

**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



**PLAINTIFF'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

PROPOSED FINDINGS OF FACT – TABLE OF CONTENTS

I. BACKGROUND 1

 A. WSS and Drew..... 1

 B. The Acquisition..... 2

II. THE SUPPLY OF MWT PRODUCTS AND SERVICES TO GLOBAL FLEETS IS A RELEVANT PRODUCT MARKET 2

 A. There Are No Functional Substitutes for the Supply of Marine BWT Products and Services and CWT Products and Services 4

 B. The Evidence Shows That A Cluster Market of the Supply of MWT Products and Services to Global Fleets Is Appropriate 6

 i. The Supply of BWT Products and Services To Global Fleets and the Supply of CWT Products and Services To Global Fleets Are Subject to Similar Competitive Conditions..... 7

 ii. Other Marine Products are Subject to Different Competitive Conditions 7

 C. The Evidence Shows That Global Fleets are an Appropriate Set of Targeted Customers 8

 i. Requirements For Price Discrimination Are Present In The Relevant Market .. 8

 ii. Global Fleets are Distinct 8

 a. Global Fleets Negotiate Individualized Framework Agreements at the Fleet Level..... 10

 b. WSS Analyzes Price Discrimination Involving Global Customers 11

 c. Global Fleets Have Particular Demands from MWT Suppliers..... 12

 d. Defendants’ Core Customers are Global, and Defendants Themselves Differentiate Between Global, Local, and Regional Customers 13

 e. Global Fleets are a Significant Group of Customers 14

 D. The Relevant Market Satisfies the Hypothetical Monopolist Test 15

III. THE RELEVANT GEOGRAPHIC MARKET IS GLOBAL 16

IV. THE ACQUISITION IS PRESUMPTIVELY ILLEGAL 16

 A. The Acquisition Will Result in Extraordinarily High Shares and a Significant Increase in Market Concentration 16

 B. Dr. Israel’s Vessel-Based Shares are Methodologically Flawed and Divorced from Market Realities 19

 C. Ordinary Course Evidence Confirms High Post-Acquisition Shares 19

- D. Dr. Nevo Analyzed Alternative Market Definitions..... 20
- V. THE ACQUISITION WOULD SUBSTANTIALLY LESSEN COMPETITION..... 21**
 - A. Defendants are Each Other’s Most Significant Competitor 21
 - B. Head-to-Head Competition Between WSS and Drew Leads to Lower Prices and Better Service..... 24
 - i. Global Fleet Customers Pit Defendants Against One Another to Receive Price Concessions, Rebates, and Other Benefits 24
 - ii. Global Fleet Customers Also Obtain Non-Price Benefits..... 25
 - C. Other Suppliers are Inferior Options to Defendants for Global Fleets 26
 - i. Marichem Cannot Constrain a Post-Acquisition WSS..... 27
 - ii. UNIservice Italy, Marine Care, Vecom, and UNI Americas are Distant Competitors 28
 - iii. Other Fringe Participants Not Viable Options for Global Fleets 29
 - D. Dr. Nevo’s Empirical Upward Pricing Pressure Analysis Confirms the Merged Firm Will Likely Have the Incentive to Raise Prices 30
 - E. Dr. Nevo’s Merger Simulation Demonstrates that Post-Acquisition Prices Will Increase and Customers Will Be Harmed 30
 - F. Dr. Israel’s Switching Study is Unreliable, Biased, and Methodologically Flawed, and Cannot Measure the Closeness of Competition between WSS or Drew or Any Alternative Suppliers 31
- VI. DEFENDANTS FAIL TO SHOW THAT GLOBAL FLEETS WILL HAVE THE POWER TO DISCIPLINE A POST- MERGER PRICE INCREASE 32**
 - A. Global Fleets Will Not Have Meaningful Post-Acquisition Alternatives 32
 - B. There is No Evidence that Global Fleets Will Sponsor Entry or Vertically Integrate... 33
 - C. Global Fleets *Already* Carry as Much Product on Board Vessels as They Can 34
 - D. There is No Evidence That Global Fleets Can Discipline Prices on MWT Products and Services by Switching Suppliers for Other Products and Services..... 34
- VII. DEFENDANTS FAIL TO SHOW ENTRY AND REPOSITIONING WILL BE TIMELY, LIKELY, AND SUFFICIENT TO OFFSET THE COMPETITIVE HARMS .. 35**
 - A. There are Numerous Barriers to Entry and Expansion 35
 - i. Global Logistics and Distribution Network are Barriers..... 35
 - ii. High-Quality and Consistent MWT Products and Services are Barriers 36
 - iii. On-Site and Remote Technical Services are Barriers 37

- iv.Reputation and Customer Relationships are Barriers..... 37
- v. Scale and Competitive Cost Structure are Barriers 38
- vi.Brand Equity is a Barrier..... 40
- vii.High Customer Retention Rates are a Barrier 40
- viii.Global Sales and Customer Support Networks are Barriers..... 41
- B. Defendants Failed to Demonstrate Sufficient Expansion by Existing MWT Suppliers is Likely; The Evidence Presented is to the Contrary 42
- C. Sufficient New Entry is Unlikely..... 43
- D. Economic Outcomes Demonstrate High Barriers to Entry and Expansion 47
- VIII. EFFICIENCIES DO NOT REVERSE THE ANTICOMPETITIVE HARM 49**
- A. WSS’s Claimed Efficiencies Cannot Be Verified 49
- B. Defendants Did Not Establish that the Claimed Savings Are Merger-Specific 53
- C. Defendants Have Not Established that their Claimed Savings will Benefit Customers 54

PROPOSED CONCLUSIONS OF LAW – TABLE OF CONTENTS

- I. THE COURT HAS JURISDICTION OVER THIS ACTION 56**
- II. THE STANDARD FOR A PRELIMINARY INJUNCTION IS MET HERE..... 56**
- III. PLAINTIFF HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS .. 57**
 - A. The Proposed Acquisition is Presumptively Unlawful..... 57
 - i. The Relevant Product Market is the Supply of MWT Products and Services to Global Fleets..... 58
 - a. Cluster Markets in Product Market Definition..... 59
 - b. Targeted Customers in Product Market Definition 60
 - c. Application of Cluster Markets and Targeted Customers to Plaintiff’s Market Definition 61
 - ii. The Relevant Geographic Market is Global..... 64
 - iii. The Acquisition is Presumptively Illegal Because It Would Create Extraordinarily High Market Shares and Concentration in the Relevant Market 64
 - iv. Evidence of Competitive Effects Corroborates the Presumption of Illegality. 68
 - B. Defendants Failed To Rebut the Strong Presumption of Illegality..... 69
 - i. The Size of Global Fleets Does Not Protect Them from Harm 69
 - ii. Entry and Expansion Will Not Be Timely, Likely, and Sufficient 71
 - iii. Defendants’ Efficiencies Defense Fails as a Matter of Law 73
- IV. THE EQUITIES FAVOR A PRELIMINARY INJUNCTION 74**

TABLE OF AUTHORITIES

Cases

Brown Shoe Co. v. United States, 370 U.S. 294 (1962)* passim

Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008)* 57, 70, 71, 73

FTC v. CCC Holdings, 605 F. Supp. 2d 26 (D.D.C. 2009)* passim

FTC v. Dean Foods Co., 384 U.S. 597 (1966) 75

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001)* passim

FTC v. Illinois Cereal Mills, Inc., 691 F. Supp. 1131 (N.D. Ill. 1988) 75

FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012) 69

FTC v. PPG Indus., 798 F.2d 1500 (D.C. Cir. 1986) 57, 74

FTC v. ProMedica Health Sys., 3:11-cv-47, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011) 74

FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) (“*Staples I*”) 58, 68

FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000)..... 68, 71, 72

FTC v. Sysco Corp., 113 F.Supp.3d. 1 (D.D.C. 2015)*..... passim

FTC v. Univ. Health, 938 F.2d 1206 (11th Cir. 1991)..... 74

FTC v. Weyerhaeuser Co., 665 F.2d 1072 (D.C. Cir. 1986) 74, 75

FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008)* 56, 65, 69, 75

ProMedica Health Sys., Inc., v. FTC, 749 F.3d 559 (6th Cir. 2014) 59, 60

Spirit Airlines, Inc., v. Nw. Airlines, Inc., 431 F.3d 917 (6th Cir. 2005)..... 60

United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990)..... 58

United States v. Citizens & S. Nat’l Bank, 422 U.S. 86 (1975) 69

United States v. Grinnell Corp., 384 U.S. 563 (1966)..... 63

United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011)* passim

United States v. Marine Bancorp, 418 U.S. 602 (1974)..... 57, 58

United States v. Phila. Nat’l Bank, 374 U.S. 321 (1963)* passim

Statutes

15 U.S.C. § 18..... 57, 69, 70

15 U.S.C. § 53(b) 56

28 U.S.C. § 1391..... 56

Other Authorities

U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (2010)

(“*Guidelines*”) passim

GLOSSARY OF ABBREVIATED TERMS, DEFINED TERMS, AND WITNESSES**1. Exhibits and Transcripts**

Abbreviation	Meaning
Decl.	Declaration
Dep. Tr.	Deposition Transcript
DX	Defendants' Exhibit
Hrg. Tr.	Preliminary Injunction Hearing Transcript
IH Tr.	Investigational Hearing Transcript
JX	Joint Exhibit
PX	Plaintiff's Exhibit
Rpt.	Report
Vol.	Volume

2. Documents and Filings

Document	Full Reference
Complaint	Amended Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act (ECF No. 14-1)
Defs' Br.	Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction (ECF No. 50)
<i>Guidelines</i>	U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (August 19, 2010)
FTC Br.	Plaintiff's Memorandum in Support of Plaintiff's Motion for Preliminary Injunction (ECF No. 45)

3. Names and Terms

Shortened Form	Full Form
Acquisition	The proposed acquisition of Drew by WSS
BWT	Boiler water treatment
Carnival	Carnival Corp.
Capgemini	Capgemini Consulting
Cardo	Cardo Partners AS

CCL	Carnival Cruise Lines
Chevron Corp.	Chevron Shipping Company
Chevron Marine	Chevron Marine Products LLC
Crowley	Crowley Maritime Corporation
CWT	Cooling water treatment
Drew	Drew Marine
EazyChem	EazyChem Ltd
Evercore	Evercore Inc.
Fremont	Fremont Water Solutions
GUPPI	Gross Upward Pricing Pressure Index
HHI	Herfindahl-Hirschman Index
HMT	Hypothetical Monopolist Test
Marine Care	Marine Care Group
MSC	Military Sealift Command
MWT	Marine water treatment
PSM	Potential Sales Model
RCCL	Royal Caribbean Cruise Lines
Rothschild	Rothschild & Co.
SAI	SAI Industrial
Scorpio	Scorpio Ship Management
SSNIP	Small but Significant Non-Transitory Increase in Price
Teekay	Teekay Corporation
UNI Americas	UNI Americas, LLC
UNIservice Germany	UNIservice Germany Marine Products GmbH
UNIservice Italy	Uniservice Unisafe SRL
Wrist	Wrist Ship Supply, North America
WSS	Wilhelmsen Ships Service

