>194</sup>

4. **Ship Chandlers**

163. “Ship chandlers” are distributors that supply a wide range of marine products at ports around the world. While ship chandlers do not have production facilities, they can and do routinely distribute marine products manufactured by others.<sup>195</sup>

164. Drew’s current operations rely heavily on ship chandlers.<sup>196</sup>

165. A Deloitte presentation to WSS in 2016 specifically highlighted the competitive threat posed by chandlers.<sup>197</sup>

a. **Wrist**

166. Wrist is a large ship chandler with operations in Europe, North America, China, Emirates, and Singapore.<sup>198</sup>

167. [REDACTED]

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<sup>191</sup> Lange tr. test. at 1160:16-22.

<sup>192</sup> Thompson tr. test. at 308:20-25.

<sup>193</sup> Lange tr. test. at 1183:19-22.

<sup>194</sup> Suez Website Screen Shots, DX-0043.

<sup>195</sup> Liantonio Dep. at 12:11-22 (PX70013).

<sup>196</sup> Knowles tr. test. at 1369:14-19; 1370:2-9.

<sup>197</sup> Israel Report ¶ 72 (DX-0060) (citing DX-2520, Deloitte Presentation, “Marine Products, Shape of digital disruption,” June 2016, at 8).

<sup>198</sup> Wrist Website Screen Shots, DX-0025.

<sup>199</sup> See Liantonio Dep. at 18:12–15 (PX70013).

168. [REDACTED]

[REDACTED]

169. [REDACTED]

[REDACTED]

170. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b. **Seven Seas**

172. Seven Seas is a global ship Chandler with operations in 600 ports in Asia, Africa, the Middle East, Europe, and North and South America.<sup>204</sup>

173. Seven Seas' sister company, Stromme, already competes with WSS and Drew for the supply of cleaning and maintenance chemicals and services by utilizing Seven Seas' distribution network.<sup>205</sup> Stromme and Seven Seas could easily move into the boiler and cooling water treatment segment by contracting with a toll manufacturer.

c. **Aggregators like Wrist, Seven Seas are likely already using their distribution networks to act as distributors for other suppliers looking to expand their distribution networks.**

174. Other potential and current competitors include Amazon-like aggregators who

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<sup>200</sup> Liantonio Dep. at 42:5–42:9 (PX70013).

<sup>201</sup> Liantonio Dep. at 78:4–79:11 (PX70013).

<sup>202</sup> Liantonio Dep. at 49:2–19 (PX70013).

<sup>203</sup> Liantonio Dep. at 64:11–65:16 (PX70013).

<sup>204</sup> See PX90128-001.

<sup>205</sup> See PX90070-001–04.

provide easy access to and distribution for suppliers.<sup>206</sup> For instance, Moscord, a recent entrant, is using a model where it provides a procurement portal as well as all of the delivery logistics. The company is led by executives from ShipServ, Maersk, MAN Diesel, and others who have experience in shipping, logistics, supply chain, and procurement. Moscord launched its business in March 2018 and is already in three major ports.<sup>207</sup> Moscord intends to offer marine chemicals and has announced a goal of being “a truly global, marketplace which brings the world’s maritime buyers and sellers together, accessible anywhere, anytime, with goods delivered directly to the vessel at the touch of a button.”<sup>208</sup>

## **5. Industrial suppliers can outsource distribution like Drew does**

175. Even without expanding their current operations, industrial suppliers could use existing production facilities and chandlers could use existing distribution to create a new source of competitive supply.<sup>209</sup>

176. Dr. Nevo did not include this possibility in his models even though this is what Drew itself does.<sup>210</sup>

## **VIII. THE MARKET IS NOT CONCENTRATED**

### **A. Market size is better measured by vessels than revenues**

177. The Merger Guidelines state that “[t]he Agencies measure market shares based on the best available indicator of firms’ future competitive significance in the relevant market. This may depend . . . on the availability of data.”<sup>211</sup>

178. Here, the parties did not have revenue data from many of the relevant competitors

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<sup>206</sup> See Grimholt tr. test. at 1213:9–1214:7.

<sup>207</sup> Moscord Pte Ltd Press Release, ‘Maritime Amazon’ set to shake up marine purchasing, DX-2631; *see also* Moscord Pte Ltd Promotional Video, DX-2632.

<sup>208</sup> *Id.*

<sup>209</sup> Israel tr. test. at 1575:9–1578:23.

<sup>210</sup> Israel tr. test. at 1578:22–1586:25; Nevo tr. test. at 743:6–754:24.

<sup>211</sup> HMG § 5.2 JX-0288-019 to -020.

and the “available” revenue data was unverified.<sup>212</sup> As a result, using more robust data that provides a better picture of future competitive significance is important.<sup>213</sup>

179. Dr. Nevo estimated the size of the market by summing the unverified revenues of the BWTP and CWTP suppliers from which the FTC obtained revenue data, and then making assumptions about the revenues for some of the firms he is missing.<sup>214</sup>

180. Dr. Nevo did not take any steps to verify the provided third-party revenue data.<sup>215</sup>

181. Despite acknowledging that they “might need to be” in the market, Dr. Nevo does not include any revenues for third party sales of equipment in his model.<sup>216</sup> This is significant because [REDACTED] of Drew’s revenues for BWTP and CWTP are for equipment sales and the defendants presented evidence that third party equipment manufacturers sell directly to customers.<sup>217</sup>

182. Lloyd’s data provides a full count of vessels, including those at least 1,000 gross tons.<sup>218</sup>

183. Each vessel needs BWTC and CWTC.<sup>219</sup>

184. Reviewing the number of vessels served by each merging party indicates what percentage of vessels each serves, although it does not indicate what percent of each vessel’s needs they provide.<sup>220</sup> In other words, this methodology for market share gives an accurate percent of sales for the vessels they do not serve (0%), but an often inflated percent of sales for

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<sup>212</sup> Nevo tr. test. at 718:25–719:3.

<sup>213</sup> Israel tr. test. at 1487:17–1490:13.

<sup>214</sup> Nevo tr. test. at 628:8–629:8; Israel tr. test. at 1487–90.

<sup>215</sup> Nevo tr. test. at 718:25–719:3.

<sup>216</sup> Nevo tr. test. at 848:1–17.

<sup>217</sup> Kelleher tr. test. at 500:6–8; DX-2377; DX-2378.

<sup>218</sup> Israel tr. test. at 1445:14–19.

<sup>219</sup> Israel tr. test. at 1485:23–1487:9.

<sup>220</sup> Israel tr. test. at 1485:23–1487:9.



the vessels to whom they sell because it assumes they have 100% of the sales to those vessels.

**B. The FTC is not entitled to a presumption**

185. Based on the foregoing, the FTC has not properly defined a relevant market; rather, it has advanced an insupportably narrow market definition. Because it is the FTC's burden to define a proper relevant antitrust market, it cannot demonstrate a likelihood of success on the merits as required to obtain a preliminary injunction.<sup>221</sup>

186. Furthermore, it follows that Dr. Nevo's market concentration figures are inflated, as borne out by the analyses performed by Dr. Israel, showing HHI's below the threshold for a presumption of anticompetitive effects.<sup>222</sup>

187. Indeed, Dr. Nevo's analysis indicates that "Global Fleets" are presently subject to a highly concentrated market and therefore have fewer choices than non-"Global Fleets." This is totally inconsistent with the real world fact that "Global Fleets" do not pay more than those other customers pay and actually, on average, pay slightly lower prices.<sup>223</sup>

188. Accordingly, the FTC's market is flawed and conclusions derived therefrom have no legal significance—and certainly not enough to grant the extraordinary remedy of a preliminary injunction.

**C. A corrected market definition and a more appropriate measure of market shares rebuts any presumption of harm to competition**

189. Consistent with the merging parties' ordinary course approach, Dr. Israel computed market shares using total vessels with a weight of at least 1,000 gross tons that had any purchases in 2017. Dr. Israel did not limit his analysis to Dr. Nevo's Global Fleets.

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<sup>221</sup> See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957) ("Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act."); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 (8th Cir. 1999) ("The FTC's failure to prove its relevant geographic market is fatal to its motion for injunctive relief.").

<sup>222</sup> Israel tr. test. at 1491:15–1492:14.

<sup>223</sup> Israel tr. test. at 1506:17–1507:12.

190. Also consistent with the merging parties' ordinary course, Dr. Israel focused on a market that includes all marine products. In that market, he found a combined share of 41%.<sup>224</sup>

191. Dr. Israel calculated HHI's based on these market shares. His calculation resulted in HHI's of 1885, well below the threshold for a presumption.<sup>225</sup>

192. Using the same methodology, Dr. Israel also computed the merging parties' shares for BWTP at 43% and for CWTP at 47%, both much lower than Dr. Nevo's estimates.<sup>226</sup>

193. These shares do not take into account that some of the vessels supplied by the parties are customers that make only occasional or "one-off" purchases from the merging parties, meaning that most of their purchases likely come from other suppliers.

## **IX. CURRENT PRICING IS INCONSISTENT WITH MARKET POWER**

### **1. Prices are low compared to value**

194. Virtually all vessels use BWTC and CWTC, but those products make up only a very small portion (around 1%) of a vessel's operating cost.<sup>227</sup>

195. Because costs are assumed to be less than revenue (otherwise there is no profit), these products make up an even smaller portion of a vessel's revenue.<sup>228</sup>

196. The FTC claims that these products and services are vital.<sup>229</sup> If an item is "vital" to a vessel, then the vessel should be willing to pay anything up to its break-even point because without the vital input, the vessel cannot sail and cannot make money.<sup>230</sup>

197. The low cost of BWTP and CWTP relative to value shows that competition is intense enough to prevent suppliers of BWTP and CWTP from capturing anything close to the

<sup>224</sup> Israel tr. test. at 1490:14–1491:7.

<sup>225</sup> Israel tr. test. at 1497:11–20; Table 9 Israel Report (DX-0060).

<sup>226</sup> Israel tr. test. at 1493:11–17.

<sup>227</sup> Nevo Report ¶ 29 (PX61000); Israel Report ¶ 27 (DX-0060 (discussing Nevo Report)).

<sup>228</sup> Israel Report ¶ 27 (DX-0060).

<sup>229</sup> Dkt. No. 45, Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, 1.

<sup>230</sup> See Israel tr. test. at 1500:8–25; 1501:1–17.

full value that Dr. Nevo's assumptions indicate they have.<sup>231</sup>

**X. THERE IS NO QUALITATIVE REASON TO BELIEVE THAT THE MERGER WILL HARM COMPETITION**

**A. It is Not Necessary to Have Head-to-Head Competition Between WSS and Drew to Constrain the Prices of BWTP and CWTP**

198. The FTC claims that competition between WSS and Drew acts as a substantial constraint on prices in the FTC's alleged market. However, the FTC put forward minimal and unreliable evidence to that effect, and failed to rebut pricing evidence to the contrary.

**1. Uninformed Customer Testimony is Unreliable and has Little to No Probative Value**

199. The FTC contacted at least 48 customers during its investigation, but testimony from only nine (eight of which are "Global Fleets") is in the evidentiary record, four of whom provided live testimony. Of the nine, five took no position on the merger, two had unclear corporate positions, and only two clearly opposed the merger. The nine customers represent 0.01% of Professor Nevo's total fleets, and the clear opponents represent 0.2% of Professor Nevo's Global Fleets.

200. This stands in stark contrast to *FTC v. Sysco*, where 185 declarations were obtained from industry participants, 115 of those from the FTC<sup>232</sup> and *FTC v. Staples*, where the FTC collected data from at least 81 of the top Fortune 100 companies to conduct its analysis of customer spending behavior.<sup>233</sup>

201. The FTC relies heavily on this small number of "Global Fleets." However, only reliable evidence can support the government's case even in the context of a motion for a preliminary injunction. Thus, the relevant question is whether this microscopic sampling of

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<sup>231</sup> Israel tr. test. at 1500:8–25; 1501:1–17.

<sup>232</sup> *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 21 (D.D.C. 2015).

<sup>233</sup> *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 128 (D.D.C. 2016).

Global Fleets is probative of any issue before the Court.<sup>234</sup> It is not.

202. Customer testimony might be helpful if, in relying on facts rather than subjective opinions, a customer explains why available alternatives or potential entrants are insufficient.<sup>235</sup>

203. The Court should give little weight to concerns expressed by customers that have not fully investigated their options post-merger as testimony that is unfounded, lacks personal knowledge, or that is inaccurate is unreliable.<sup>236</sup> This includes statements from customers that vendors other than defendants cannot meet their needs.<sup>237</sup>

204. The thrust of the FTC customer testimony was that there are no suitable alternatives to WSS and Drew. However, time and time again, the customers conceded that they had done nothing to familiarize themselves with competitive alternatives, and no testifying customer undertook a meaningful or comprehensive review of available sources of marine chemicals.

205. Further, customer preferences alone are not enough to establish harm to competition because preferences shed little light on customers' ability to substitute in response to post-merger price increase.<sup>238</sup>

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<sup>234</sup> See *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir 1995).

<sup>235</sup> See *Oracle*, 331 F. Supp. 2d at 1131; Ilene Gotts & Daniel Hemli, *Just the Facts: The Role of Customer and Economic Evidence in MA Analysis*, 13 Geo. Mason Rev. 1217, 1226 (2006) (“‘Bare’ customer claims that the removal of a competitor is likely to influence adversely prices, quality, etc., are generally unhelpful. Similarly, a customer’s testimony that it would or would not switch to a competing product in response to a hypothetical five or ten percent price increase may not without further explanation be given much weight.”).

<sup>236</sup> See *Oracle*, 331 F. Supp. 2d at 1131 (finding that “unsubstantiated customer apprehensions do not substitute for hard evidence”).

<sup>237</sup> *Id.* (“Although these witnesses speculated on that subject, their speculation was not backed up by serious analysis that they had themselves performed or evidence they presented.”).

<sup>238</sup> See *Arch Coal*, 329 F. Supp. 2d at 122 (despite some customers indicating a preference, “the evidence also shows that customers having that preference nonetheless can use and have used” other products “and benefit from the competition between” their preferred and not-preferred products); *Global Disc. Travel Servs. LLC v. Trans World Airlines, Inc.*, 960 F. Supp 701, 705

206. As the *Oracle* court observed in declining to give weight to similar customer testimony, “[t]he court cannot take the self-interested testimony of five companies which chose to eliminate SAP from consideration and from that sample draw the general conclusion that SAP does not present a competitive alternative to Oracle and PeopleSoft.”<sup>239</sup>

207. As Judge Walker further explained, the value of customer testimony is “limited at best” because “the issue is not what solutions the customers would like or prefer, the issue is what customers could do in response to an anti-competitive price increase.”<sup>240</sup> Judge Bates expressed a similar view in rejecting a government merger challenge.<sup>241</sup>

208. Dr. Areeda, in a treatise that FTC counsel characterized in closing as “the leading antitrust treatise that’s sort of our almost Bible,” referred to subjective customer testimony as a “[l]ess reliable” form of evidence in the merger context.<sup>242</sup>

209. None of the customers offered by the FTC seriously or comprehensively investigated what alternatives they might have in response to a price increase.

a. [REDACTED]

[REDACTED]<sup>243</sup>

b. [REDACTED]<sup>244</sup>

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(S.D.N.Y. 1997) (Sotomayor, J.) (noting that a consumer is not “‘locked into’ Pepsi because she prefers the taste or NBC because she prefers Seinfeld,” and noting “at base, Pepsi is one of many sodas and NBC is just another television network.”).

<sup>239</sup> *Oracle*, 331 Supp. 2d at 1167.

<sup>240</sup> *Oracle*, 331 F. Supp. 3d at 1130–31.

<sup>241</sup> See *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 145 (D.D.C. 2004) (“In many contexts, however, antitrust authorities do not accord great weight to the subjective views of customers in the market.”).

<sup>242</sup> FTC Closing at 1816:7–9; See P. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 538b (May 2018); (“unsubstantiated customer apprehensions do not substitute for hard evidence”).

<sup>243</sup> Medina tr. test. at 166:3–10; 181:3–5; 252:23–253:3; 190:21–192:2.

<sup>244</sup> PX70025 73:7–74:13.

c. Royal Caribbean already purchases water treatment chemicals from Marine Care and has not reviewed any other suppliers.<sup>245</sup>

d. [REDACTED]

e. [REDACTED]

210. Ironically, in perhaps the only example of an FTC witness who undertook a serious look at competing suppliers, Rene Fry, a former employee at MSC, found that Marichem and Vecom could possibly fulfill MSC's demands.<sup>248</sup>

211. The FTC also failed to establish that the limited customer evidence it did put forward was representative of "Global Fleets" more generally. The FTC's expert constructed 532 "Global Fleets" and the FTC made no showing that the 1.5% of these customers from whom any testimony or evidence is in the record is representative of the views of that group, let alone the thousands of customers that Dr. Nevo excluded from his targeted customer construct.

212. In contrast to customer testimony, evidence from competitors, including their declarations, included specific details concerning the assets and industry dynamics that will allow them to expand and replace competition lost as a result of WSS's acquisition of Drew.

213. Testimony from Marichem, the UNIservice entities, UNI Americas, Marine Care, and Chevron Marine describe their global distribution networks, the methods by which they could easily expand those networks, their product lines, their histories of serving large marine fleets, their willingness to expand to meet customer demands, sources through which they obtain

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<sup>245</sup> See PX70028 106:14–18.

<sup>246</sup> DX-0022 ¶¶ 5-6.

<sup>247</sup> Thompson testimony at 302:23–303:1; 304:13–23.

<sup>248</sup> Fry tr. test. at 935:14–936:5.

marine chemicals and how they could obtain more, and their technical services offerings.<sup>249</sup>

214. Dr. Nevo's testimony that he did not consider competitor testimony in making his analysis is at odds with the Merger Guidelines.<sup>250</sup>

## **2. FTC's Data Analysis is Unreliable, Unpersuasive, and Contradicted by Pricing Data**

215. Dr. Nevo relies on Salesforce data and win-loss records to assert that head-to-head competition between WSS and Drew is an essential part of competition in this market. However, he acknowledged that when searching WSS's Salesforce database for information from WSS sales representatives, he could not focus on Global Fleets without an "onerous and potentially error-prone manual classification process"<sup>251</sup> and did not focus only on BWTP and CWTP.<sup>252</sup> He also acknowledged the extremely limited usefulness of the win-loss data.<sup>253</sup>

216. The FTC's reliance on documents mentioning the other party as a competitor also does not establish that competition between the defendants currently constrains prices or is necessary to do so.<sup>254</sup>

217. If the cause of current low prices were Drew's and WSS's head-to-head competition, one would expect to see a projection of increased revenue from higher prices in post-merger plans. Instead, the evidence shows a recognition that customers will continue to have competitive options and that some customers may switch suppliers. As a result, WSS expects to have to cut prices to its largest customers, including by sharing the cost savings from the merger—and not only lowering prices on BWTC and CWTC, but on the whole water

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<sup>249</sup> See *infra* VII. C.

<sup>250</sup> Nevo tr. test. at 719:4–5; HMG § 2.2.3 JX-0288-008 to -009.

<sup>251</sup> Israel Report ¶ 96 (DX-0060).

<sup>252</sup> Nevo tr. test. at 803:17–21.

<sup>253</sup> Nevo tr. test. at 581:7–13; 581:23–582:3.

<sup>254</sup> Nevo tr. test. at 581:19–22; 644:8–645:11.

treatment portfolio.<sup>255</sup>

218. Indeed, prices have historically gone down when WSS merged with an alleged competitor because the efficiencies created savings and the market is very competitive. WSS stands to *lose* customers as a result of the merger and must work to keep them from leaving.<sup>256</sup>

### 3. Customers Use Other Suppliers

219. Dr. Israel considered what happens when vessels stop buying BWTP and CWTP from one of the merging parties.

220. His analyses found that the vast majority that switch away from Drew go somewhere other than WSS and, similarly, the vast majority that switch away from WSS go somewhere other than Drew.<sup>257</sup>

221. That the clear majority of vessels that leave one of the merging parties do not go to the other merging party confirms that there are significant other options in the marketplace.<sup>258</sup>

## XI. HARM TO COMPETITION IS HIGHLY UNLIKELY

### A. “Global Fleets” Are Power Buyers With the Ability and Incentive to Resist Price Increases

222. The existence of powerful buyers is considered when evaluating the likely effects of a transaction.<sup>259</sup>

223. Buyer power here strongly weighs against the government’s claim that WSS will

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<sup>255</sup> Grimholt tr. test. at 1227:10–1229:19.

<sup>256</sup> See Grimholt tr. test. at 1217–18 (discussing Unitor and Nalfleet acquisitions); at 1228–29 (discussing current and future inability to raise prices and inability to reduce quality); *see also* Flaesen at 1292–93 (discussing plans to maintain the high quality of products).

<sup>257</sup> Israel tr. test. at 1522:24–25 – 1523:1–10; 1528:18 to 1532:2.

<sup>258</sup> Israel tr. test. at 1531:22–1532:2.