4. Hearing Witnesses (in order of appearance)

Name	Affiliation
Rob Sarro, Director of Global Procurement	Teekay Corporation

Oswaldo Medina, Director of Procurement	Crowley Maritime Corporation
Scott Thompson, Vice President of Supply Chain	Carnival Cruise Line
Andrew Franzo, Jr., President	UNI Americas, LLC
Bruce Deckman, President	SAI Industrial
Daniel Kelleher, Vice President of Marketing, Supply Chain, and Technology	Drew
Aviv Nevo, Ph.D.	Plaintiff's Expert
Rene Fry, former Senior Technical Representative & Program Manager	Military Sealift Command (retired)
Dov Rothman, Ph.D.	Plaintiff's Expert
Donald Lange, Vice President of Business Development	Ecolab
Bjoerge Grimholt, President and Chief Executive Officer	WSS
David Rice (by video), Director of Strategic Sourcing	Royal Caribbean Cruise Lines
Geir Flaesen, Vice President, Strategy and Mergers & Acquisitions	WSS
Michael Liantonio (by video), Chief Executive Officer	Wrist Ship Supply, North America
David Knowles, President and Chief Executive Officer	Drew
Mark Israel, Ph.D.	Defendants' Expert

5. Deponents and Declarants (in alphabetical order)

Name, Title	Affiliation
Curt Bender, General Manager of Supply Chain	Maersk Line Limited
Baard Bjoerloew, Vice President, Sales and Customer Service	WSS
Christopher Cappelen, Owner	UNIservice Germany
Edward Carute, North American Sales Manager	WSS
Michael Cassaras, Senior Vice President, Global Sales	Drew
Edward Connors, Senior Vice President,	Solenis

Industrial Water Technologies	
Michael de Ruiter, Chief Executive Officer	Marine Care Group
Ralph Exton, Chief Marketing Officer	Suez Water
Leonard Gelosa, Chairman and former Chief Executive Officer	Drew
Alan Good, Vice President Europe	Drew
“Hari” Chakravarthi Hariprasad, Supply Chain Manager	Chevron Shipping Company
Nakul Malhotra, Vice President, Technical Solutions & Marketing	WSS
Livio Milossevich, Procurement Manager	Scorpio Ship Management
Matteo Niego, Director and Chief Technical Officer	Uniservice Unisafe SRL (UNIservice Italy)
Thong Nguyen, Engineering Branch Head Supervisor	Military Sealift Command
Mark Pincumbe, Executive Vice President and Chief Risk Management and Compliance Officer	Fremont Water Solutions
Jason Pitre, Owner	Alpha Marine Solutions
Scott Richards, Senior Manager, Strategic Sourcing Group	Disney Cruise Line
Marc Sfakianakis, Director	EazyChem Ltd
Ian Thurloway, Global Brand & Marketing Manager	Chevron Marine Products LLC

PLAINTIFF’S PROPOSED FINDINGS OF FACT

I. BACKGROUND

A. WSS and Drew

1. Defendant Wilhelmsen Maritime Services AS, which includes Wilhelmsen Ship Services (“WSS”), is a wholly owned subsidiary of Defendant Wilh. Wilhelmsen Holding ASA,¹ a publically traded corporation headquartered in Norway.² WSS provides marine products to customers around the world, including marine boiler water treatment (“BWT”) and marine cooling water treatment (“CWT”) products and services.³ WSS has the self-proclaimed “largest maritime services network in the world,” serving 2,400 ports in 125 countries and delivering to around 24,000 vessels annually from 180 stock points.⁴ WSS has more than 4,500 employees worldwide.⁵ In 2017, WSS’s revenues exceeded [REDACTED] for all marine products, with [REDACTED] [REDACTED] specific to BWT and CWT products and services.⁶

2. Defendant Drew Marine Group, Inc., is a subsidiary of Defendant Drew Marine Intermediate II B.V., which is in turn owned by Defendant The Resolute Fund II, L.P., a private equity fund managed by The Jordan Company.⁷ Established in 1928 and based in New Jersey, Drew provides marine products, including BWT and CWT products and services, worldwide.⁸ Drew employs about 400 people and serves 900 ports worldwide from 81 distribution centers

¹ Defendants Wilhelmsen Marine Services AS and Wilh. Wilhelmsen Holding ASA are collectively referred to herein as “Wilhelmsen.”

² Defs’ Br. at 39 (ECF No. 50) at 7.

³ *Id.*; JX-0161 (WSS) at 010-17; JX-0188 (WSS) at 015; PX70015 (Malhotra (WSS) Dep. Tr. at 34:8-11, 34:19-21).

⁴ PX20004 (WSS) at 003, 019; JX-0161 (WSS) at 004; JX-0188 (WSS) at 006-007.

⁵ JX-0188 (WSS) at 007.

⁶ PX61000 (Nevo Rpt.) ¶ 54.

⁷ Defs’ Br. at 39 (ECF No. 50) at 7. Defendants Resolute Fund II, L.P., Drew Marine Intermediate II B.V., and Drew Marine Group, Inc. are collectively referred to as “Drew.”

⁸ Defs’ Br. at 39 (ECF No. 50) at 7; PX61000 (Nevo Rpt.) ¶ 56; PX70019 (Kelleher (Drew) Dep. Tr. at 192:11-25, 193:1-4); PX70001 (Gelosa (Drew) IH Tr. at 90:21-91:20).

located in 46 countries.⁹ Drew’s 2017 global revenues for all marine products and services exceeded [REDACTED] with [REDACTED] specific to BWT and CWT products and services.¹⁰

B. The Acquisition

5. As early as 2014, WSS began strategizing to acquire Drew, with the intention to “take out the one competitor that contributes in ‘driving’ the global market.”¹¹

6. Pursuant to a Share Purchase Agreement dated April 27, 2017, WSS proposes to acquire 100% of the voting securities of Drew for \$400 million in cash (the “Acquisition”).¹²

II. THE SUPPLY OF MWT PRODUCTS AND SERVICES TO GLOBAL FLEETS IS A RELEVANT PRODUCT MARKET

7. The relevant product market is the supply of marine water treatment (“MWT”) products and services to Global Fleet customers.¹³

8. Dr. Nevo applied the U.S. Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines* (“*Guidelines*”) framework and found that the supply of MWT products and services to Global Fleets is a properly defined relevant antitrust market.¹⁴

9. The relevant product market of MWT products and services is a “cluster market” consisting of the supply of marine BWT products and services to Global Fleets and the supply of marine CWT products and services to Global Fleets.¹⁵

10. The cluster market includes the supply of individual products and services—marine BWT and marine CWT—that are not substitutes for each other. These individual products and services are aggregated together into a single relevant market for analytical convenience.¹⁶

⁹ PX61000 (Nevo Rpt.) ¶ 56; Knowles (Drew) Hrg. Tr. at 1414:20-22; PX70023 (Knowles (Drew) Dep. Tr. at 148:9-18); PX70008 (Knowles (Drew) IH Tr. at 170:25-171:14).

¹⁰ PX61000 (Nevo Rpt.) ¶ 58; Knowles (Drew) Hrg. Tr. 1417:22-25.

¹¹ JX-0216 (WSS) at 005 (noting that the analysis regarding the acquisition of Drew was performed in 2014); *see also*, PX70006 (Grimholt (WSS) IH Vol. 1 Tr. at 178:1-24, 184:19-185:7); PX20329 (WSS) at 006, 015.

¹² PX10017 (WSS and Drew) at 026.

¹³ PX61000 (Nevo Rpt.) ¶ 239; Nevo Hrg. Tr. at 558:22-559:3.

¹⁴ PX61000 (Nevo Rpt.) ¶¶ 137-39, 239.

¹⁵ PX61000 (Nevo Rpt.) ¶ 58.

11. “Cluster markets” are common. The standard for determining whether items may be properly combined in a cluster market is whether the items face similar competitive conditions.¹⁷

12. The supply of marine BWT products and services to Global Fleets and the supply of marine CWT products and services to Global Fleets are subject to similar competitive conditions. Defendants have similar market shares, earn similar margins, and face a nearly identical set of competitors for the supply of both products.¹⁸

13. It is appropriate to define the relevant market in this matter around Global Fleets. Global Fleets are distinct from other customers who obtain the supply of MWT products and services.¹⁹ The key condition for defining a market around a particular type of customer—namely, that sellers can profitably price discriminate by setting different prices to the targeted customers than to other customers—is satisfied here.²⁰ Suppliers can identify Global Fleets based on the number and travel patterns of their vessels.²¹ It is undisputed that prices for MWT products and services are determined through individual negotiations with each customer.²² Finally, it is also beyond dispute that arbitrage by Global Fleets is neither practical nor attractive.²³

14. Dr. Nevo employed the hypothetical monopolist test (“HMT”) to assess whether Plaintiff’s proposed relevant market is properly defined. The HMT is the standard test used by antitrust economists to define relevant antitrust markets.²⁴

15. The HMT asks whether a hypothetical, profit-maximizing monopolist over the supply of products and services in a candidate market could profitably impose at least a small but

¹⁶ PX61000 (Nevo Rpt.) ¶ 148; PX61002 (Nevo Reply Rpt.) ¶¶ 71-73, 75; Nevo Hrg. Tr. at 565:9-18, 568:4-569:8.

¹⁷ PX61000 (Nevo Rpt.) ¶ 146; Nevo Hrg. Tr. at 568:4-569:2.

¹⁸ PX61002 (Nevo Reply Rpt.) ¶ 75; Nevo Hrg. Tr. at 569:3-14.

¹⁹ PX61000 (Nevo Rpt.) ¶¶ 117-27.

²⁰ *Guidelines* § 3.

²¹ PX61000 (Nevo Rpt.) ¶¶ 103-05, 113, 117, 176-77.

²² PX61000 (Nevo Rpt.) ¶¶ 95-96, 170; Nevo Hrg. Tr. at 601:24-602:5, 603:17-23; Israel Hrg. Tr. at 1628:14-18.

²³ *Guidelines* § 3; PX61000 (Nevo Report) ¶ 178; Nevo Hrg. Tr. at 606:24-608:3; Israel Hrg. Tr. at 1632:5-9.

²⁴ PX61000 (Nevo Rpt.) ¶¶ 137-39; Nevo Hrg. Tr. at 563:15-564:16; Israel Hrg. Tr. at 1638:4-16.

significant and non-transitory increase in price (“SSNIP”) above prevailing price levels. A SSNIP is normally 5% of the prevailing price.²⁵ If so, the relevant market is properly defined.²⁶

16. Dr. Nevo demonstrated that the candidate market, the supply of MWT products and services to Global Fleets, satisfies the HMT.²⁷

A. There Are No Functional Substitutes for the Supply of Marine BWT Products and Services and CWT Products and Services

17. The supply of MWT products and services to Global Fleets consists of the supply of BWT chemicals, CWT chemicals, and associated products and services.

18. In 2017, BWT and CWT products and services made up most of the Defendants’ overall water treatment revenues, 77% for WSS and 80% for Drew.²⁸

19. BWT chemicals are used to inhibit corrosion by maintaining the chemistry of water in the boiler.²⁹ BWT protects a ship’s boiler from condensate, controls scale, and eliminates oxygen.³⁰ Boilers on a ship can fail because of corrosion, scale, and oxygen formation, and BWT chemicals inhibit the development of those conditions.³¹

20. CWT chemicals are added to the engine cooling water system to inhibit corrosion and scale in engines and keep engines from overheating.³²

21. Suppliers have proprietary mixtures that they claim have better performance than other suppliers’ mixtures.³³

²⁵ *Guidelines* § 4.1.2; PX61000 (Nevo Rpt.) ¶ 139.

²⁶ *Guidelines* § 4.1.1; Nevo Hrg. Tr. at 563:15-564:16.

²⁷ PX61000 (Nevo Rpt.) ¶ 239; Nevo Hrg. Tr. at 625:20-626:6.

²⁸ PX6100 (Nevo Rpt.) ¶ 150; Nevo Hrg. Tr. at 567:8-21; *see also*, Knowles (Drew) Hrg. Tr. at 1417:22-25 (“Q. Sure. [BWT] chemicals, [CWT] chemicals, and test kits comprise the biggest part of Drew Marine’s water treatment chemical revenues. Correct? A. That’s correct.”); PX70020 (Gelosa (Drew) Dep. Tr. at 18:18-22); JX-0250 (WSS) at 008 (analyzing “Water” category as “Treatment for boiler and engine”).

²⁹ Thompson (CCL) Hrg. Tr. at 259:13-17.

³⁰ JX-0161 (WSS) at 008; JX-0135 (MSC Decl.) ¶¶ 10; Sarro (Teekay) Hrg. Tr. at 86:20-87:1 (BWT).

³¹ PX70028 (Rice (RCCL) Dep. Tr. at 56:24-57:20).

³² Thompson (CCL) Hrg. Tr. at 260:11-14; JX-0161 (WSS) at 008.

³³ PX61000 (Nevo Rpt.) ¶ 35-37; *see also*, JX-0009 (Drew) at 004-06 (comparing Drew’s BWT products to WSS’s BWT products); *id.* at 008-009 (comparing Drew’s CWT products to WSS’s CWT products).

22. In addition to the chemicals themselves, MWT suppliers need to provide a “total solution rather than just a product” to compete for customers.³⁴ The “solution” (or “program”) includes test kits,³⁵ technical expertise,³⁶ on-board and remote technical support,³⁷ and the ability to distribute the product in a timely and reliable manner wherever vessels may be located.³⁸

23. Other marine products are not functional substitutes for BWT and CWT products. Maintenance chemicals, tank cleaning chemicals, cargo hold cleaning chemicals, pool and spa treatment chemicals, fuel treatment chemicals, welding gases, and refrigerants are not functional substitutes for marine BWT chemicals or marine CWT chemicals.³⁹

24. **Industrial Suppliers and Ship Chandlers are Not Substitutes for Suppliers of MWT Products and Services to Global Fleets.** Industrial suppliers do not market products or services to marine customers, do not have the capabilities to supply Global Fleets and do not have the technical service capabilities that MWT suppliers provide.⁴⁰ Consistent with this, Ecolab does not market or provide any services to marine customers and only identified ██████ in sales of water treatment chemicals to customers in the marine industry in 2015 and 2016, of which ██████ went to WSS.⁴¹ Solenis, the successor to Ashland’s industrial business, provides toll blending to

³⁴ Deckman (SAI) Hrg. Tr. at 457: 4-15; JX-0182 (SAI) at 069; JX-0231 (WSS) at 154; PX70026 (Deckman (SAI) Dep. Tr. at 100:1-23); PX70007 (Grimholt (WSS) IH Vol. 2 Tr. at 452:16-19).

³⁵ Medina (Crowley) Hrg. At 170:21-171:8; JX-0137 (Crowley Decl.) ¶ 9; JX-0135 (MSC Decl.) at ¶¶ 20-21; PX80006 (CCL Decl.) at ¶ 8.

³⁶ PX70026 (Deckman (SAI) Dep. Tr. at 99:10-16);

³⁷ JX-0137 (Crowley Decl.) at ¶ 11; Thompson (CCL) Hrg. Tr. at 279:9-280:4, 280:25-281:22; JX-0001 (Carnival) at 070-071; PX80006 (CCL Decl.) at ¶ 8; JX-0135 (MSC Decl.) at ¶ 26-28; PX70017 (Fry (MSC) Dep. Tr. at 212:14-213-15); Fry (MSC) Hrg. Tr. at 962:2-14; PX80006 (CCL Decl.) at ¶ 8; PX70031 (Bender (Maersk) Dep. Tr. at 67:2-68:25).

³⁸ JX-0278 ██████ at 051; JX-0155 (WSS) at 007; PX70016 (Grimholt (WSS) Dep. Tr. at 130:11-15, 132:12-23). Customers value a supplier’s ability to provide timely and reliable logistics and delivery around the world. PX70016 (Grimholt (WSS) Dep. Tr. at 164:10-165:3.

³⁹ Defendants’ Responses to Plaintiff’s Second Set of RFAs at 3-8 (Apr. 27, 2018).

⁴⁰ Lange (Ecolab) Hrg. Tr. at 1141:1-9, 1192:10-16; Thompson (CCL) Hrg. Tr. at 284:24-285:5; PX70029 (Lange (Ecolab) Dep. Tr. at 105:4-8).

⁴¹ JX-0136 (Ecolab Decl.) ¶ 9; Lange (Ecolab) Hrg. Tr. at 1142:21-1143:17; PX30012 (Ecolab) at 001-02.

Drew, but does not offer any marine technical services and has no marine customers.⁴² Suez, who acquired GE Water in 2017, does not sell MWT chemicals to vessels.⁴³ Kurita, a Japanese industrial water treatment chemicals firm, supplies the marine market on a limited basis through a Japanese distributor out of its Tokyo office, with 2016 revenues of about [REDACTED], despite having been in business for decades.⁴⁴ Global Fleets do not view industrial suppliers as options for supplying their needs for MWT products and services.⁴⁵

25. Ship chandlers are retailers that stock a wide range of consumables (from food and cigarettes to light bulbs and galley equipment) in warehouses close to ports.⁴⁶ Typically, their only involvement with marine chemicals is providing last-mile delivery (i.e., the final transfer of goods from the transportation hub to the vessel).⁴⁷ Ship chandlers do not—and cannot—offer the full complement of products and services that MWT suppliers offer to Global Fleets.⁴⁸ Neither of the [REDACTED]—sells MWT products or services directly to vessels.⁴⁹ Global Fleets do not consider ship chandlers a good alternative supplier for MWT products and services, often due to higher prices.⁵⁰

B. The Evidence Shows That A Cluster Market of the Supply of MWT Products and Services to Global Fleets Is Appropriate

⁴² PX70024 (Connors (Solenis) Dep. Tr. at 18:21-19:16, 27:7-19, 77:4-22, 84:10-13).

⁴³ PX80015 (Suez Decl.) ¶¶ 1-3.

⁴⁴ JX-0283-001. Kurita acquired Minnesota-based Fremont Water Solutions in 2017, [REDACTED]

⁴⁵ Thompson (CCL) Hrg. Tr. at 284:24-285:5; *see also* Kelleher (Drew) Hrg. Tr. at 539:23-540:13; Knowles (Drew) Hrg. Tr. at 1407:15-1408:15.

⁴⁶ JX-0139 (Wrist Decl.) ¶ 3.

⁴⁷ PX70013 (Liantonio (Wrist) Dep. Tr. at 128:11-18); Knowles (Drew) Hrg. Tr. at 1369:17-19.

⁴⁸ [REDACTED]; *see also*, PX70019 (Kelleher (Drew) Dep. 141:22-25;142:1-16) (“They basically are a storage and logistics provider to the last mile.”); PX70006 (Grimholt (WSS) IH Vol. 1 Tr. at 329:12-21) (testifying that he would be “surprised” if chandlers had “technical expertise to board vessels” because that is “not in their core domain”); Thompson (CCL) Hrg. Tr. at 284:17-23 (testifying that ship chandlers are unable to “offer the liability or the warranty for the chemicals”).

⁴⁹ [REDACTED]

⁵⁰ Medina (Crowley) Hrg. Tr. at 173:8-20; PX70011 (Medina (Crowley) Dep. Tr. at 124:20-125:2); JX-0137 (Crowley Decl.) ¶ 24; [REDACTED]

i. The Supply of BWT Products and Services To Global Fleets and the Supply of CWT Products and Services To Global Fleets Are Subject to Similar Competitive Conditions

26. It is appropriate to cluster the supply of BWT and CWT products and services to Global Fleets for analytical convenience because both are subject to similar competitive conditions. For each set of products and services, Defendants have similar market shares, earn similar margins, and face a nearly identical set of competitors.⁵¹

27. Defendants suggest that competitive conditions for BWT and CWT differ because one supplier, Chevron Marine Lubricants, sells CWT but not BWT to marine customers.⁵² However, Chevron's CWT is a niche product with [REDACTED]—about [REDACTED] in 2017, accounting for about [REDACTED] of Chevron Marine Lubricant's sales.⁵³ Further, there is no evidence that Chevron Marine [REDACTED]⁵⁴

28. Because they face similar competitive conditions, the supply of BWT and CWT products and services to Global Fleets are appropriately combined together into one cluster market for the supply of MWT products and services to Global Fleets.

ii. Other Marine Products are Subject to Different Competitive Conditions

29. The cluster market does not include other, less technical, types of water treatment such as pool and spa treatment chemicals, which make up a only a small fraction of Defendants' overall water treatment revenues.⁵⁵ Pool and spa treatment chemicals, for example, are easier to source from multiple different suppliers.⁵⁶

30. The cluster market also does not include other categories of marine products, like marine gases, tank cleaning chemicals, and marine fuel additives, which are also subject to different

⁵¹ Nevo Hrg. Tr. at 569:3-15; PX61002 (Nevo Reply Rpt.) ¶¶ 75-76, 84-86.

⁵² DX-0060 (Israel Rpt.) ¶ 67.

⁵³ PX80027 (Chevron Marine Decl.) ¶ 8.

⁵⁴ Israel Hrg. Tr. at 1648:20-1649:4.

⁵⁵ PX61000 (Nevo Rpt.) ¶ 150.

⁵⁶ Thompson (CCL) Hrg. Tr. at 326:24-327:10; PX80006 (CCL Decl.) ¶¶ 10, 27.

competitive conditions than BWT and CWT. For example, various small marine suppliers focus their business and competitive efforts on tank cleaning chemicals, rather than water treatment,⁵⁷ while other companies supply marine fuel additives but not other marine products.⁵⁸

31. Defendants suggest that the market should be defined as a bundle of all products that Defendants sell because Defendants' agreements with customers encompass multiple product categories. While these agreements typically address multiple categories of non-substitute marine products beyond BWT and CWT, customers typically do not one-stop shop and buy all of their marine products from one supplier or at one location.⁵⁹ As a result, a bundle market definition is not appropriate.⁶⁰

C. The Evidence Shows That Global Fleets are an Appropriate Set of Targeted Customers

i. Requirements For Price Discrimination Are Present In The Relevant Market

32. The relevant market is characterized by differential pricing: prices for the supply of MWT products and services to Global Fleets are individually negotiated and already differ from Global Fleet to Global Fleet.⁶¹ Additionally, there is no evidence whatsoever of arbitrage.⁶²

ii. Global Fleets are Distinct

33. Dr. Nevo defines Global Fleets as fleets of 10 or more globally trading vessels. Globally trading vessels are vessels above 1,000 gross tons in size that have traded at two ports at least

⁵⁷ Franzo (UNI Americas) Hrg. Tr. at 344:16-19, 348:14-21; PX70030 Niego (UNIService Italy) Dep. Tr. at 18:10-23; JX-0254 (Marine Care Decl.) ¶ 3; PX80028 (EazyChem Decl.) ¶ 3; PX 61002 (Nevo Reply Rpt.) ¶ 82.