<sup>259</sup> HMG § 8 JX-0288–030; *Cardinal Health, Inc.*, 12 F. Supp. 2d at 58; *see also R.R. Donnelley & Sons Co.*, 1990–2 Trade Cases (CCH) ¶ 69,239 at 64,855 (D.D.C.1990) (“Well-established precedent and the ... Merger Guidelines recognize that the sophistication and bargaining power of buyers play a significant role in assessing the effects of a proposed transaction.”).



have monopoly power.<sup>260</sup> The FTC defines the proposed market as consisting of only the largest and most sophisticated purchasers of marine chemicals—the customers best able to take advantage of opportunities to defeat an attempt to exercise market power.<sup>261</sup>

224. The Merger Guidelines and case law make clear that powerful and sophisticated customers are well suited to thwart potential anticompetitive injuries from mergers.<sup>262</sup>

225. Dr. Nevo failed to analyze the effect of power buyers—an ironic choice given that the alleged market is constructed around some of the largest customers and given that every customer that was asked indicated it had buyer power.<sup>263</sup>

226. These customers have many options to discipline a price increase, none of which were captured by Dr. Nevo’s merger effects model. These include the ability to: (i) shift purchases of other products (which account for the vast majority of products purchased from WSS and Drew) to different suppliers; (ii) use multiple suppliers of BWTP and CWTP; (iii) threaten to stockpile product and shift purchases of BWTP and CWTP to competitors; (iv) sponsor entry and expansion to create new options as needed.<sup>264</sup>

227. Further, in every case the buyer need only threaten to take such action, and can convincingly bluff.<sup>265</sup>

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<sup>260</sup> See *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001) (stating that sophisticated nature of purchasers can render HHI figures unreliable); see also HMG § 8 (2010).

<sup>261</sup> See Israel Report ¶¶ 207-208 and Tables 17–18 (DX-0060).

<sup>262</sup> See Merger Guidelines § 8 JX-0288-030; *Baker Hughes, Inc.*, 908 F.2d at 986 (finding that existence of sophisticated buyers can “promote competition even in a highly concentrated market”).

<sup>263</sup> See *infra* notes 274–284 and accompanying text (discussing customer testimony concerning leverage associated with being a power buyer).

<sup>264</sup> See *infra* notes 286-306 and accompanying text (discussing levers that power buyers will have post merger).

<sup>265</sup> *Baker Hughes*, 908 F.2d 981, 988 (“If barriers to entry are insignificant, the threat of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs. . . . [T]he threat of potential competition operates as a significant check on monopoly power since

228. The merger is unlikely to substantially reduce competition in the presence of these powerful buyers with many options to discipline prices

**1. Framework agreements cover multiple products**

229. Purchases of marine products are often made according to “framework agreements” that include negotiated discounts off list prices.<sup>266</sup>

230. Framework agreements usually are for a relatively short term (1-3 years), are non-exclusive, and do not guarantee any particular purchase volume by the customer.<sup>267</sup>

231. In other words, customers can effectively end their relationship with the supplier overnight simply by switching supply to another supplier.<sup>268</sup>

232. Framework agreements are typically negotiated by fleet procurement personnel, but purchases are made at the vessel level when additional price negotiations often occur.<sup>269</sup>

233. Framework agreements usually include terms regarding ports at which products are to be supplied. While some customers may contract for supply at more ports than other customers, prices for BWTP and CWTP are not, on average, higher for customers that fall within the FTC’s Global Fleets than for other customers. Indeed, the prices are, in fact, a bit lower.<sup>270</sup>

234. Marine suppliers typically do not know who they are competing against during bids or the nature of competitors’ bids.

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competitors will quickly enter the market if prices are raised significantly.” (citations omitted)); Israel Report ¶¶ 181; 203–17 (DX-0060).

<sup>266</sup> Sarro tr. test. at 110:8–10 and 15–22, 113:11–18 (discussing negotiation types both for specific contracted price and for a discount off a list price); [REDACTED]

[REDACTED] *see also* JX-0248-014 (“Discounts provided to customers often take the form of a flat percentage discount across multiple product categories.”).

<sup>267</sup> Sarro tr. test. at 106:1–18; Grimholt tr. test. at 1221:17–1223:5; *see also* Israel tr. test. at 1479:10–1480:5.

<sup>268</sup> *See* Grimholt tr. test. at 1221:17–1222:16.

<sup>269</sup> *See* Medina tr. test. at 179:5–25; Sarro tr. test. at 106:9–18.

<sup>270</sup> Israel tr. test. at 1506:15–25–1507:1–12.

235. Some customers prefer to purchase all, substantially all, or a particular “basket” of their marine products from a single supplier, while other customers prefer to purchase some products from one supplier and other products from one or more additional suppliers.<sup>271</sup>

236. Some customers “dual source” by contracting with one supplier for a portion of a fleet and contracting with a different supplier for another portion.

## **2. Power Buyers**

### **a. “Global Fleets” Include Multi-billion dollar companies**

237. Customers in Dr. Nevo’s Global Fleets include some of the largest companies in the world – Maersk, which had \$35.56 billion in revenue in 2016; Carnival, which had \$16.39 billion the same year; and Royal Caribbean with \$8.5 billion in revenue in 2016.<sup>272</sup>

### **b. Customers have leverage as significant purchasers**

238. [REDACTED] of Drew’s sales come from its top 10 customers.<sup>273</sup> Accordingly, these customers have tremendous power and leverage in negotiations with Drew. They tend to buy the full product line or at the very least negotiate on the full product line.<sup>274</sup>

### **c. Buying Groups a/k/a group purchasing organizations**

239. Customers can join together to form a buying group, which applies greater pricing power against suppliers.<sup>275</sup> Buying groups use their increased bargaining power to receive lower

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<sup>271</sup> Thompson tr. test. at 296:14–297:10; Kelleher tr. test. at 535:17–537:12; Sarro tr. test. at 128:16–18; Medina tr. test. at 183:9–11; Rice video test. at 137:12–138:17, PX70028 (discussing that although not required to purchase chemicals from one supplier, doing so increases price leverage through volume).

<sup>272</sup> See <https://www.maersk.com/press/press-release-archive/2017/annual-report-2016>; <http://www.carnivalcorp.com/phoenix.zhtml?c=140690&p=irol-reportsannual>; <http://yearinreview.rclcorporate.com/2016/>.

<sup>273</sup> Knowles tr. test. at 1391:1–19.

<sup>274</sup> Knowles tr. test. at 1391:1–20.

<sup>275</sup> Kelleher tr. test. at 530:4–13.

prices across their membership regardless of vessel or fleet size or trading pattern.<sup>276</sup>

240. For example, Marcas is a purchase alliance started by the biggest ship management company in the world. Membership enables ship owners, operators, and managers to come together to negotiate the best possible rates. They pool their purchasing power and negotiate a framework agreement that all members can use. Marcas has 25 shipping companies/ about 1700 vessels in its membership, all of whom have access to the negotiated price.<sup>277</sup>

241. Incentra is a buying group of Norwegian owners and operators that includes a range of vessels from offshore supply vessels to large tankers.<sup>278</sup>

242. Teekay is a member of Teekay Bergesen Worldwide (TBW), a buying group comprised of two of the largest tanker operators in the world.<sup>279</sup> Teekay participates in the TBW group in order to leverage the purchasing power of combined fleets.<sup>280</sup>

**d. Global Fleets are sophisticated buyers**

243. Bigger fleets have more leverage, and customers will strategically restructure vessels and product bundles to ensure lower prices.<sup>281</sup>

244. Mr. Sarro of Teekay stated it believed it was an “attractive customer” and that large volume purchasers hope to have leverage with respect to price terms and other terms and conditions.<sup>282</sup>

245. [REDACTED]

<sup>276</sup> Kelleher tr. test. at 531:3–532:1.

<sup>277</sup> Grimholt testimony at 1222:17–1223:5; *see also* DX-1072.

<sup>278</sup> Kelleher tr. test. at 530:14–531:20; *see also* Grimholt tr. test. at 1221:11-16.

<sup>279</sup> Sarro tr. test. at 119:7–120:8; Kelleher tr. test. at 530:18–531:5.

<sup>280</sup> Sarro tr. test. at 119:19–120:7.

<sup>281</sup> Sarro tr. test. at 119:7–120:8 (vessels); 128:4–18 (products).

<sup>282</sup> Sarro tr. test. at 104:19–21; 120:1–4.

[REDACTED]

246. Mr. Medina of Crowley testified that as a big company and one of the largest purchasers of products for vessels, it could look to move its cleaning products away from Drew if it were unhappy with its BWTP/CWTP prices or services.<sup>284</sup>

**3. Global Fleet customers have many negotiating Levers/Credible Threats**

**a. In the face of a potential price increase, a customer could threaten to shift purchases for non-BWTP/CWTP products**

247. There are many fuel additive suppliers, gases suppliers, cleaning chemicals suppliers, welding gas suppliers, and refrigerant suppliers.<sup>285</sup>

248. If the merged company were to try to increase BWTP/CWTP prices, customers could push back by lining up other suppliers, including by considering moving all marine products to other suppliers.<sup>286</sup>

249. [REDACTED]

[REDACTED]

[REDACTED]

**b. A customer could adapt its purchases to another competitor's network or could shift part of its fleet to another competitor**

250. Most vessels in Dr. Nevo's "Global Fleets" do not use the full extent of either defendant's distribution network, meaning competitors with smaller distribution networks could

<sup>283</sup> Thompson tr. test. at 315:11–13; 316:8–19.

<sup>284</sup> Medina tr. test. at 183:13–15; 189:9–19.

<sup>285</sup> Kelleher tr. test. at 536:11–20.

<sup>286</sup> Kelleher tr. test. at 535:17–536:10; *see also* Grimholt testimony at 1227:14–17 ("So if a customer decides to shift their business, what products, if any, would you expect them to shift away from WSS?" "I would think that they would shift the whole product range that they are currently sourcing from us."); Medina testimony at 188:12–189:19 (discussing market power, Crowley's options if a supplier "tried to take advantage of Crowley").

<sup>287</sup> Thompson tr. test. at 316:8–19.

capture a significant portion of sales.<sup>288</sup>

251. Global Fleets make purchases at far fewer ports than they visit in a given year. In 2017, vessels that were part of Global Fleets that purchased BWTP or CWTP from WSS visited 19 ports on average, but only purchased BWTP or CWTP from 2 ports.<sup>289</sup> Vessels that were not part of Global Fleets that purchased BWTP or CWTP from WSS visited 16 ports on average, and purchased BWTP or CWTP from 2 ports.<sup>290</sup>

252. In 2017, vessels that were part of Global Fleets that purchased BWTP or CWTP from Drew visited 18 ports on average, but only purchased BWTP or CWTP from 2 ports.<sup>291</sup> Vessels that were not part of Global Fleets that purchased BWTP or CWTP from Drew visited 14 ports on average, but only purchased BWTP or CWTP from 2 ports.<sup>292</sup>

253. Global Fleets have *more*, not *fewer* options for when and where to purchase, considering their larger trading patterns.

254. BWTC and CWTC are sold in small 25-liter (6.2 gallon) pails that are stored on vessels.<sup>293</sup> Each container holds 20- to 30-day supply of product. While vessels might be somewhat space-constrained, they have space to store some additional marine chemicals.<sup>294</sup>

255. Approximately 50% of vessels that purchase BWTC or CWTC from WSS or Drew purchase those products no more frequently than every six months.<sup>295</sup> Indeed, vessels

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<sup>288</sup> Israel tr. test. at 1542:17–1547:6.

<sup>289</sup> Israel Report Table 28 (DX-0060).