⁵⁸ See, e.g., PX00003 (Drew) at 010 (Listing Aderco, Fuelcare, Infineum, Innospec, and Power Research as providing fuel oil treatment, *but not* other categories of marine products).

⁵⁹ PX70001 (Gelosa (Drew) IH Tr. at 170:25-171:5) (“[C]ustomers do not demand multiple solutions. They do not demand to buy all their stuff at the same place. There is no such demand there. Okay? So whether you call it ‘one-stop shopping’ or ‘bundling’ -- you know, it just doesn't exist.”); PX00004 (WSS) at 010 (“Unlike Sysco/USF, Customers Generally Do Not ‘One-Stop Shop’”)

⁶⁰ PX61002 (Nevo Reply Rpt.) 79-80.

⁶¹ Israel Hrg. Tr. at 1628:14-1629:1; PX61000 (Nevo Report) ¶ 96.

⁶² Israel Hrg. Tr. at 1632:5-9.

2,000 nautical miles apart in the preceding 12 months.⁶³ WSS defines globally trading vessels as vessels that travel 2,000 nautical miles or more between the farthest two points visited within a given year.⁶⁴ Defendants focus their sales efforts on vessels above 1,000 gross tons.⁶⁵ As for 10 or more vessels, Dr. Nevo started with 10 vessels but ran sensitivities using 5 and 15 vessels, as well as all globally trading vessels regardless of fleet, to confirm the robustness of his analysis.⁶⁶

34. Certain vessels trade globally rather than regionally or locally.⁶⁷ These different trading patterns can affect the distance traveled, ports visited, and other variables that affect the needs of a vessel's supply of MWT products and services.⁶⁸

35. WSS recognizes this market reality. WSS defines globally trading vessels as vessels that travel 2,000 nautical miles or more between the farthest two ports visited within a given year.⁶⁹ WSS has used this definition of "Global" in its Potential Sales Model ("PSM") and in other ordinary course documents, such as investor presentations.⁷⁰ WSS developed this definition as part of its tool to provide strategic guidance to its salesforce in seeking business opportunities.⁷¹

36. Certain fleets consist primarily of globally trading vessels. To capture the basic economic reality that fleets with more globally trading vessels place greater value on obtaining marine water treatment products on a global basis,⁷² Dr. Nevo defined Global Fleets as those with 10 or

⁶³ See PX61000 (Nevo Rpt.) ¶¶ 91-92, 105, 160.

⁶⁴ See *infra* ¶¶ 35, 45.

⁶⁵ See PX61000 (Nevo Rpt.) ¶ 91.

⁶⁶ See *infra* ¶ 36.

⁶⁷ PX 61000 (Nevo Rpt.) ¶¶ 103-111, Exhibits 4-8.

⁶⁸ PX 61000 (Nevo Rpt.) ¶¶ 103-111, Exhibits 4-8.

⁶⁹ PX20113 (WSS) at 065; PX70016 (Grimholt (WSS) Dep. Tr. at 111:4-112:6); PX61000 (Nevo Rpt.) ¶ 105; PX70006 (Grimholt (WSS) IH Vol. 1 Tr. at 164:23-165:11 (Testifying that "we categorize customers" that travel in excess of 2,000 nautical miles as global because we "sell and deliver differently to global customers" who "have a different need than [l]ocal customer[s]"); PX20388 (WSS) at 17:29-18:22 ("This is clearly a globally trading vessel as they are defined as vessels trading above 2,000 nautical miles").

⁷⁰ PX 61000 (Nevo Rpt.) ¶¶ 103, 110; JX-0145 (WSS) at 023 (Investor presentation stating "Our Market-Targeting Vessels Trading Globally").

⁷¹ According to a video prepared by WSS's Market Intelligence Manager, "we have a primary market, which is our core market, larger globally trading vessels. PX20388 (WSS) at 15:52-17:04; JX-0188 (WSS) at 046.

⁷² Nevo Hrg. Tr. at 587:7-588:20.

more globally trading vessels.⁷³ Dr. Nevo performed various robustness checks that confirmed that his overall opinions do not change using alternative cutoffs of either 5 or 15 globally trading vessels, or even by looking at globally trading vessels collectively regardless of fleet.⁷⁴ Dr. Nevo determined that there are 532 Global Fleets.⁷⁵

37. These Global Fleets include the majority of all globally trading vessels, 84% by tonnage and 71% by vessel count.⁷⁶ Similarly, Global Fleets are mainly composed of globally trading vessels: 81.8% and 92.2% by count and tonnage, respectively.⁷⁷

38. Global Fleets account for the majority of both Defendants' business: [REDACTED] and [REDACTED] of WSS's and Drew's MWT revenue, respectively.⁷⁸ Defendants do not dispute this.

39. While Defendants and their expert sought to minimize the importance of Global Fleets by focusing on the customer count, the reality is that Global Fleet customers account for the vast majority of the market.⁷⁹

40. Compared to vessels that are not in a Global Fleet, Global Fleet vessels tend to be larger, visit more unique ports and countries, travel greater distances, and spend fewer days in port.⁸⁰

Dr. Nevo found that these differences statistically significant.⁸¹

a. Global Fleets Negotiate Individualized Framework Agreements at the Fleet Level

41. Global Fleet customers tend to negotiate framework agreements that cover the supply of MWT products and services to their entire fleet or to a substantial group of their vessels rather

⁷³ Nevo Hrg. Tr. at 586:21-587:6; PX61000 (Nevo Rpt.) ¶¶ 106, 117.

⁷⁴ Nevo Hrg. Tr. at 589:14-590:11; PX61000 (Nevo Rpt.) ¶ 166 n.305.

⁷⁵ PX61000 (Nevo Rpt.) ¶ 118.

⁷⁶ PX61000 (Nevo Rpt.) ¶ 118, Ex. 10; Nevo Hrg. Tr. at 595:16-596:13.

⁷⁷ PX61000 (Nevo Rpt.) ¶ 161.

⁷⁸ PX61000 (Nevo Rpt.) ¶ 123, Ex. 13.

⁷⁹ See *supra* ¶¶ 37-38.

⁸⁰ PX61000 (Nevo Rpt.) ¶¶ 109-111.

⁸¹ PX61000 (Nevo Rpt.) ¶ 161.

than negotiate on a vessel-by-vessel basis.⁸² These negotiations are typically highly individualized.⁸³ Framework agreements typically run for one to three years and contain terms including price, delivery ports, product offerings, and technical services.⁸⁴ These terms can vary significantly from one Global Fleet to another Global Fleet.⁸⁵ Generally, ports with higher volumes have lower prices and ports with lower volumes have higher prices.⁸⁶ However, Global Fleets can negotiate prices based on the set of ports they may require.⁸⁷ While framework agreements are often non-exclusive, Global Fleets typically purchase all MWT products and services through these agreements.⁸⁸

b. WSS Analyzes Price Discrimination Involving Global Customers

42. In its strategic planning, WSS has explicitly analyzed price discrimination involving global customers. For example, in a 2014 internal presentation on pricing, WSS distinguished between a “global customer” and a “local customer,” and stated that the global customer values “global reach” more than the local customer does.⁸⁹ The presentation also explained that agreement discount levels should be set for each customer “by applying indexes to multiple price discrimination levels,” including trading pattern and other factors.⁹⁰ Two years later, another pricing strategy presentation contained the same distinction for global and local customers.⁹¹ In May 2017, after the Acquisition was already announced, WSS began adopting a new customer categorization program that groups actual and prospective customers into one of four categories:

⁸² PX80006 (CCL Decl.) ¶ 21; JX-0135 (MSC Decl.) ¶ 30; JX-0277 (Teekay Decl.) ¶¶ 20-21; PX80007 (Chevron Decl.) ¶ 3; PX80012 (RCCL Decl.) ¶ 3; PX61000 (Nevo Rpt.) ¶ 112.

⁸³ JX-0248 (WSS) at 013-14; JX-0240 (Drew) at 011-12; PX70008 (Knowles (Drew) IH Tr. at 212:20-25).

⁸⁴ See generally JX-0165 (WSS); PX40001 (WSS).

⁸⁵ Israel Hrg. Tr. at 1628:14-1629:25.

⁸⁶ PX70019 (Kelleher (Drew) Dep. Tr. at 114:14-115:11); PX70000 (Cassaras (Drew) IH Tr. at 84:8-85:3).

⁸⁷ PX70000 (Cassaras (Drew) IH Tr. at 84:8-85:18).

⁸⁸ Sarro (Teekay) Hrg. Tr. at 106:9-107:11; JX-0277 (Teekay Decl.) ¶¶ 21-22.

⁸⁹ PX20381 (WSS) at 003.

⁹⁰ PX20381 (WSS) at 011.

⁹¹ PX20322 (WSS) at 006 (“Customer segments value attributes differently – value based pricing reflects this”).

Target, Anchor, Explore, and Transactional.⁹² While the new categorization uses different terminology to replace ‘global’ and ‘local,’ the precise verbiage is not important in any event.

The “Target” category serves as a proxy for global customers: [REDACTED] of the WSS customers with more than 10 globally trading vessels fall into the “Target” category.⁹³

c. Global Fleets Have Particular Demands from MWT Suppliers

43. Global Fleets value a MWT supplier’s global reach.⁹⁴ For example, Carnival purchases its MWT products and services globally from WSS,⁹⁵ and would rule out using a supplier who could not supply MWT products globally.⁹⁶ Defendants also recognize that Global Fleets value a supplier’s global reach.⁹⁷ WSS concluded that large global customers value the WSS network and are willing to pay for global reach.⁹⁸ Indeed, WSS’s Business Development Manager wrote in an internal email that “globally trading customers often are willing to pay more if they can receive the product anywhere they are.”⁹⁹ Global Fleets also value access to MWT products and services at remote ports due to the unpredictability of vessel routes and potential need for unplanned service.¹⁰⁰

44. Global Fleet customers value a consistent, uniform supply of MWT products and services around the world.¹⁰¹ For example, [REDACTED] contract with WSS includes dosing and testing equipment as well as a “comprehensive service agreement” with on-board ship visits by WSS

⁹² JX-0207 (WSS) at 010-011; PX70004 (Bjoerlow (WSS) IH Tr. at 194:8-195:4).

⁹³ PX 61002 (Nevo Reply Rpt.) ¶ 96.

⁹⁴ PX80012 (RCCL Decl.) ¶ 9; JX-0135 (MSC Decl.) ¶ 30; JX-0277 (Teekay Decl.) ¶¶ 12-13; JX-0137 (Crowley Decl.) ¶ 14; PX80006 (CCL Decl.) ¶ 13; PX80007 (Chevron Decl.) ¶ 2; PX80014 (Scorpio Decl.) ¶ 6.

⁹⁵ Thompson (CCL) Hrg. Tr. at 265:12-16.

⁹⁶ Thompson (CCL) Hrg. Tr. at 265:17-25.

⁹⁷ PX20323 (WSS) at 026, 030; PX60002 [REDACTED] at 004.

⁹⁸ PX20323 (WSS) at 026, 030.

⁹⁹ PX20357 (WSS) at 002.

¹⁰⁰ See e.g., Sarro (Teekay) Hrg. Tr. at 77:23-25; 92:13-14 (Teekay vessels frequently operate like a “taxi” and do not necessarily know which port they “will call in from month to month”); Medina (Crowley) Hrg. Tr. at 168:11-169:14 (many of Crowley’s vessels travel on unpredictable routes).