<sup>290</sup> Israel tr. test. at 1547–50; Israel Report ¶ 256; Table 28 (DX-0060).

<sup>291</sup> Israel tr. test. at 1549–52; Israel Report Table 29 (DX-0060).

<sup>292</sup> Israel tr. test. at 1547–50; Israel Report ¶ 257; Table 29 (DX-0060).

<sup>293</sup> Kelleher tr. test. at 519:1–9.

<sup>294</sup> Sarro tr. test. at 93:4–9 (20' x 20' section); Thompson tr. test. at 321 (locker is “not quite as big as this [court]room”).

<sup>295</sup> Israel tr. test. at 1551:3–13; Israel Report ¶ 34 (DX-0060).

typically carry 90-120 days' worth of water treatment chemicals.<sup>296</sup> A 90-day supply requires 8-16 pails maximum.<sup>297</sup> A demonstrative exhibit used by the FTC at the hearing showed a globally trading vessel picking up water treatment chemicals only twice a year.

256. Several trans-continental voyages can be completed in 90 days: a ship voyage from Japan to the United States takes 20 days. Traveling between Houston and New Orleans takes less than a day.<sup>298</sup>

257. Liner vessels and cruise vessels travel between scheduled ports on a regular basis. Container ships are often liner vessels.<sup>299</sup>

258. Even among vessels with less predictable travel routes, the majority visit major ports where they would be able to purchase BWTP and CWTP at low prices.<sup>300</sup>

259. While proper water treatment is important, no witness in this matter has identified an instance in which lack of supply of BWTP or CWTP has been an issue.<sup>301</sup>

260. Even if a customer did not want to switch its entire fleet to another supplier, faced with a price increase, a customer could threaten to switch part of its fleet to another supplier.<sup>302</sup>

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<sup>296</sup> Kelleher tr. test. at 519:12–520:18.

<sup>297</sup> Kelleher tr. test. at 534:2–5.

<sup>298</sup> Kelleher tr. test. at 520:2–8, 522:3–7.

<sup>299</sup> Kelleher tr. test. at 520:22–521:10.

<sup>300</sup> Israel tr. test. at 1468:10–1469:14; Israel Report ¶ 260 (DX-0060); Table 31 (more than 65% of bulk vessels in the Lloyd's movement data visited at least one of the top 5 most visited global ports in both halves of 2017, and close to 75% visited at least one of the top 15 most visited ports).

<sup>301</sup> See, e.g., Fry tr. test. at 987:16–21 (“Q. And in your 26 years at MSC, has there been such a failure as a result of the boiler water treatment chemicals being out of what? A. It’s such a broad—I can’t answer that question. Can you narrow it down? Q. No, sir. If you don’t recall when, that’s all I need.”); see also Sarro tr. test. at 121:7-14 (discussing lack of knowledge of any time a vessel had ever run out of BWTC).

<sup>302</sup> Indeed, Mr. Sarro testified that it is Teekay’s “negotiation tactic” to refuse to accept any price increases and to threaten to bid out all of its business in response to a price increase on any of its marine product purchases. Sarro tr. test. at 124:11–22; DX-1298.

c. **A customer could work with other suppliers to expand their networks**

261. Suppliers can add distribution sites and ports to their networks to meet a customer's or vessel's needs.<sup>303</sup>

262. Drew serves many ports at which it has only 1-2 customers and, in many cases, serves only 1-2 vessels. Recently, Drew expanded to ports to serve just 1-2 customers.<sup>304</sup>

263. Large customers can sponsor expansion by a supplier by agreeing to purchase product from the supplier.

264. Sponsored entry can provide the supplier with a reputational benefit because winning one account can serve as a stamp of approval and provide a signal to other purchasers that the supplier is a credible competitor.<sup>305</sup>

**4. Switching BWTC/CWTC is not difficult or expensive**

265. Switching suppliers of BWTC or CWTC is something vessel operators do in their normal course of business. Switching can be done over time as part of a vessel's regular maintenance program, as acknowledged by the FTC's expert.<sup>306</sup>

266. Whether or not to flush a system prior to switching is a choice of the customer. Flushing the system is done mainly to give a baseline on the condition of the equipment.<sup>307</sup> Although Drew advises its customers to flush their systems before switching to their products, this is primarily a sales tactic because more product is needed when the boiler is emptied.<sup>308</sup>

267. In his 36-year-career, Mr. Kelleher had never seen a situation "where switching

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<sup>303</sup> See, e.g. Thompson tr. test. at 323–24 (admitting Marine Care, Uni, and Marichem could theoretically open at any port); Israel tr. test. at 1545:22–1547:23; Sarro tr. test. at 294:18–20.

<sup>304</sup> Israel tr. test. at 1583:13–1590:17.

<sup>305</sup> Israel tr. test. at 1590:18–1592:16.

<sup>306</sup> Nevo report ¶ 42; see also Israel Report ¶ 39 (DX-0060) (discussing Nevo report).

<sup>307</sup> Kelleher tr. test. at 476:1–477:2.

<sup>308</sup> See Kelleher tr. test. at 492:20–493:3.



water treatment chemicals had an adverse impact on the operation of the ship's engines," or "where switching [BWTC] had an adverse impact on the operation of the vessel's boilers."<sup>309</sup> Mr. Kelleher further testified that flushing or draining a system is rather simple and inexpensive.<sup>310</sup>

268. Although vessels typically "sole source" for BWTC or CWTC, this is not strictly required: depending on the chemistry of the chemicals, different suppliers' chemicals can be used. The treatment programs, especially in the cooling water system, have pretty consistent base chemistry across the brands. There's not too much variation there.<sup>311</sup>

269. If switching costs were large enough to limit a customer's ability or willingness to switch suppliers of BWTC or CWTC, this would also limit the extent to which customers would switch between WSS and Drew, and, in turn, competition between these parties.

**B. There are no material barriers to entry or expansion, so there can be no harm to competition**

270. Case law is uniform that "[i]n the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time."<sup>312</sup>

271. The Merger Guidelines make clear that a credible threat of new or expanded competition alone may be sufficient to prevent an exercise of market power.<sup>313</sup> Entry need not actually occur in order to constrain prices—the threat of entry is enough particularly when barriers to entry are low.<sup>314</sup>

272. In addition, the growth or entry of new competition does not have to occur

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<sup>309</sup> Kelleher tr. test. at 491:20–492:11.

<sup>310</sup> Kelleher tr. test. at 508:12 – 509:14.

<sup>311</sup> Kelleher tr. test. at 477:3–9.

<sup>312</sup> *United States v. Baker Hughes Inc.*, 908 F.2d at 987; HMG § 9 JX-0288–030 to -031.

<sup>313</sup> HMG § 9 JX-0288-030 to -032.

<sup>314</sup> *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 988 (D.C. Cir. 1990).

instantaneously in order to defeat an attempt to raise prices.<sup>315</sup>

273. If there are competitive assets that can be brought to bear and defeat market power in a one-to-two year period, then there is no antitrust violation.<sup>316</sup> In fact, the treatise that the FTC deems a leading antitrust authority suggests that in cases of alleged unilateral market power (which is this case) mergers should not be blocked if competitive resources and market tools can be brought to bear over the course of three years.<sup>317</sup> The reason for this rule is apparent. As both experts agreed at trial, markets and competition are powerful forces.<sup>318</sup> Competition will find a way over time.

274. This District has also recognized the relevant time frame for the analysis of anticompetitive effects is how the market will be affected over the next three years or so.<sup>319</sup>

275. The FTC's expert admitted that he did not undertake an analysis of the individual barriers to entry or expansion in the alleged market. Defendants on the other hand demonstrated that entry or expansion would be simple and that barriers are low.<sup>320</sup>

276. Dr. Nevo justified his failure to assess potential barriers to entry individually by pointing to the past and suggesting that the failure of potential expanders or entrants to expand or

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<sup>315</sup> *United States v. Baker Hughes Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990) (rejecting Government's argument that defendants must make clear showing of "quick and effective" entry).

<sup>316</sup> *Id.*; see also Rothman tr. test. at 1110:14–1111:4.

<sup>317</sup> See P. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 422b (May 2018) ("[A] firm should be deemed a monopolist only when competition-restoring entry would take more than three years.").

<sup>318</sup> Nevo tr. test. at 748:7–10 ("The market is a strong force. As economists, we listen to it."); Israel tr. test. at 1438:25–1439:5).

<sup>319</sup> See *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 133 (D.D.C. 2016) ("The relevant time frame for consideration in this forward looking exercise [of entry] is two to three years."); *Arch Coal*, 329 F. Supp. 2d at 147–150 (determining that "fringe" competitors' production capacity would be "more than sufficient to absorb any increase in demand ... over the next three years").

<sup>320</sup> See *infra* ¶¶ 293–400.

enter reveals that they will not do so in the future.<sup>321</sup>

277. This approach is inconsistent with the inherently predictive nature of assessing what will happen in the future.<sup>322</sup> It is also factually flawed because Dr. Nevo admits that he also failed to assess the capabilities of current competitors or whether they have in fact been expanding,<sup>323</sup> and failed to assess how easy it would be to use a third party logistics network to expand or enter.<sup>324</sup>

278. In stark contrast to Dr. Nevo and the FTC's approach here, the FTC and their expert in *FTC v. Sysco* analyzed and presented detailed analysis regarding the alleged barriers. For instance, they showed that it would cost \$35 million to build a single distribution center and that an entrant would need a "fleet of expensive, refrigerated trucks" and [p]eople—lots of them— . . . to sell the broadline service, maintain and stock the warehouse, and deliver the products."<sup>325</sup>

279. Also, in stark contrast to this case, in *Sysco* the potential expanders (*e.g.*, the equivalent of Marichem, Marine Care, and UNIservice in this case) said they had "no plans to expand or reposition in order to serve national customers" and that such expansion "would not be 'viable' in the short term given the 'time and cost required.'"<sup>326</sup>

# **1. Entry Must Only Replace Competition from Drew**

280. The question with regard to barriers is whether entry or expansion can be expected to replace the competition lost as a result of the merger – in other words, can another competitor or group of competitors fill Drew's current position in the market?<sup>327</sup>

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<sup>321</sup> Nevo tr. test. at 732:12–16, 828:25–829:3.

<sup>322</sup> *Staples, Inc.*, 190 F. Supp. 3d at 133 (deeming entry analysis to be a "forward looking exercise").

<sup>323</sup> *Id.* at 819:24–820:8.

<sup>324</sup> *Id.* at 732:1–11.

<sup>325</sup> *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 81 (D.D.C. 2015).

<sup>326</sup> *Id.*

<sup>327</sup> HMG § 9.3 JX-0288-032

## 2. The FTC Failed to Establish Any Barriers to Entry

281. The FTC has identified but not tested four general categories of barriers to entry – production, distribution, services, and reputation. The evidence does not support the existence of any such barriers.<sup>328</sup>

282. As detailed above,<sup>329</sup> there are numerous current suppliers with global networks that could expand to replace the competition from Drew—entry need not be greenfield.<sup>330</sup> Those suppliers already have production, distribution, services, and brand recognition/reputation.<sup>331</sup>

283. Further, industrial suppliers, who already have production, services and reputation, could partner with companies with distribution networks, like Wrist and Seven Seas, to offer products to the marine market—essentially mirroring Drew’s current business model.

284. Insofar as smaller suppliers would need to expand their distribution networks to serve customers, the evidence established that this could be accomplished on a largely outsourced basis with minimal sunk costs.<sup>332</sup> Therefore, distribution is not a barrier to entry.

285. The evidence showed that the services provided by Drew are not significant, and the skills required to provide these services are not in short supply. Similarly, acquiring computer programs using Microsoft Excel is not difficult.<sup>333</sup> Accordingly, the provision of services related to BWTP and CWTP is not a barrier.

286. As discussed above, the anecdotal testimony of a few customers regarding their

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<sup>328</sup> Amended Comp. ¶ 63.

<sup>329</sup> See *supra* ¶¶ 117–180.

<sup>330</sup> *Sysco Corp.*, 113 F. Supp. 3d at 81 (“Companies rarely enter new markets without an existing customer base because the costs and risks are prohibitive. There is a real ‘chicken-and-egg’ problem with such expansion, known in the industry as ‘greenfield’ expansion.”)

<sup>331</sup> See *supra* ¶¶ 117–180.

<sup>332</sup> See *infra* ¶¶ 309–328.

<sup>333</sup> See *supra* ¶ 82.

preferences for WSS or Drew products does not create a legitimate barrier to entry.<sup>334</sup>

a. **There are no supply barriers**

i. **Chemistry is well-known, and Products are not unique**

287. There is no claim in this case that the merger will enable WSS to constrain the available supply of BWTC and CWTC.<sup>335</sup> There are multiple large manufacturers of chemicals around the world who make or could make BWTC and CWTC for use by marine customers.<sup>336</sup> Dr. Nevo testified that he had not identified any issue with respect to product supply, and the FTC has not argued otherwise.<sup>337</sup>

288. Indeed, the consolidation of the Parties production footprint will free up capacity of toll manufacturers currently producing BWTC and CWTC for Drew, and these manufacturers may be incentivized to find another outlet for their production.<sup>338</sup>

289. Water treatment is a mature technology, and there have been no real dramatic improvements or changes in the way water is treated for over 40 years.<sup>339</sup>

290. BWTC and CWTC are essentially blends of commodity chemicals. Blenders mix raw ingredients to produce them based on chemical formulas and customer specifications.<sup>340</sup>

291. Product formulas are not patented and can be easily developed.<sup>341</sup>

292. [REDACTED]

[REDACTED]

<sup>334</sup> See *Epicenter Recognition, Inc. v. Jostens, Inc.*, 81 F. App'x 910, 911 (9th Cir. 2003) ("It is apparent from the record that if Jostens should attempt to increase prices or decrease quality, Jostens' existing competitors could easily and quickly expand production and pick up the slack.")

<sup>335</sup> Nevo tr. test. at 894: 17-20.

<sup>336</sup> See supra ¶ 118-147.

<sup>337</sup> Nevo Dep. Tr. at 402:18-403:24 (PX70033).

<sup>338</sup> Israel tr. test. at 1579:21-1580:10.

<sup>339</sup> Kelleher tr. test. at 523:3-19; Lange tr. test. at 1172:8-15.

<sup>340</sup> Israel Report ¶ 220 (DX-0060).

<sup>341</sup> See Kelleher tr. test. at 523:25-525:3.

293. BWTC and CWTC from competing suppliers are often chemically very similar. In fact, some suppliers provide a map between their products and other suppliers' products tied to dosing concentrations should a vessel want to substitute.<sup>343</sup>

294. Engine OEMs typically approve multiple suppliers of each product type, facilitating customers switching among the approved suppliers.<sup>344</sup>

295. The fact that OEMs typically approve multiple suppliers is supported by the documents provided by the OEMs themselves. For instance, MAN Diesel lists Drew, WMS, Marisol/Maritech, UNIservice, Marichem, and Vecom as companies providing permissible cooling water additives that contain nitrite for MAN diesel engines.<sup>345</sup> Wartsila lists Drew, Chevron Marine, GE Water, Marine Care, Maritech/Marisol, Nalco, Vecom, and WSS as companies providing permissible cooling water additives for its closed systems.<sup>346</sup>

296. Competitors have products that are "very similar" to Drew's.<sup>347</sup> For example, Drew's alkalinity products have a similar composition to its competitor's alkalinity products.<sup>348</sup>

**b. Distribution is Not a Barrier**

**i. There are many existing suppliers of water treatment chemicals with worldwide networks**

297. The FTC contends that, in order to compete for sales to Global Fleets, a water treatment chemical supplier must be able to deliver products to ports around the world. While the FTC relies heavily on distribution as a barrier to entry, the record establishes (as discussed

<sup>342</sup> See, e.g., Franzo (UNI Americas) Depo. Tr. at 41:11-42:1 (PX70010).

<sup>343</sup> For instance, Vecom and Marine Care publish equivalency tables on their websites. See Vecom Screen Shots (DX-0015); Supplemental Marine Care Screen Shots (DX-0038)

<sup>344</sup> See DX-0032 and DX-2599.

<sup>345</sup> See DX-0032.0004.

<sup>346</sup> See DX-2599.0007 and PX90141-007.

<sup>347</sup> Kelleher tr. test. at 524:6-8.

<sup>348</sup> Kelleher tr. test. at 524:18-25:3.

above) that there are several existing marine suppliers with global distribution networks. These include, among others, Marichem, Marine Care, UNIservice, Vecom, and Blutec. In addition, Chevron Marine, which sells a premier CWTC, has worldwide distribution.<sup>349</sup>

298. Missing from the record is any evidence showing that any particular WSS and Drew competitors lacks a presence at a particular port that is necessary to compete for the business of Global Fleets. Dr. Nevo testified that he made no effort to compare the distribution networks of particular firms to the WSS and Drew networks.<sup>350</sup> And no customer testified that it had done any comprehensive review of the port coverage of WSS and Drew competitors.<sup>351</sup>

299. On the other hand, several WSS and Drew competitors submitted declarations attesting to their ability to serve hundreds of ports on multiple continents.<sup>352</sup> The Court is therefore left to speculate as to any alleged deficiencies in existing competitor distribution networks, much less as to what barriers competitors would face in adding to their networks.

300. Networks can easily be expanded to meet customers' needs. Several companies have testified that they could easily expand to serve new ports in as little as 3–6 months, often by using the third-party providers in the same manner that Drew does.<sup>353</sup>

ii. **Technical Suppliers can expand or enter using Drew's heavily outsourced business model**

301. Drew operates a heavily outsourced business model. About 2/3 of Drew's business goes through third parties.<sup>354</sup> Drew currently uses six toll blenders on five continents.<sup>355</sup>

302. Drew also outsources much of its distribution. Drew relies on a network of 81

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<sup>349</sup> Chevron Marine Screen Shots, DX-0009.

<sup>350</sup> Nevo tr. test. at 819:24-820:8, 864:7-19, 889:12-14.

<sup>351</sup> See Thompson tr. test. at 297:24-298:11; Sarro tr. test. at 152:22-153:21; Medina tr. test. at 217:2-6.

<sup>352</sup> PX80027 at ¶ 5; PX80010 at ¶ 7; PX81005 at ¶¶ 3-5; PX81000 at ¶ 3-4.

<sup>353</sup> Israel tr. test. at 1583:5–1590:17.

<sup>354</sup> Knowles tr. test. at 1370:10-14.

<sup>355</sup> Kelleher tr. test. at 485:14-15, 494:14-19.

warehouse sites to deliver its marine products to vessels at ports across the world. There are no Drew employees at the 74 outsourced sites.<sup>356</sup> Drew operates seven warehouses, all of which are leased from third parties.<sup>357</sup> Drew owns no distribution warehouses.

303. The warehouses are simple buildings with no specialized equipment.<sup>358</sup>

304. Drew's distribution system includes deliveries to ports more than 200 miles away from the warehouse sites.<sup>359</sup> These deliveries are made by third parties. The use of third party distribution creates flexibility and allows Drew to avoid fixed costs.<sup>360</sup>

305. Drew sales are concentrated in small number of ports or warehouses. Between 15 and 17 warehouses accounted for 70% or more of Drew's 2017 sales to vessels across all categories of marine products, including water treatment products, BWTP, and CWTP.<sup>361</sup>

306. Drew's arrangements with third party tollers and distributors are non-exclusive.<sup>362</sup>

307. Solenis, Drew's U.S. toller, ships products to Drew's outsourced third party warehouse and delivery agent Wrist, which then makes last-mile deliveries to vessels.<sup>363</sup>

308. There are no Drew employees at Solenis or at Wrist.<sup>364</sup>

309. Dowa, Drew's toller in Japan, ships product to Fuji Trading, Drew's outsourced third party warehouse and delivery agent.<sup>365</sup> There are no Drew employees at Dowa or Fuji.<sup>366</sup> Neither Dowa nor Fuji have exclusive contracts with Drew and both can and do toll and

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<sup>356</sup> Knowles tr. test. at 1367:1-6; Kelleher tr. test. at 533:14-22.

<sup>357</sup> Knowles tr. test. at 1367:1-6.

<sup>358</sup> Israel tr. test. at 1585:23-1586:14.

<sup>359</sup> Israel tr. test. at 1584:24-1587:12.

<sup>360</sup> See Knowles tr. test. at 1369:2-1370:9.

<sup>361</sup> Israel tr. test. at 1586-87; Israel Report ¶ 253 Table 26 (DX-0060).

<sup>362</sup> Kelleher tr. test. at 496:5-498:4.

<sup>363</sup> Kelleher tr. test. at 497:17-498:24.

<sup>364</sup> Kelleher tr. test. at 497:17-498:19.

<sup>365</sup> Kelleher tr. test. at 496:5-19.

<sup>366</sup> Kelleher tr. test. at 496:12-17.



distribute for Drew's competitors.<sup>367</sup>

310. Synerlogic is Drew's European toller; it is free to make products for others.<sup>368</sup>

311. The costs associated with sourcing BWTC and CWTC from third party producers are essentially all variable. For example, Drew's tolling agreement with [REDACTED]

312. The prices Drew pays for warehousing and distribution are almost entirely variable—usually including product-specific and weight based charges. Other contracts use other variable pricing, such as per unit, per delivery, per pallet, or percentage of sales value.<sup>370</sup>

313. As a matter of economics, this largely variable cost structure makes entry much easier and more likely because an entrant only bears the costs of the products it needs and does not face the risk of significant sunk costs—costs that it would be unable to recover if its expansion or entry failed. Put simply, variable costs mean that the cost of producing and distributing water treatment chemicals is not a barrier to entry.<sup>371</sup>

314. An outsourced distribution network can be expanded to meet customers' needs. Several companies have testified that they could easily expand to serve new ports in as little as 3–6 months, often by using the third-party providers in the same manner that Drew does.<sup>372</sup>

**c. Ability to Provide Support Services is not a barrier**

315. Testing advice and other services are provided by Drew in only a small number of locations; are simple, straightforward and easily replicated by competitors; and do not represent a

<sup>367</sup> Kelleher tr. test. at 497:4-13.