¹⁰¹ Sarro (Teekay) Hrg. Tr. at 83:3-7, 84:25-85:4; Medina (Crowley) Hrg. Tr. at 167:6-23; Franzo (UNI Americas) Hrg. Tr. at 347:1-348:3; PX80014 (Scorpio Decl.) ¶ 5; PX70031 (Bender (Maersk) Dep. Tr. at 92:6-93:13).

technical representatives at least six times per year, quarterly meetings to review product and service performance, monthly log reviews, and unscheduled water testing service visits at “virtually . . . any port.”¹⁰² Because these products are used to maintain water chemistry within consistent ranges, it is critical that Global Fleets receive MWT products and services that are consistent and reliable in their composition, performance, dosage, and concentrations.¹⁰³ Global Fleets do not mix-and-match MWT products from different suppliers on the same vessel.¹⁰⁴ A retired chemicals specialist for the U.S. Navy’s Military Sealift Command (“MSC”) likened mixing-and-matching MWT products to “playing Russian roulette.”¹⁰⁵

d. Defendants’ Core Customers are Global, and Defendants Themselves Differentiate Between Global, Local, and Regional Customers

45. WSS views the majority of its business as “global” and recognizes it has a stronger value proposition among vessels with global trading patterns.¹⁰⁶ A 2016 WSS internal presentation identifies “larger sailing vessels trading globally” as WSS’s core, indisputable market.¹⁰⁷ The manual for WSS’s PSM explains that WSS’s “core” market consists of “all sailing vessels larger than 5,000 gross ton, [sic] that trade on a global scale.”¹⁰⁸ WSS defines this as its “core” market because they “benefit the most from the global standards and availability of products and

¹⁰² [REDACTED]

¹⁰³ Sarro (Teekay) Hrg. Tr. at 83:3-7, 84:25-85:4; Medina (Crowley) Hrg. Tr. at 167:6-23; Franzo (UNI Americas) Hrg. Tr. at 347:1-348:3; PX80014 (Scorpio Decl.) ¶ 5; PX70031 (Bender (Maersk) Dep. Tr. at 92:6-93:13).

¹⁰⁴ Sarro (Teekay) Hrg. Tr. at 83:3-11; Thompson (CCL) Hrg. Tr. at 265:8-11; PX70028 (Rice (RCCL) Dep. Tr. at 46:23-47:12); JX-0137 (Crowley Decl.) ¶ 6; JX-0135 (MSC Decl.) at ¶ 38; PX80007 (Chevron Decl.) ¶ 4; PX80014 (Scorpio Decl.) ¶¶ 5, 8.

¹⁰⁵ Fry (MSC) Hrg. Tr. at 945:24-946:1, 946:18-20.

¹⁰⁶ PX70006 (Grimholt (WSS) IH Vol 2. Tr. at 397:17-398:17, 427:14-428:20).

¹⁰⁷ JX-0188 (WSS) at 046. *See also*, JX-0145 at 023 (describing WSS as “[t]argeting vessels trading globally”); JX-0250 (WSS) at 007 (“WSS’s core customer base is predominantly global customers”); PX70016 (Grimholt (WSS) Dep. Tr. at 111:4-112:6).

¹⁰⁸ JX-0122 (WSS) at -004; JX-0188 (WSS) at -046.

services.”¹⁰⁹ An analysis of the marine chemicals market by a WSS consultant found that WSS’s “core customer base” is global customers that “traveled a distance of 2,000 nm”.¹¹⁰

46. Drew’s larger customers by revenue tend to be customers that they serve on a global basis.¹¹¹ Drew’s Chairman admitted that its core business is “serving [] large international trading vessels.”¹¹² Drew’s President testified that “[t]he markets that we serve have a significant component of customers that buy in locations in more than just one country or even some in more than one region.”¹¹³

e. Global Fleets are a Significant Group of Customers

47. Dr. Nevo found that [REDACTED] and [REDACTED] of WSS’s and Drew’s MWT revenue, respectively, comes from vessels in Global Fleets.¹¹⁴ Dr. Nevo found that all but [REDACTED] of WSS’s and Drew’s 25 largest MWT customers are Global Fleets that own or operate many vessels.¹¹⁵

48. Defendants’ top 25 MWT customers make use of the Defendants’ global reach.¹¹⁶ WSS and Drew’s top 25 customers visit—and purchase MWT products—at many different ports and countries, across different continents.¹¹⁷ Drew delivers products to an average of 45 ports for their top 25 customers¹¹⁸ and [REDACTED] of Drew’s sales are to their top 10 customers.¹¹⁹

¹⁰⁹ JX-0122 (WSS) at -004.

¹¹⁰ JX-0250 (WSS) at 007. Other ordinary course documents also differentiate between global, regional, and local customers. *See, e.g.*, PX20323 (WSS) at 016, 030.

¹¹¹ PX70008 (Knowles (Drew) IH Tr. at 216:19-217:8); Knowles (Drew) Hrg. Tr. at 1420:18-21. Drew’s Senior Vice President of Marketing, Technology, and Supply Chain, explained that a document that separates 31,000 worldwide trading vessels from other vessels does so because “these vessels really are the population of Drew’s targeted vessels.” PX70003 (Kelleher (Drew) IH Tr. at 150–154); JX-0006 (Drew) at 004.

¹¹² PX70001 (Gelosa (Drew) IH Tr. at 134:24-135:2, 133:7-10) (“Q. Okay. Is Drew Marine’s core business providing global maritime customers with critical products and services? A. Yes.”); *see also*, PX10265 (Drew) at 016 (“Drew Marine is the #1 independent global supplier of marine performance chemicals and compliance products and services targeting a diverse base of global asset owners and operators...”).

¹¹³ PX70008 (Knowles (Drew) IH Tr. at 171:11-14).

¹¹⁴ PX61000 (Nevo Report) ¶ 123, Ex. 13.

¹¹⁵ PX61000 (Nevo Report) ¶ 124, Exs. 14 and 15.

¹¹⁶ PX61000 (Nevo Report) ¶ 126, Exs. 16 and 17.

¹¹⁷ PX61000 (Nevo Report) ¶ 126, Exs. 16 and 17.

¹¹⁸ Knowles (Drew) Hrg. Tr. at 1385:7-9.

¹¹⁹ Knowles (Drew) Hrg. Tr. at 1391:1-9.

49. Slides 3 and 4 of Dr. Israel’s demonstratives—suggesting that Global Fleets are a minority of Defendants’ customers—are misleading because they use the raw number of customers, and are not weighted by the number of vessels, revenue, gross tonnage per customer, or any other factor that could capture the commercial significance of different customers.¹²⁰

D. The Relevant Market Satisfies the Hypothetical Monopolist Test

50. As detailed in his reports and summarized in his testimony, Dr. Nevo demonstrated that the relevant market satisfies the HMT.¹²¹

51. Defendants raised certain unfounded, highly technical criticisms of Dr. Nevo’s implementation of the HMT because certain of his estimates were derived from data sources based on all water treatment products, rather than the relevant market specifically. These criticisms are misplaced.¹²² Moreover, Defendants have presented no evidence suggesting that any plausible alternative calculation could yield aggregate diversion ratios lower than the critical loss, such that the test would not be satisfied.

52. Indeed, the only way the HMT would *not* be satisfied is if a sufficient number of customers would switch to options outside the relevant market—e.g., to land-based industrial manufacturers

¹²⁰ Israel Hrg. Tr. at 1635:2-25, 1637:5-1638:3.

¹²¹ PX61000 (Nevo Rpt.) § 4.6 (¶¶ 203-40); Nevo Hrg. Tr. at 625:20-626:6.

¹²² First, three out of four of Dr. Nevo’s margin estimates *were* specific to the relevant market. PX 61000 (Nevo Rpt.) ¶ 220-22. The fourth margin estimate was also reasonable because BWT and CWT account for approximately 80% of Defendants’ sales of all products and services classified as water treatment. Nevo Hrg. Tr. 900:10-901:2. Indeed, the actual gross margin estimates for “all water treatment” (█████ for WSS and █████ for Drew) fall entirely within the range of the two categories of gross margins estimated using relevant-market-specific calculations, proving there is no error in considering “all water treatment” data as a reasonable estimate for the relevant market. *See* PX 61000 (Nevo Rpt.) ¶ 223, Ex. 24. The situation is similar regarding Dr. Nevo’s aggregate diversion estimates. Given the limits in the data available from third parties, Dr. Nevo applied conservative assumptions for scaling the “all water treatment” revenue data to account for the relevant market, and no one has demonstrated these assumptions are unreliable, and for the aggregate diversion ratio specifically, the ratio would be the same whether you apply the scaling or not. *See* Nevo Hrg. Tr. 902:12-903:4. Further, as Dr. Nevo testified, if you take the extremely conservative approach of scaling down the revenue from marine suppliers to account for just the relevant market, while not scaling the revenues from industrial suppliers at all, you would still get an aggregate diversion ratio estimate of approximately 90%. Nevo Hrg. Tr. 902:12-904:4. This value would need to be below 20% to begin to call the results of the HMT into question. Nevo Hrg. Tr. 904:6-23; *see also* PX 61000 (Nevo Rpt.) ¶ 232 (highest critical loss estimate is 17.5%).

or ship chandlers—to make it unprofitable for a hypothetical monopolist to raise prices by a SSNIP of 5%. Such a scenario is not plausible based on the facts in the record about industrial manufacturers and ship chandlers.¹²³

53. The candidate market consisting of the supply of MWT products and services to Global Fleet customers easily satisfies the HMT and thus qualifies as a relevant antitrust market.¹²⁴

III. THE RELEVANT GEOGRAPHIC MARKET IS GLOBAL

54. Dr. Nevo and Dr. Israel agree that the relevant geographic market is global.¹²⁵

IV. THE ACQUISITION IS PRESUMPTIVELY ILLEGAL

A. The Acquisition Will Result in Extraordinarily High Shares and a Significant Increase in Market Concentration

55. The FTC calculated HHIs based on market shares using: (1) revenue information produced by market participants, and (2) WSS's PSM.¹²⁶ Market shares calculated using revenue information reflect the best available information on actual MWT revenues and the competitive significance of market participants.¹²⁷

56. **Shares and Concentration Measures Calculated Using Revenue Data Indicate the Acquisition is Presumptively Illegal.** Using revenue information produced by market participants, Dr. Nevo calculated market shares for the supply of MWT products and services to Global Fleets as 46.1% for WSS and 38.7% for Drew (84.7% combined).¹²⁸ Although Dr. Nevo is aware of only one supplier that did not produce revenue data, the calculation included five “missing” suppliers, assigning each revenues equal to the median for all MWT suppliers other

¹²³ See *supra* ¶¶ 24-25, 140-43, 146-47.

¹²⁴ Nevo Hrg. Tr. at 618:16-21; 625:3-19; PX 61000 (Nevo Rpt.) ¶ 239.

¹²⁵ Nevo Hrg. Tr. at 564:18-565:8; Israel Hrg. Tr. at 1456:21-23.

¹²⁶ PX61000 (Nevo Rpt.) ¶¶ 250-51; see also, JX-0188 (WSS) at 040-42.

¹²⁷ Nevo Hrg. Tr. at 627:17-628:3.