<sup>368</sup> Kelleher tr. test. at 499:2-8.

<sup>369</sup> Israel tr. test. at 1579:2-1580:22 (production barriers generally); Israel Report ¶ 231-32 (DX-0060).

<sup>370</sup> Israel tr. test. at 1583:5-1590:17.

<sup>371</sup> Israel tr. test. at 1588:8–1590:9.

<sup>372</sup> Israel tr. test. at 1583:5-1590:17.

sustainable source of competitive advantage for the merging parties.<sup>373</sup>

i. **Services provided by port sales engineers are not a barrier**

316. Boiler water is tested at least five times a week.<sup>374</sup> The testing is performed by shipboard engineers.<sup>375</sup> This simple process is similar to checking and maintaining the pH level of a fish tank or the chlorine level of a swimming pool. In fact, testing the pH level is one of the tests done on the boiler and engine cooling water. Additional chemicals are added as needed.<sup>376</sup>

317. Drew's technicians do not visit the ships while they are at sea, but only in port.<sup>377</sup>

318. Drew's technicians do not do the testing and are not allowed to touch the ship's equipment.<sup>378</sup> Many vessel owners do not allow Drew personnel on board at all.<sup>379</sup>

319. Drew's technicians "interface with the vessel's engineers," "speak to them about [the] application of [Drew's] products," "review the testing history," make recommendations," and "support marketing efforts in the fleet."<sup>380</sup> Drew does not charge for these visits.<sup>381</sup>

320. Between January 2016 and February 2018, WSS had between 45 and 51 port sales engineers working at between 30 and 35 sites. Similarly, Drew had between 40 and 53 service engineers between January 2015 and June 2017.<sup>382</sup>

321. The need to hire a small number of engineers is not a sustainable entry barrier, particularly given that an entrant can start with a few engineers and scale up as it grows.<sup>383</sup>

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<sup>373</sup> Israel tr. test. at 1580:23–1583:4.

<sup>374</sup> Kelleher tr. test. at 504:17–22.

<sup>375</sup> Kelleher tr. test. at 505:4–5.

<sup>376</sup> See Kelleher tr. test. at 502:16–503:8.

<sup>377</sup> Kelleher tr. test. at 505:1–3.

<sup>378</sup> Kelleher tr. test. at 505:13.

<sup>379</sup> Kelleher tr. test. at 505:1–506:2.

<sup>380</sup> Kelleher tr. test. at 505:15–22.

<sup>381</sup> Kelleher tr. test. at 505:10–506:2.

<sup>382</sup> Israel Report ¶ 264 (DX-0060).

<sup>383</sup> See Israel tr. test. at 1580:23–1583:5.

**d. Reputation is Not a Barrier to Serving Sophisticated Purchasers**

322. Branding is not an important aspect of competition in BWTP and CWTP because purchasers are sophisticated businesses that are not likely to be influenced by branding.<sup>384</sup>

323. Other competitors currently operate in either the marine space or industrial space and are already established and known to customers.<sup>385</sup>

324. Sophisticated customers have the resources to evaluate whether the chemicals and services offered by different suppliers are comparable and can meet their needs, particularly since customers handle their own boiler and cooling systems and water treatment.<sup>386</sup>

325. As noted, insofar as a few customers have expressed a preference for WSS or Drew, that preference is not a legitimate barrier to entry.

326. The few customer witnesses who indicated that they did not believe that other suppliers could currently provide their BWTP and CWTP needs were not well informed.

a. For example, Rene Fry of MSC did not work at all in water treatment chemicals between at least 2009 and mid-2017 and retired at the end of 2017.<sup>387</sup> In order to assess competitors for his declaration, Mr. Fry visited their websites.<sup>388</sup> While Fry originally believed that there were no other competitors who could supply MSC, after doing additional research, he concluded that Marichem and Vecom might be able to do so.<sup>389</sup>

b. [REDACTED]

[REDACTED]

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<sup>384</sup> Israel tr. test. at 1590:20–1592:16.

<sup>385</sup> Israel tr. test. at 1590:16–1592:16. For example, Marichem is a known brand that has been in the marine supply industry for years. Similarly, Solenis is a leading supplier of industrial chemicals and a known brand to customers that know it is a major supplier of products to Drew.

<sup>386</sup> Israel tr. test. at 1590:20–1592:3.

<sup>387</sup> Fry tr. test. at 925:19–23.

<sup>388</sup> Fry tr. test. at 974:6–10.

<sup>389</sup> Fry tr. test. at 935:14–936:5.

[REDACTED]

[REDACTED]

[REDACTED]

c. Another example is Royal Caribbean's David Rice, who multiple times in his deposition that he did not have personal knowledge of many statements in his declaration<sup>392</sup> and that several statements in his declaration were not entirely accurate.<sup>393</sup>

d. Despite suggesting that WSS and Drew were the only suppliers who could meet Teekay's needs in his declaration, Rob Sarro testified that he had heard of UNIservice but had not researched it. He also acknowledged that he had not assessed the capabilities of several other competitors, including Marine Care, Vecom, or Blutec.<sup>394</sup>

e. Osvaldo Medina suggested in his declaration that WSS and Drew were the only suppliers who could meet Crowley's needs, but he testified that he had not researched whether other suppliers could serve Crowley's needs.<sup>395</sup>

### **3. Historical Experience Does Not Establish the Existence of Barriers to Entry or Expansion**

327. Dr. Nevo relies on the "lack of meaningful entry" in the past to conclude that there are barriers to entry, but the "lack of meaningful entry" is entirely consistent with a competitive industry that has had no profitable opportunities for entry.<sup>396</sup>

328. Dr. Nevo did not use a benchmark to other similar firms or segments, making it

<sup>390</sup> [REDACTED]

<sup>392</sup> Rice Dep. 46:14–22; 149:17–150:8 (PX70028).

<sup>393</sup> Rice Dep. 62:03–62:22; 83:15–86:13; 102:24–103:21 (PX70028).

<sup>394</sup> Sarro tr. test. at 129:1–15

<sup>395</sup> Medina tr. test. at 193:12–194:10.

<sup>396</sup> Nevo tr. test. at 894:1–895:11.

impossible to characterize profits as “high.”<sup>397</sup> Dr. Nevo did not identify any historical change in margins that would have attracted entry.<sup>398</sup>

329. Dr. Nevo cites the price WSS is paying for Drew as an additional indication of high barriers to entry, but provides no relevant benchmark.<sup>399</sup>

330. WSS’s analysis of the benefits from the deal indicates that Drew is more valuable to WSS as part of its larger, in-house distribution network than Drew might be as part of a standalone firm, including as a way to cut costs and thus earn profits in a highly competitive marketplace. The purchase price indicates that the owners of Drew were able to negotiate for a share of that value; it does not indicate whether an entrant could replicate Drew’s standalone business model or whether a buyer could threaten to sponsor entry.<sup>400</sup>

331. Dr. Nevo’s comparison to WSS’s purchase of Nalfleet is inapt. The value of each company depends on its future streams of profit, not revenues. The comparison says nothing about an entrant’s ability to replace Drew, only about Drew’s value relative to Nalfleet at the time of the respective transactions.<sup>401</sup>

## **XII. EFFICIENCIES ARE MERGER-SPECIFIC AND EXCEED ALLEGED HARM**

332. The likely efficiencies resulting from a proposed merger must be considered when evaluating the likely effects of a transaction. Here, the significant, merger-specific, and verifiable efficiencies outweigh any potential anticompetitive harm from the merger.

333. The evidence shows plainly that the proposed merger will achieve its fundamental purpose and enable WSS to realize significant cost reductions across the full array of marine

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<sup>397</sup> Nevo tr. test. at 830:23–831:15.

<sup>398</sup> HMG § 9 (JX-0288) (“The Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence”); *see also* Israel tr. test. at 1569:16–1571:17.

<sup>399</sup> PX61002 at ¶ 245; Nevo tr. test. at 832:7–833:19; Israel tr. test. at 1595:11–1596:1.

<sup>400</sup> Israel tr. test. at 1580:3–10.

<sup>401</sup> Israel tr. test. at 1601:21–1602:14.

chemicals sold by the two firms. WSS estimated these savings by making conservative assumptions based on its experience in past acquisitions and all available data. These assumptions include revenue losses (dis-synergies) in the form of lost customers and lower prices to customers. Fundamentally, these savings are predicated upon the elimination of duplication across the supply chain, which can be verified easily.<sup>402</sup>

334. WSS vetted the estimates thoroughly and, accordingly, they were verified by reasonable means. The estimates were developed by functional experts for each affected department, were overseen by an experienced manager (Geir Flaesen) with a track record of delivering cost savings, were informed by an experienced consultant (Cardo), reflected WSS's experience from prior transactions in which the company exceeded the cost savings it set out to achieve, and were reconfirmed during months of reevaluation. These estimates were confirmed through diligence in ordinary course documents from January 2017 through signing in April 2017, and reconfirmed post-integration from June through October 2017.<sup>403</sup>

335. These cost savings can only be achieved through the merger.

336. In sum, consistent with the estimates provided by Dr. Israel, cost savings of [REDACTED] [REDACTED] are verifiable and merger-specific, not [REDACTED] as estimated by Dr. Rothman.

**A. Cost Savings Can Reverse Potential Incentives to Increase Price**

337. The expectation of cost savings often drives mergers and acquisitions. Indeed, it was the primary motivation for this transaction. The Merger Guidelines, the views of antitrust scholars, including one relied upon by Dr. Rothman in forming his opinions, explain that the

<sup>402</sup> See Flaesen tr. test. at 1290:18–1295:3 and JX-0121 (Project Dragon Commercial Report, 3/22/2017).

<sup>403</sup> See Flaesen tr. test. at 1300:6–1301:22 (explaining that after further evaluation WSS is now targeting the high case, not merely the bank case, for cost savings).

potential for cost savings often reverse any incentives that may exist to raise price.<sup>404</sup>

338. Nonetheless, the FTC disregards significant cost savings in the form of fixed cost-savings and out-of-market. But the evidence shows that these cost savings are likely to benefit customers, including Global Fleets.