¹²⁸ PX61002 (Nevo Reply Rpt.) ¶ 271.

than Defendants.¹²⁹ Dr. Nevo performed additional robustness checks assuming 5 or 10 additional suppliers.¹³⁰ In each scenario, the combined post-Acquisition market share of Defendants remains extremely high, ranging from 78.7% to 82.8%.¹³¹

57. The HHIs corresponding to these market share calculations indicate high market concentration and a significant increase in concentration, with an HHI of 7,214 and an increase of 3,563, far in excess of the presumption set forth in the *Guidelines*.¹³² In every scenario, WSS and Drew collectively account for over 75% of the total market for the supply of MWT products and services to Global Fleets.¹³³

58. Shares and Concentration Measures Calculated Using an Internal WSS Tool Confirm the Acquisition is Presumptively Illegal. As an alternative measure of market share, Dr. Nevo calculated market shares using the PSM. WSS's CEO testified that WSS used the PSM to measure its market share and that he has received market share estimates from the PSM.¹³⁴ The PSM aims to "quantify the overall market."¹³⁵ The PSM, however, tends to overstate the overall size of the market, and thus understate market shares and concentration.¹³⁶

59. The Acquisition would increase concentration above the presumption threshold even using the conservative shares from the PSM.¹³⁷ Using the PSM, Dr. Nevo calculated Defendants' combined market shares as 69% in 2017.¹³⁸ The PSM identifies "representative vessels" to calculate the overall size of the market, assuming WSS could achieve the same level of sales

¹²⁹ Nevo Hrg. Tr. at 628:8-17; PX61002 (Nevo Reply Rpt.) ¶ 271, Ex. 26.

¹³⁰ Corresponding to the median or average revenue of non-Defendant suppliers, respectively.

¹³¹ PX61002 (Nevo Reply Rpt.) ¶ 271, Ex. 26.

¹³² PX61002 (Nevo Reply Rpt.) ¶ 272, Ex. 27. The HHIs derived from Dr. Nevo's robustness checks are extremely high as well, with post-Acquisition HHIs ranging from 6,235-6,883 and change in HHIs of 3,075-3,399. *Id.*

¹³³ PX61000 (Nevo Rpt.) ¶ 263, Exhibit 32; PX61002 (Nevo Reply Rpt.) ¶ 271, Exhibit 26.

¹³⁴ Grimholt (WSS) Hrg. Tr. at 1237:19-1238:8.

¹³⁵ PX20452 (WSS) at 005, 007, 015; PX61000 (Nevo Rpt.) ¶ 267.

¹³⁶ Nevo Hrg. Tr. at 635:7-636:13; PX61000 (Nevo Rpt.) ¶ 250-51.

¹³⁷ Nevo Hrg. Tr. at 636:25-637:23; PX61000 (Nevo Rpt.) ¶ 266. WSS has use the PSM for many years and continues to use it today. PX70006 (Grimholt (WSS) IH Vol. 1 Tr. at 152:20-153:8 (testifying that PSM existed before he "took on his responsibilities" as CEO and is still in use today).

¹³⁸ PX61000 (Nevo Rpt.) ¶ 275, Exhibit 34.

from any vessel.¹³⁹ To identify these representative vessels, the PSM segments the market based on vessel size and type, and then focuses on the top 25% of vessels with the greatest revenues in each segment, excluding the top 5% of each segment to eliminate outliers.¹⁴⁰ The PSM then calculates the average revenue from all of these vessels, and applies it to all vessels within that segment over 1,000 GT, using publically available vessel data.¹⁴¹

60. The PSM's estimates of the total market size are substantially larger than the market size based on revenue data produced by market participants.¹⁴² This large discrepancy seems implausible, as it would mean that at least [REDACTED] suppliers the size of Marichem did not provide data to the FTC. However, the FTC obtained revenues from all but one of the purported suppliers Defendants identified in February 2018.¹⁴³ Even so, under the PSM calculations Dr. Nevo performed, the post-Acquisition HHI and HHI change exceed the thresholds.¹⁴⁴

61. Dr. Israel's PSM-based market shares—which he first presented during his testimony at the hearing—rely on assumptions about average vessel spend on BWT and CWT products that are inconsistent with WSS's ordinary-course methodology.¹⁴⁵ Dr. Israel's flawed assumptions lead to a large overestimation of total market size and, thus, a large underestimation of WSS's and Drew's market shares.¹⁴⁶

¹³⁹ PX61000 (Nevo Rpt.) ¶ 268.

¹⁴⁰ PX61000 (Nevo Rpt.) ¶¶ 268-269; JX-0122 (WSS) at 008.

¹⁴¹ PX61000 (Nevo Rpt.) ¶ 270.

¹⁴² PX61000 (Nevo Rpt.) ¶ 276-78.

¹⁴³ PX61002 (Nevo Reply Rpt.) ¶ 133 n.166.

¹⁴⁴ Nevo Hrg. Tr. at 636:25-637:23; PX61000 (Nevo Rpt.) ¶ 277.

¹⁴⁵ Dr. Israel's calculation assumed that the representative vessels that the PSM should use to calculate market size are the average of vessels in the top 90%-100% (or, alternatively, 85-95%) vessels. Israel Hrg. Tr. at 1496:2-1497:2. This is inconsistent with the normal use of the PSM, which calculates potentials based on the 75-95% range of vessels, as described above, and dramatically changes his results. JX-0188 (WSS) at 044; PX20452 (WSS) at 010; PX61000 (Nevo Rpt.) ¶ 268-69.

¹⁴⁶ The effect of Dr. Israel's adjustment is to estimate an unrealistically large market size (from 60-120% larger than Dr. Nevo's estimates) resulting in smaller shares for Defendants. Unlike the 75-95% range used by Dr. Nevo, there is no evidence that the ranges used by Dr. Israel have ever been used by WSS for any purpose other than antitrust advocacy in connection with the Acquisition. *See, e.g.*, JX-0188 (WSS) at 044 (describing the 75-95% methodology); PX20452 (WSS) at 010 (same).

B. Dr. Israel’s Vessel-Based Shares are Methodologically Flawed and Divorced from Market Realities

62. Dr. Israel’s market shares are based on “headcounts,” treating each vessel the same regardless of the associated revenue or the volume of MWT purchased.¹⁴⁷ However, the PSM predicts higher water treatment sales to larger vessels, all else equal.¹⁴⁸ The vessel-based shares used by Dr. Israel in his report (Table 9) are further invalidated by his single-invoice restriction, which does not count any purchases from Defendants made via a single invoice. Dr. Israel assigns each single-invoice vessel to unidentified competitors other than Defendants, even if the *amount* of MWT purchased from Defendants is consistent with that purchased via multiple invoices in prior years.¹⁴⁹

C. Ordinary Course Evidence Confirms High Post-Acquisition Shares

63. Defendants’ ordinary course documents confirm their high market shares, including for large global customers specifically.¹⁵⁰ A 2017 WSS strategy document shows that WSS has approximately 50% of the marine chemicals market, with Drew at approximately 25%.¹⁵¹ A WSS presentation entitled “Shaping the Maritime Industry” made by its CEO to investors in 2013, defines the “marine chemicals market” as “consolidated” and characterizes WSS’s market position as “++++”, higher than any other market segment in which WSS participates.¹⁵²

¹⁴⁷ Israel Hrg. Tr. at 1671:3-13, 18-25.

¹⁴⁸ Israel Hrg. Tr. at 1668:12-23.

¹⁴⁹ Israel Hrg. Tr. at 1674:9-17, 1675:22-1676:6.

¹⁵⁰ *See, e.g.*, PX20323 (WSS) at 030 (WSS has 47% market share and Drew has 35% market share for large global customers); JX-0144 (WSS) at 008 (WSS with approx. 50% share in marine chemicals, Drew with approx. 25% share, rest split among Marichem and “Other” suppliers); JX-0112 (Drew) at 014 (“Water – Drew [] and [WSS] command 70%” and “Drew [] probably have 40%), 035 (“[Drew] and [WSS] have a 70% market”), 018 (Global market share in top 4 VPP categories” was approximately 40% and for “Water treatment, fuel treatment, and MMC stronger – somewhere in the mid-40%’s”).

¹⁵¹ JX-0192 (WSS) at 005.

¹⁵² JX-0145 (WSS) at 024. By contrast, the presentation describes other markets in which WSS competes as “highly fragmented” and characterizes WSS’s position as “marginal”. *Id.* The only marine chemicals competitors identified in this presentation were Drew and Marichem, whereas other WSS segments identified many more competitors. *Id.*

64. Defendants' consultants confirmed these high market shares. [REDACTED] noted that WSS and Drew's combined market shares are likely to be too high for regulatory approval.¹⁵³ In a 2015 analysis, [REDACTED] concluded that "consolidation of close to 90% market share in a single player may still be a concern for customers in some markets. . . .", and "[r]egulatory authorities . . . may also consider anti-trust from perspective of actual market situation and other barriers to entry to marine market".¹⁵⁴ [REDACTED] reached the same conclusion, stating, "[t]he main challenge is whether competition authorities will accept the combined market shares of Nancy [i.e., Drew] and WSS."¹⁵⁵ [REDACTED] determined that "it is clearly within water treatment shares are the highest [sic]".¹⁵⁶

D. Dr. Nevo Analyzed Alternative Market Definitions

65. Dr. Nevo calculated market shares and HHIs for various alternative candidate market definitions, including definitions put forward by Defendants.¹⁵⁷ These alternative market definitions include the following:¹⁵⁸

Alternative Market Definition	Post-merger HHI	Change in HHI	Presumptively Unlawful?
Supply of marine water treatment to all vessels	6,991	3,399	Yes
Supply of boiler water treatment to all vessels	5,899	2,861	Yes
Supply of cooling system water treatment to all vessels	4,779	2,189	Yes
Supply of marine chemicals, gases, and refrigerants to all vessels	6,274	2,630	Yes

¹⁵³ [REDACTED]

¹⁵⁴ [REDACTED]; see

also, Grimholt (WSS) Hrg. Tr. at 1258 (confirming these barriers).

¹⁵⁵ JX-0216 (WSS) at 017.

¹⁵⁶ JX-0216 (WSS) at 019. [REDACTED] also determined that "water treatment market shares were especially high in Europe (77%) and North America (74%). PX20115 (WSS) at 003; *see also*, [REDACTED] at 001 (noting that Defendants are the two major players with a combined 80%-90% global market share for marine chemicals).

¹⁵⁷ Nevo Hrg. Tr. at 637:24-640:6; PX61002 (Nevo Reply Rpt.) ¶ 104.

¹⁵⁸ PX61002 (Nevo Reply Rpt.) ¶ 104. All analyses are limited to live and active vessels above 1,000 gross tons.

66. Finally, Dr. Nevo also calculated market shares using a partially corrected version of Dr. Israel's flawed approach using vessel counts, as described in Dr. Nevo's Reply Report.¹⁵⁹ These calculations also establish a presumption of anticompetitive effects.¹⁶⁰

V. THE ACQUISITION WOULD SUBSTANTIALLY LESSEN COMPETITION

A. Defendants are Each Other's Most Significant Competitor

67. Defendants are the two largest and best suppliers of MWT products and services to Global Fleets. WSS's and Drew's total sales of MWT products and services are many times greater than any of the smaller suppliers.¹⁶¹ By both qualitative and quantitative measures, Defendants are #1 and #2 in the market and each other's biggest and closest competitor.¹⁶² Global Fleets overwhelmingly purchase from either WSS or Drew. Of the 532 Global Fleets Dr. Nevo identified, 94% purchase from Defendants; only 31 fleets did not buy these products from Defendants. While those purchasers account for 6% of Global Fleets, they only account for 2.8% of vessels and 1.2% of tonnage within Global Fleets.¹⁶³

68. **Defendants' Documents Confirm Closeness of Competition and Market Dominance.**

Defendants' documents overwhelmingly recognize each other as their most significant competitor.¹⁶⁴ Drew's CEO identified WSS's aggressive pursuit of Drew's top customers as "real downside threats to Drew's EBITDA."¹⁶⁵ A Drew executive suggested in a 2016 strategic

¹⁵⁹ Nevo Hrg. Tr. at 640:7-641:11; PX61002 (Nevo Reply Rpt.) ¶ 140-42.

¹⁶⁰ Nevo Hrg. Tr. at 640:7-641:11; PX61002 (Nevo Reply Rpt.) ¶ 140-42.

¹⁶¹ Nevo Hrg. Tr. at 629:9-630:22; PX61000 (Nevo Rpt.) ¶¶ 61-62, 69.

¹⁶² See PX70008 (Knowles (Drew) IH Tr. at 98:12-14) ("Q. Do you agree...that [WSS] is Drew's biggest competitor? A. I do."); PX70016 (Grimholt (WSS) Dep. Tr. at 154:10-21); JX-0278 [REDACTED] at 013, 139; JX-0112 (Drew) at 016 (stating that Drew's [d]uopoly with [WSS's] Unitor accounts for more than 60% of the market"); PX61000 (Nevo Rpt.) ¶¶ 18, 284-297, 311-314.

¹⁶³ PX61000 (Nevo Report) ¶ 121.

¹⁶⁴ PX20323 (WSS) at 008; PX20329 (WSS) at 048 ("The combined entity will be the unrivaled leader in maritime services..."); JX-0055 (Drew) at 027 ("Drew Marine essentially has one global competitor – Wilh. Wilhelmsen"); JX-0250 (WSS) at 038 (third-party analysis of the marine chemicals market found that Drew was the leading player in the North American water treatment market while WSS was second); JX-0053 (Drew) at 024 (the marine chemical market "is dominated by Drew Marine and the market's largest participant, Wilh. Wilhelmsen").

¹⁶⁵ JX-0097 at 001; Knowles (Drew) Hrg. Tr. at 1429:17-1431:4; PX70008 (Knowles (Drew) IH Tr. at 60:2-6).

planning email that Drew “[a]cquire WSS chemical business, take away your main competitor and win back this space fully for DM [Drew Marine], this could increase our ability to charge far better prices and win across all segments.”¹⁶⁶ While describing competition for the 2016 tender for a marine chemicals contract with the MSC, WSS stated that “Drew Marine is considered the only strong competitor.”¹⁶⁷ WSS also suggested that acquiring Drew would “take out the one competitor that contributed in ‘driving’ the global market.”¹⁶⁸

69. █████ provided its consultant █████ with market share estimates identifying WSS and Drew at #1 and #2 in water treatment.¹⁶⁹ An analysis by █████ found that WSS and Drew “hold majority of contract business for marine chemicals (in particular water treatment) due to long-term market participation and global presence.”¹⁷⁰ A 2014 █████ analysis found that Drew and WSS were the two largest and closest competitors in the North American MWT market.¹⁷¹ In a memorandum to its shareholders, Drew’s owner, the Jordan Company, stated that Drew is just one of two global players in MWT.¹⁷²

70. **Defendants Win and Lose to Each Other Most Frequently.** Dr. Nevo performed an analysis of WSS’s Salesforce database using the keyword “water” and the names of many different marine and industrial suppliers.¹⁷³ With well over 1,000 observations the results showed that Drew appeared more frequently than any other firm, accounting for 57% of all results, and

¹⁶⁶ JX-0048 (Drew) at 006.

¹⁶⁷ JX-0229 (WSS) at 036.

¹⁶⁸ PX20329 (WSS) at -015; *see also* PX70007 (Grimholt (WSS) IH Vol. 2 Tr. at 442:23-443:13, 457:1-458:25) (prospective five-year WSS technical services strategy document lists Drew as the only competitor in the “oligopoly” of service providers that offers chemical services).

¹⁶⁹ █████; PX70006 (Grimholt (WSS) IH Vol. 1 Tr. at 254:8-256:3).

¹⁷⁰ █████

¹⁷¹ JX-0250 (WSS) at 038.

¹⁷² JX-0096 (Drew) at 054.

¹⁷³ PX61000 (Nevo Rpt.) at ¶ 312.

Drew had at least three times as many results as any other supplier.¹⁷⁴ Drew's prominence was even more pronounced in results for Sales Activity Plans for particular customers.¹⁷⁵ In total, Drew appeared in 65% of all results for Sales Activity Plans.¹⁷⁶ In Defendants' win-loss databases, Drew was the competitor in 83% of the Global Fleet MWT opportunities for which WSS identified a competitor, while WSS was the competitor in 76% of such opportunities where Drew identified a competitor.¹⁷⁷

71. **Global Fleet Customers Confirm Defendants are #1 and #2.** Global Fleet customers recognize that Drew and WSS are the two leading suppliers of MWT products and services, and often the only two suppliers that maintain the kind of global supply and distribution networks required to meet their needs.¹⁷⁸ Teekay considers Drew to be its next best option after WSS when negotiating framework agreements, and considers Defendants to be its only viable MWT suppliers.¹⁷⁹ [REDACTED] is not aware of any other credible alternatives to WSS and Drew as potential competitors for MWT products.¹⁸⁰ [REDACTED] would have no alternative suppliers for marine water treatment chemicals if WSS purchases Drew.¹⁸¹

72. **Other Industry Participants Confirm Defendants are #1 and #2.** In reviewing its sale of [REDACTED] stated, "[o]ur feeling was that WSS and [Drew] as the number 1 and 2 market share holders had the most to gain/lose in our divestiture of [REDACTED]

¹⁷⁴ PX61000 (Nevo Rpt.) at ¶ 312.

¹⁷⁵ PX61000 (Nevo Rpt.) ¶ 312, Exhibits 20-21.

¹⁷⁶ PX61000 (Nevo Rpt.) ¶ 312, Exhibit 22; Nevo Hrg. Tr. at 650.

¹⁷⁷ PX61000 (Nevo Rpt.) ¶ 313, Exhibit 23.

¹⁷⁸ PX80007 (Chevron Decl.) ¶ 2; JX-0137 (Crowley Decl.) ¶ 6; PX70028 (Rice (RCCL) Dep. Tr. at 41:4-15); PX80012 (RCCL Decl.) ¶¶ 3, 14, 16; JX-0135 (MSC Decl.) ¶ 41; PX80014 (Scorpio Decl.) ¶ 7.

¹⁷⁹ Sarro (Teekay) Hrg. Tr. at 157:22-25, 96:8-10.

¹⁸⁰ [REDACTED]

¹⁸¹ [REDACTED]

¹⁸² [REDACTED]

77. **Royal Caribbean (“RCCL”)**: In a 2016 bid for RCCL’s chemicals contract, RCCL negotiated with WSS and Drew for three rounds.¹⁸⁹ Drew’s offer came in at [REDACTED] less than WSS, a savings of [REDACTED] from the previous contract with WSS, who had previously supplied RCCL for seven years.¹⁹⁰

78. [REDACTED]: During [REDACTED] most recent RFP for MWT, [REDACTED] pitted WSS and Drew against one another to receive price concessions.¹⁹¹ Drew’s head of sales testified that WSS bid at a lower price than Drew and won a portion of [REDACTED] business.¹⁹²

79. **MSC**: Although WSS ultimately chose not to bid for MSC’s business in 2017, Drew did not know that WSS did not bid.¹⁹³ A Drew presentation regarding MSC’s 2017 RFP listed WSS as an “[REDACTED]” with Drew as the “[REDACTED]” in the bid process.¹⁹⁴ When reflecting on losing a tender for MSC business to Drew, WSS noted that “[REDACTED] [REDACTED]”¹⁹⁵

80. **Many Other Examples**: The factual record is replete with other examples of direct competition between WSS and Drew for Global Fleets. These include [REDACTED] [REDACTED] [REDACTED] and others.¹⁹⁶

ii. Global Fleet Customers Also Obtain Non-Price Benefits

¹⁸⁹ PX80012 (RCCL Decl.) ¶ 13.

¹⁹⁰ PX70028 (Rice (RCCL) Dep. Tr. at 30:24-31:6); PX80012 (RCCL Decl.) ¶ 13; *see also*, PX20338 (WSS) at 001 (noting, “the business was lost to Drew who went in exceptionally low”).

¹⁹¹ JX-0083 (Drew) at 001 (discussing potentially offering a further discount based on WSS’ low bid); JX-0097 (Drew) at 001 (noting Drew lost “about [REDACTED]”).

¹⁹² PX70014 (Cassaras (Drew) Dep. Tr. at 158:21-162:23; PX10085 (Drew) at 003; PX70005 (Good (Drew) IH Tr. at 258:24-259:13); PX20081 (WSS) at 001 (“Christmas came early this year for WSS as we win Maersk Line from Drew...”).

¹⁹³ PX70018 (Nguyen (MSC) Dep. Tr. at 97:16-98:25); Fry (MSC) Hrg. Tr. at 1006:12-18.

¹⁹⁴ *See* JX-0108 (Drew) at 009; PX70023 (Knowles (Drew) Dep. Tr. at 177:1-178:11, 180:12-19, 186:23-187:11.

¹⁹⁵ JX-0153 (WSS) at 026, 030 (emphasis in original).

¹⁹⁶ *See* JX-0033 (Drew) at 002; JX-0032 (Drew) at 002; JX-0042 (Drew) at 005; PX20073 (WSS) at 001; PX20072 (WSS) at 001; PX20063 (WSS) at 001; JX-0082 (Drew) at 002-03; JX-0080 (Drew) at 001; JX-0046 (WSS) at 002; JX-0098 (Drew) at 001.

81. Global Fleet customers also gain non-price benefits from direct competition between WSS and Drew. For example, in a 2016 bid to take RCCL's business from WSS, Drew offered to give RCCL [REDACTED]

[REDACTED]¹⁹⁷

82. Throughout MSC's relationship with Drew, Drew has been proactive in developing new technologies and improving the efficiency of its goods and services.¹⁹⁸

C. Other Suppliers are Inferior Options to Defendants for Global Fleets

83. WSS and Drew are the only two suppliers capable of meeting the needs of many Global Fleets for MWT products and services.¹⁹⁹ One WSS sales manager described the remaining competitors, besides Drew, in the MWT market as "[REDACTED]": "[REDACTED]

[REDACTED]"²⁰⁰ An annual Drew investor presentation reached a similar conclusion, stating that while the "segment is dominated by [Drew] and the market's largest participant, [WSS], [t]he remaining market is characterized by small regional/local suppliers, specializing in [REDACTED]

[REDACTED]"²⁰¹

84. The experiences of Global Fleets who have investigated the capabilities of other marine suppliers or invited them to bid have been consistent with these observations. For example, in 2016, when [REDACTED] invited WSS, Drew, and Marine Care to bid on its worldwide chemicals contract to [REDACTED] eliminated Marine Care, in part because Marine Care [REDACTED]²⁰² RCCL would not look to Marine Care for marine water

¹⁹⁷ PX70028 (Rice (RCCL) Dep. Tr. at 128:12-133:13); PX10346 (Drew) at 002.

¹⁹⁸ JX-0135 (MSC Decl.) ¶ 55.