### 1. Substantial Fixed Cost Savings Will Benefit Customers

339. The transaction will eliminate significant duplication, lowering both fixed costs and average costs.

340. The antitrust agencies recognize the value of fixed cost savings. The DOJ and FTC Commentary on the Merger Guidelines comments that “[t]he Agencies consider merger-specific, cognizable reductions in fixed costs even if they cannot be expected to result in direct, short-term, procompetitive price effects because consumers may benefit from them over the longer term even if not immediately.”<sup>405</sup> The Commentary also acknowledges that they can benefit consumers in the *short term*.<sup>406</sup>

341. These cost savings, particularly the elimination of sales costs, are likely to benefit customers.<sup>407</sup> They are merger-specific,<sup>408</sup> verifiable, and lower average costs, which will enable WSS to lower the prices of its products to customers.<sup>409</sup>

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<sup>404</sup> HMG § 10 JX-0288-032 to -033; *see also* Commentary, JX-0151-005 (“[M]any [mergers] produce efficiencies that benefit consumers in the form of lower prices, higher quality goods or services, or investments in innovation. Efficiencies such as these enable companies to compete more effectively, both domestically and overseas.”).

<sup>405</sup> Commentary on the Horizontal Merger Guidelines (JX-0151-062) (hereinafter “Commentary”); *see also* Israel tr. test. at 1603:22–06:10.

<sup>406</sup> Commentary, JX-0151-062 (“[U]nder certain market or sales circumstances, fixed-cost savings may result in lower prices in the short term.”),

<sup>407</sup> Israel Report ¶ 283 (DX-0060) (explaining that “[r]educed sales costs make it more profitable to compete for more business, which creates a corresponding incentive to cut prices”).

<sup>408</sup> Israel Report ¶ 285 (DX-0060) (finding [REDACTED] “in annual cost savings from eliminating duplicative back office and administrative functions” to be merger specific).

<sup>409</sup> JX-0248-069 (“In all, customers will see the immediate pass through of variable-cost savings as a matter of course and fixed-cost synergies as a matter of competitive necessity.”).

342. Although Dr. Rothman agrees that as an economic matter, fixed cost savings can benefit consumers,<sup>410</sup> he *ignores* them in his analysis.<sup>411</sup>

**2. Substantial Savings Across All Marine Products, not Just BWTP and CWTP, Benefits All Customers**

343. The transaction will lower costs across the supply of water treatment chemicals and across customers. Nevertheless, the FTC ignores the *vast majority* of these benefits by counting only those savings related to BWTP and CWTP sold to Global Fleets.<sup>412</sup>

344. The Merger Guidelines explain that it is appropriate to consider efficiencies outside the relevant market that are so “inextricably linked” that a “partial divestiture” could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing efficiencies in other markets.<sup>413</sup>

345. Neither Dr. Rothman nor Dr. Nevo evaluated whether efficiencies related to BWTP and CWTP are inextricably linked to efficiencies from other products.<sup>414</sup> And neither Dr. Rothman nor Dr. Nevo evaluated whether efficiencies related to non-BWTP and CWTP are verifiable, cognizable, or merger specific.<sup>415</sup>

346. Dr. Israel concluded that efficiencies from BWTP and CWTP are inextricably linked to efficiencies generated from non-relevant products and that these efficiencies are

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<sup>410</sup> Rothman Report ¶ 7 (PX 61001); PX70032 62:13–16.

<sup>411</sup> Rothman Report (PX61001-004) (describing the scope of Dr. Rothman’s assignment); *see also* Dr. Rothman tr. test at 1058:14–17 (Dr. Rothman agreeing that by implication, this scope also defines what he was not asked to analyze).

<sup>412</sup> Israel Report ¶ 299 (DX-0060) (“Dr. Rothman counts just a portion of the total cost efficiencies: those he allocates to purchase of boiler and cooling water treatment products by Global Fleet customers, with the allocation done based on a percentage of total sales revenues.”).

<sup>413</sup> Merger Guidelines, JX-0288-033, n. 14.

<sup>414</sup> Rothman tr. test. at 1072:3–5; Nevo Report PX61000-008 (Dr. Nevo deferred to Dr. Rothman for efficiency estimates.).

<sup>415</sup> Rothman tr. test. at 1072:3–5.



verifiable, cognizable, and merger specific.<sup>416</sup>

347. From a supply chain perspective, BWTP, CWTP, and other products *use the same resources*. Thus, a divestiture of products sold just to the Global Fleets could not be achieved without losing the efficiency benefits associated with non-Global Fleets because BWTP and CWTP are produced for Global Fleets and non-Global Fleets and are produced in the same facilities using the same equipment as other products. They are also sold through the same sales and distribution operations as other products.<sup>417</sup>

348. Divesting assets related only to BWTP and CWTP would compromise cost savings that would benefit all customers, including Global Fleets because it would reduce the scale benefits expected from the merger.<sup>418</sup> In addition, the efficiencies on products other than BWTP and CWTP will benefit the *same* Global Fleet customers that purchase BWTP and CWTP, so those benefits should not be ignored.<sup>419</sup>

349. As Dr. Israel explained, there is no economic rationale to oppose a merger based on higher price for one set of products while ignoring that the same merger would benefit the same customers via lower prices on other products.<sup>420</sup>

**B. Efficiencies Were Thoroughly Evaluated and Verified by Reasonable Means**

350. Under the Merger Guidelines, efficiencies must be “verified by reasonable means.”<sup>421</sup> While they will not be considered if they are “vague” or “speculative,”<sup>422</sup> the Guidelines do not require the parties to prove efficiency estimates to a near certainty.<sup>423</sup>

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<sup>416</sup> Dr. Israel Report ¶ 301 (DX-0060).

<sup>417</sup> Grimholt tr. test. at 1219:7 – 24; *see also* Israel Report DX-0060.0139-40.

<sup>418</sup> Israel Report ¶ 303 (DX-0060).

<sup>419</sup> Israel Report ¶ 304 (DX-0060).

<sup>420</sup> Israel Report DX-0060.0140.

<sup>421</sup> HMG, JX-0288.033.

<sup>422</sup> *Id.*

<sup>423</sup> Rothman tr. test. at 1073:2 – 13.

351. In assessing a proposed merger’s potential efficiencies, the estimates must necessarily involve projections about the future.<sup>424</sup> They are not to be rejected based on “minor discrepancies uncovered in the verification process.”<sup>425</sup>

352. Over nearly ten months, WSS vetted synergies from the proposed merger during the due diligence phase and the reanalyzed them after signing in integration planning.

353. Geir Flaesen, WWH Vice President for Strategy and M&A, was tasked with managing the cost savings possible from the acquisition. Mr. Flaesen, who has a track record of achieving cost savings, organized internal experts and external support from Cardo to evaluate the opportunity for cost savings.<sup>426</sup>

354. WSS’s industry experience, including its experience in two similar transactions—the acquisition of Unitor, which was the Company’s entry into water treatment chemicals, and Nalfleet, which also involved the chemicals at issue here—informed its expectation for cost efficiencies from Drew.<sup>427</sup> Indeed, a retrospective analysis of WSS’s acquisition of Nalfleet revealed that WSS achieved the cost savings it set out to achieve according to plan.<sup>428</sup>

355. This record is important because the Merger Guidelines explain that efficiency

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<sup>424</sup> Commentary, JX-0151.056 (“The Agencies recognize that assessing a proposed merger’s potential efficiency benefits, like its competitive effects, necessarily involves projections about the future.”).

<sup>425</sup> *Id.* (“[S]hortcoming in the substantiation of a particular efficiency claim may cause the Agencies to reduce the magnitude of the efficiencies associated with that claim rather than to reject the claim altogether.”).

<sup>426</sup> Flaesen tr. test. at 1278:1 – 1280:5, 1286:17 – 1287:11 (explaining that WSS relied upon “the best background in terms of functional expertise, private previous transactional knowledge and managerial responsibilities and [the team members selected] reflect and covered it”).

<sup>427</sup> JX-0248-076 (describing the Company’s views about how the acquisition of Nalfleet “sharpened its expectations for realistic synergies” from the acquisition of Drew); *see also* Flaesen tr. test. at 1287:12 – 1288:7.

<sup>428</sup> DX-1404 (concluding that the “majority of the integration activities” were completed within five months and that “cost-synergies [were] carried out according to plan”).

claims based on similar past experiences are most likely to be verified.<sup>429</sup> In fact, the Commentary says, “*the best way to substantiate an efficiency claim* is to demonstrate that similar efficiencies were achieved in the recent past from similar actions.”<sup>430</sup>

356. Unlike Dr. Rothman, Dr. Israel relied upon WSS’s record of success in explaining why WSS’s estimates of efficiencies were verifiable.<sup>431</sup>

357. WSS validated its estimates through integration planning after signing.<sup>432</sup> The integration planning project not only included the functional experts from the due diligence effort, but, because the transaction had become public, included additional work streams and more experts from within WSS to consider and challenge pre-signing assumptions.<sup>433</sup>

358. The post-signing analysis, which concluded in October 2017, verified the previous assumptions and savings targets, determined when they should be realized, obtained final sign-off from the work streams on their commitment to the targets. The Steering Committee then presented the final analysis to the WSS Board of Directors and concluded that not only was the bank case realistic but that the high case was achievable.<sup>434</sup>

359. Despite all of this work,<sup>435</sup> Dr. Rothman concluded that *none* of WSS’s claimed efficiencies were verified by reasonable means.<sup>436</sup>

**C. Drew’s Standalone Cost Savings in Project Doubleday Do Not Reduce the Magnitude of WSS’s Merger-Specific Cost Savings**

360. Merger-specific efficiencies are those that can only be accomplished by the

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<sup>429</sup> HMG, JX0288–033.

<sup>430</sup> JX-0151-057 (emphasis added).

<sup>431</sup> DX-0060.0139; Dr. Rothman tr. test. at 1078:3–1079:14.

<sup>432</sup> Flaesen tr. test. at 1301:16–1302:5.

<sup>433</sup> Flaesen tr. test. at 1299 :14–25.

<sup>434</sup> Flaesen tr. test. at 1301:16–1302:5.

<sup>435</sup> PX70032–033 at 126:9 – 127:14.

<sup>436</sup> Dr. Rothman tr. test. at 1087:17 – 21.

merger.<sup>437</sup> These alternatives must be more than theoretical; they must be practical in the business situation facing the merging parties.<sup>438</sup>

361. The low-end of WSS's estimated cost savings are based on improvements to Drew's cost structure only.<sup>439</sup>

362. Dr. Rothman's conclusion that most of the variable cost savings are not merger specific is based on a *single* document—Project Doubleday—that purportedly describes cost savings that Drew could *achieve on its own*.<sup>440</sup>

363. But this document does not support that conclusion.<sup>441</sup> It was a marketing effort aimed to fetch the best price from WSS,<sup>442</sup> and was discredited by Drew's own executives.<sup>443</sup>

364. In fact, Drew's President and CEO, David Knowles, testified that the document was not meant to convey what cost savings Drew could achieve on its own, but rather to verify that the estimated efficiencies could be achieved by WSS post-acquisition.<sup>444</sup>

365. Neither WSS<sup>445</sup> nor Dr. Israel<sup>446</sup> found the estimates described in Project Doubleday to be reliable.

#### **D. Production and Sourcing Cost Savings are Verified and Merger-Specific**

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<sup>437</sup> JX-0288–033.

<sup>438</sup> *Id.*

<sup>439</sup> Dr. Rothman tr. test. at 1092:22 – 1093:8.

<sup>440</sup> Dr. Rothman tr. test. at 1093:2 – 1093:18.

<sup>441</sup> Israel Report, DX0060.0136 (“This [Project Doubleday] document cannot support [Dr. Rothman's] conclusion.”).

<sup>442</sup> PX70008 218:1 – 12 (“And so this [Project Doubleday] document was our document to try to do everything that we could to sell the value and keep the value high in the process.”).

<sup>443</sup> See e.g., Gelosa Investigational Hearing, PX70001, 274: 2 – 11 (describing Project Doubleday's estimates for SG&A as having “no precision” and being done “one-sidedly”); Knowles Investigational Hearing, PX7008, 221:1 – 7 (“What [Project Doubleday] doesn't mean is that these are costs that we can necessarily take out on our own.”).

<sup>444</sup> Knowles tr. test. at 1377:24 – 1378:20.

<sup>445</sup> Flaesen tr. test. at 1295:4 – 1297:5 (explaining that that following the Project Doubleday presentation, WSS reduced its offer for Drew, demonstrating that it rejected Drew's views).

<sup>446</sup> Israel Report, DX0060.0136 – 37.

366. WSS believed it would reduce costs by migrating the products of the two firms to a single portfolio; that is, where both parties had virtually identical products, it plans to keep just one.<sup>447</sup> Because about 96% of the products are virtually identical,<sup>448</sup> WSS concluded that its costs would be no higher than the current cost of producing the products at WSS without sacrificing quality and that it would benefit from increased scale (i.e., from the increased average volume created from producing larger batches and not having to produce duplicative products).<sup>449</sup> Increased transportation costs that could result from shifting production were incorporated in the supply chain cost elements of WSS's cost savings analysis.<sup>450</sup>

367. In the absence of the merger, Drew would not insource all of its production in its Singapore facility because that would create too much risk, including potential competition from Solenis, if Drew discontinued its relationship with Solenis.<sup>451</sup>

368. In total, based on WSS's work and prior experience, [REDACTED] in annual production cost savings and [REDACTED] in sourcing cost savings are verified and merger-specific.<sup>452</sup>

**E. Supply Chain Cost Savings are Verified and Merger-Specific**

369. WSS also estimated that the merger would reduce supply chain costs by enabling the combined firm to deliver products more cost effectively to customers. These cost savings would be achieved by migrating the distribution of Drew's products onto WSS's more robust network and by eliminating duplicative operations (e.g., eliminating a warehouse where both

<sup>447</sup> Flaesen tr. test. at 1291:11 – 1293:5.

<sup>448</sup> Project Dragon, Commercial Report, JX0121–026 (showing that 96% of Drew's volume overlapped with WSS); Flaesen tr. test. at 1291:20 –1292:16 (noting that 96% of the products were the same or very similar).

<sup>449</sup> Flaesen tr. test. at 1292:4 – 16 (explaining that the analysis showed that Drew's costs of production were higher than WSS's production costs at its Norway facility).

<sup>450</sup> Israel Report ¶ 296 (DX-0060).

<sup>451</sup> Knowles tr. test. at 1376:14–23; 1379:17–80:17.

<sup>452</sup> Israel Report, DX0060.0141.

companies had warehouses and consolidating distribution into a single third-party logistics provider where both independently use third-party providers).<sup>453</sup>

370. In total, based on WSS's work and prior experience, [REDACTED] in annual supply chain cost savings are verified and merger-specific.<sup>454</sup>

**F. Fixed Cost Savings, Including Sales-Cost Savings that Can Benefit Customers Quickly, are Substantial, Verified and Merger-Specific**

371. WSS also estimated cost savings from eliminating duplicative operations in customer and non-customer facing operations and personnel.<sup>455</sup>

**1. Reductions in Customer-Facing Costs**

372. Reductions in customer-facing costs derive from eliminating duplicative account managers and customer service operations.<sup>456</sup> This was done by carefully reviewing areas of duplication and calculating savings based on removing certain employee overlaps.<sup>457</sup>

373. Dr. Rothman incorrectly dismisses sales costs savings by incorrectly assuming that they were derived from an across-the-board [REDACTED] increase in Drew's productivity.<sup>458</sup>

374. Although WSS classifies sales costs as fixed, they are associated with selling product and are much more tightly linked to sales volumes than to back office and administrative costs; thus, they should be treated as variable costs for the purpose of assessing efficiencies.<sup>459</sup>

**2. Reductions in Non-Customer-Facing Costs**

375. The merger will also generate significant cost savings from the elimination of

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<sup>453</sup> Flaesen tr. test. at 1293:14 – 1294:12.

<sup>454</sup> Israel Report, DX-0060.0141.

<sup>455</sup> Flaesen tr. test. at 1294:13 – 1295:3.

<sup>456</sup> Flaesen tr. test. at 1294:2 – 1295:3.

<sup>457</sup> DX-0060.0135 (Dr. Israel).

<sup>458</sup> Israel Report ¶ 287 (DX-0060).

<sup>459</sup> Israel tr. test. at 1603 :16 – 1606:10 .

duplicative non-customer-facing operations and personnel.<sup>460</sup> In particular, the acquisition will generate back-office and administrative cost savings in the areas of human resources, finance, legal, and governance by consolidating operations onto WSS's existing infrastructure.<sup>461</sup>

376. The WSS functional teams and Cardo carefully reviewed the areas of employee overlap and calculated savings based on that overlap. They also calculated savings based on a review of the overlap in rent, professional fees, and other operations expenses.<sup>462</sup>

377. These cost savings result from integrating Drew's operations into WSS, which can only be completed through the merger; thus, these cost savings are merger specific.<sup>463</sup>

378. In total, based on WSS's work and prior experience, [REDACTED] in fixed cost savings plus sales cost savings of [REDACTED] are verified and merger-specific.<sup>464</sup>

**G. Verified Plans to Reduce Prices to Address Revenue Dissynergies**

379. Under the Merger Guidelines, efficiencies are analyzed to understand their influence on the merged firm's incentives to change price and quality.<sup>465</sup>

380. Here, WSS has explained its plans.<sup>466</sup> WSS expects revenue dis-synergies in the form of reduced prices and lost customers.<sup>467</sup> WSS expectation is based in part on the Nalfleet transaction where it had greater dis-synergies than expected.<sup>468</sup>

381. To mitigate against these expected losses, WSS plans to reduce prices to some or

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<sup>460</sup> Flaesen tr. test. at 1294:13 – 1295:3.

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> Israel Report ¶ 287 (DX-0060).

<sup>464</sup> Israel Report, DX0060.0140–41.

<sup>465</sup> JX-0288.032.

<sup>466</sup> Dr. Rothman tr. test. at 1114:1–1115:5.

<sup>467</sup> JX-0121.035 (noting a net loss of \$9–\$12 million in EBITDA from these factors).

<sup>468</sup> Flaesen tr. test. at 1304:14–25.

[REDACTED], which include Global Fleets.<sup>469</sup>

382. Dr. Rothman did not consider revenue dis-synergies or their impact on WSS's incentives.<sup>470</sup>

383. The expectation of revenue dis-synergies is credible, providing, as WSS has explained in ordinary course documents, powerful incentives to lower prices on all water treatment chemicals, including the relevant products, to Global Fleets.

### **XIII. THE PUBLIC INTEREST AND EQUITIES DO NOT FAVOR A PRELIMINARY INJUNCTION**

384. Section 13(b) of the FTC Act authorizes entry of a preliminary injunction only if a court, "weighing the equities," determines that "such action would be in the public interest."<sup>471</sup> Thus, regardless of whether the FTC has demonstrated a likelihood of success, a court "must still weigh the equities . . . to decide whether enjoining the merger would be in the public interest."<sup>472</sup>

385. The D.C. Circuit has rejected the view "that there is no equity to weigh here other than . . . the public interest in effective antitrust enforcement."<sup>473</sup> Instead, a court should weigh both public and private equities, including "the potential benefits, public and private, that may be lost by a merger-blocking preliminary injunction."<sup>474</sup>

386. The equities weigh overwhelmingly against a preliminary injunction. The FTC has not quantified any potential harm in the United States. Nor has it sought to show that any

<sup>469</sup> Flaesen tr. test. at 1306:2–18 ([REDACTED]).

Dr. Rothman tr. test. at 1111:1–4.

<sup>471</sup> 15 U.S.C. § 53(b).

<sup>472</sup> *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001).

<sup>473</sup> *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1081 (D.C. Cir. 1981).

<sup>474</sup> *Id.* at 1083.



potential price increases would be passed on to consumers.<sup>475</sup> Conversely, the efficiencies on all of the products are significant and will be passed on to customers.

387. In addition, “[i]f this Court issues a preliminary injunction, . . . [defendants] will abandon the transaction rather than undergo an administrative proceeding, and any cost savings and output enhancements that the transactions will create will be lost.”<sup>476</sup>

388. The FTC argued in closing that it has established a likelihood of a substantial lessening of competition in the United States because (a) Drew is headquartered in New Jersey and (b) there are Global Fleets based in the U. S. or which purchase products at U.S. ports. This argument confuses the Court’s personal jurisdiction over the parties and subject matter jurisdiction over the FTC’s claim, both of which are uncontested, with whether the FTC has established a violation of Section 7.

389. The issue is whether the FTC has satisfied its burden under Section 7 to demonstrate a substantial lessening of competition in the United States.<sup>477</sup>

- a. Dr. Nevo conceded he had not done this analysis.<sup>478</sup>
- b. There is no factual evidence in the record that the merger will cause prices to go up at U.S. ports, that the several competitors now present in the U.S. would be unable to defeat a price increase, or that WSS’s competitors would be unable to expand in the U.S. post-merger.
- c. Drew’s largest U.S. customer (Military Sealift Command, a federal agency) did not lodge any objection to the merger nor did Carnival.
- d. While Royal Caribbean and Crowley testified that they do not favor the merger,

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<sup>475</sup> See Dr. Nevo tr. test. at 821:9–21; see also *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 868 (8th Cir. 1981) (explaining that “principal purposes of the antitrust laws are protection of American consumers and American export and investment opportunities”).

<sup>476</sup> *Arch Coal*, 329 F. Supp. 2d at 160; see DX-0071 (Exh. A - Grimholt Decl.).

<sup>477</sup> JX-0288-004.

<sup>478</sup> Dr. Nevo tr. test. at 821:9–12.

there is no evidence that their respective U.S. operations would be adversely impacted.

390. The government's only answer to this absence of evidence, and Dr. Nevo's failure to analyze any impact on competition in the U.S., is that Section 7 has no "de minimis" exception. But that is clearly wrong as the statute explicitly requires proof of a "substantial lessening of competition." For this reason as well the FTC claim fails.

#### **XIV. CONCLUSION**

391. The FTC's request for an injunction should be denied.

Dated: June 25, 2018

Respectfully submitted,

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