¹⁹⁹ See, e.g., Sarro (Teekay) Hrg. Tr. at 81:21-23; Fry (MSC) Hrg. Tr. at 966:7-12; Medina (Crowley) Hrg. Tr. at 181:14-16.; PX70028 (Rice (RCCL) Dep. Tr. at 41:4-19).

²⁰⁰ PX70002 (Carute (WSS) IH Tr. at 116:1-10).

²⁰¹ JX-0053 (Drew) at 024; JX-0279 (Drew) at 040.

²⁰² [REDACTED]

treatment chemicals in the future, because Marine Care lacks the “global capabilities that [WSS] and Drew have.”²⁰³ When [REDACTED] invited WSS, Drew, Marichem, and UNIservice to bid on its business in 2011, Marichem and UNIservice declined to submit a bid.²⁰⁴ [REDACTED] declines to bid for the MWT business of cruise lines or MSC, recognizing that it simply does not have the capabilities to serve these customers.²⁰⁵

i. Marichem Cannot Constrain a Post-Acquisition WSS

85. Marichem, the third-largest marine supplier, has MWT revenues far smaller than either Defendant.²⁰⁶ Marichem’s MWT sales are [REDACTED] smaller than WSS, [REDACTED] smaller than Drew, and its revenues would be roughly [REDACTED] of Defendants’ combined revenues.²⁰⁷ Drew thinks of Marichem as a [REDACTED] in the market and a [REDACTED] [REDACTED]²⁰⁸

86. After learning about the Acquisition, Teekay reached out to Marichem to explore potential alternatives to the Defendants.²⁰⁹ In the course of their meetings, Marichem admitted that it does not have the capability to meet Teekay’s needs.²¹⁰ As a result, Teekay declined to move forward on a planned trial with Marichem. Teekay will not shift its fleet’s water treatment purchases to Marichem under any circumstances.²¹¹ Other Global Fleet customers deem Marichem inferior to Defendants.²¹²

²⁰³ PX70028 (Rice (RCCL) Dep. Tr. at 136:10-137:11).

²⁰⁴ [REDACTED]
²⁰⁵ [REDACTED]

²⁰⁶ JX-0129 (Marichem) at 001 (In 2015 and 2016 Marichem sold approximately [REDACTED] and [REDACTED] respectively in water treatment chemicals).

²⁰⁷ PX61000 (Nevo Report) ¶ 66.

²⁰⁸ PX70014 (Cassaras (Drew) Dep. Tr. at 204:8-13, 210:8-24).

²⁰⁹ Sarro (Teekay) Hrg. at 97:23-98:10.

²¹⁰ Sarro (Teekay) Hrg. at 98:11-99:25, 127:8-24.

²¹¹ Sarro (Teekay) Hrg. at 100:1-22.

²¹² See, e.g., PX80007 ([REDACTED] Decl.) ¶ 2, ([REDACTED] believes that Marichem [REDACTED] that Drew and WSS currently maintain.); PX80014 ([REDACTED] Decl.) ¶ 11 ([REDACTED] believes that Marichem’s [REDACTED] as WSS’s or Drew’s); JX-0135 (MSC

87. Drew's VP of Marketing, Technical, and Supply Chain testified that Drew's customers have complained about the [REDACTED] from Marichem, and specifically the [REDACTED]

[REDACTED]²¹³ Defendants themselves view Marichem as [REDACTED]²¹⁴

ii. UNIservice Italy, Marine Care, Vecom, and UNI Americas are Distant Competitors

88. **UNIservice Italy:** UNIservice Italy specializes in the sale of tank cleaning chemicals, with between [REDACTED] of its 2017 revenue attributable to tank and cargo hold cleaning compared to [REDACTED] from marine water treatment chemicals.²¹⁵ The majority of UNIservice Italy's MWT customers are Italian shipping companies.²¹⁶ UNIservice Italy has [REDACTED] total employees all based in Italy.²¹⁷

89. **Marine Care:** Marine Care has [REDACTED] employees and operates [REDACTED] warehouses located in [REDACTED]²¹⁸ Marine Care has not expanded their geographic presence for offering MWT chemicals in at least [REDACTED] years.²¹⁹ Despite the fact that Marine Care's bid for [REDACTED] chemicals contract in 2016 included [REDACTED] while Drew's did not, it did not advance to the next round of bidding, while Drew did.²²⁰ [REDACTED] determined that

Decl.) ¶ 42 (Marichem [REDACTED])

²¹³ PX70019 (Kelleher (Drew) Dep. Tr. at 167:8-16; 168:12-13).

²¹⁴ JX-0075 (Drew) at 001; JX-0006 (Drew) at 017; [REDACTED]

²¹⁵ PX70030 (Niego (UNIservice Italy) Dep. Tr. at 18:24-19:9, 19:12-19, 18:10-23); PX80025 (UNIservice Italy Decl.) ¶ 3.

²¹⁶ PX80025 (UNIservice Italy Decl.) ¶ 4.

²¹⁷ PX70030 (Niego (UNIservice Italy) Dep. Tr. at 20:16-17, 22:9-23, 23:9-21).

²¹⁸ JX-0254 (Marine Care Decl.) ¶¶ 3, 8.

²¹⁹ JX-0254 (Marine Care Decl.) ¶ 10.

²²⁰ [REDACTED]

Marine Care's bid had [REDACTED] because Marine Care could not serve all of [REDACTED] required ports and Marine Care could not supply everything that was being tendered.²²¹

90. **Vecom:** [REDACTED] recently investigated Vecom's capabilities by inviting it to bid on [REDACTED] items for a vessel based in [REDACTED], one of the busiest ports in the world. Ultimately, [REDACTED] determined that Vecom was not a viable supplier.²²² It could only supply [REDACTED] of the [REDACTED] requested products, and required [REDACTED] lead-time because it needed to ship the product from [REDACTED].²²³ Additionally, Vecom was [REDACTED] more expensive on one MWT chemicals than [REDACTED], and [REDACTED].²²⁴ Drew's VP of Marketing, Technical, and Supply Chain testified that Drew's customers have complained about [REDACTED] [REDACTED].²²⁵

91. **UNI Americas:** UNI Americas specializes in tank cleaning chemicals.²²⁶ UNI Americas lacks the global distribution footprint Defendants possess, owning a single warehouse and having just three stock locations.²²⁷ While UNI Americas can serve other ports within the U.S., they require [REDACTED].²²⁸

iii. Other Fringe Participants Not Viable Options for Global Fleets

92. [REDACTED], testified that [REDACTED] "get[s] approached by suppliers all the time offering to do all kinds of things, but when you really begin to explore what it would take to service these ships on such a high frequent basis, usually they don't pan out" and "usually you find that they're not" willing to set up the necessary distribution network to meet

²²¹ [REDACTED]; *see also*, PX80012 (RCCL Decl.) ¶ 13 (In 2016, RCCL eliminated Marine Care after the first round of bids because it could only supply 50% of the required ports.).

²²² [REDACTED]

²²³ [REDACTED]

²²⁴ [REDACTED]

²²⁵ PX70019 (Kelleher (Drew) Dep. Tr. at 167:8-16; 168:14-15).

²²⁶ Franzo (UNI Americas) Hrg. Tr. at 344:16-19, 348:14-21.

²²⁷ Franzo (UNI Americas) Hrg. Tr. at 352:24-353:12.

²²⁸ Franzo (UNI Americas) Hrg. Tr. at 360:20-361:2.

needs.²²⁹ Rob Sarro, Teekay's Director of Global Procurement, testified that it is common in the shipping industry for suppliers to "say[] they can do something, but then when you come time to actually doing it...that's when we find out what their true capability is."²³⁰

D. Dr. Nevo's Empirical Upward Pricing Pressure Analysis Confirms the Merged Firm Will Likely Have the Incentive to Raise Prices

93. To study the likely effect of the proposed merger on competition, Dr. Nevo used the Gross Upward Pricing Pressure Index methodology ("GUPPI"). Upward pricing pressure is a standard methodology, which is discussed in the *Guidelines* and accepted by the antitrust agencies and the courts.²³¹

94. As described in detail in his reports and summarized in his testimony, Dr. Nevo performed the GUPPI analysis using multiple reasonable estimates of the necessary inputs to ensure the robustness of his results.²³² Across all the input estimates he analyzed, Dr. Nevo found that the GUPPI for WSS and Drew products are well above zero, confirming that the merged firm will have strong incentives to raise prices.²³³

E. Dr. Nevo's Merger Simulation Demonstrates that Post-Acquisition Prices Will Increase and Customers Will Be Harmed

95. Dr. Nevo also employed a merger simulation model, which has been accepted by the antitrust agencies and the courts.²³⁴ Merger simulation is used to quantify the magnitude of likely competitive harm.²³⁵

96. As described in detail in his reports and summarized in his testimony, Dr. Nevo employed the merger simulation to measure the effect that the merger of WSS and Drew would have on

²²⁹ [REDACTED]

²³⁰ Sarro (Teekay) Hrg. Tr. at 99:10-18.

²³¹ PX61000 (Nevo Rpt.) ¶316; Nevo Hrg. Tr. at 652:8-12.

²³² PX61000 (Nevo Rpt.) ¶321, Exhibit 36; PX61002 (Nevo Reply Rpt.) ¶ 218 & Exhibit 24; Nevo Hrg. Tr. at 655:14-56:20, 661:21-62:8.

²³³ PX61000 (Nevo Rpt.) ¶ 328.

²³⁴ PX61000 (Nevo Rpt.) ¶ 330; Nevo Hrg. Tr. at 662:19-663:16.

²³⁵ PX61000 (Nevo Rpt.) ¶ 329.

pricing of MWT products and services.²³⁶ Using the best estimate of market share and two sets of margin estimates, Dr. Nevo found that under this merger simulation prices will increase by 29-46.6% for an annual harm of \$14.4-23.1 million.²³⁷ As with his other analyses, Dr. Nevo also ran his merger simulation sensitivities using alternative parameters, all of which indicated harm to competition.²³⁸

97. Dr. Nevo also performed a merger simulation based on Defendants' proposed alternative market definition for the bundle of all marine products that Defendants sell.²³⁹ This simulation showed that if such a bundle were an appropriate relevant market, the anticipated price increase would be 29.8%, resulting in annual harm of \$110.9 million.²⁴⁰

98. Dr. Nevo's GUPPI and merger simulation models represent two different ways of modeling the negotiation and procurement process, including buyer power.²⁴¹

F. Dr. Israel's Switching Study is Unreliable, Biased, and Methodologically Flawed, and Cannot Measure the Closeness of Competition between WSS or Drew or Any Alternative Suppliers

99. In his report, Dr. Israel attempted to perform a study to quantify the level of switching between WSS, Drew, and other suppliers. However, Dr. Israel's switching analysis is not designed to measure bidding competition by suppliers to enter into framework agreements with fleets.²⁴² And Dr. Israel does not rely on his switching study to assess the closeness of competition between WSS and Drew.²⁴³ Dr. Israel's switching study is deeply flawed and

²³⁶ Nevo Hrg. Tr. at 663:17-665:5, 671:19-672:24; PX61000 (Nevo Rpt.) ¶ 338-340.

²³⁷ Nevo Hrg. Tr. at 674:17-675:11; PX61000 (Nevo Rpt.) ¶ 339, Exhibit 39.

²³⁸ Nevo Hrg. Tr. at 674:17-675:11; PX61000 (Nevo Rpt.) ¶ 339-41.

²³⁹ Nevo Hrg. Tr. at 683:13-684:3; PX61002 (Nevo Reply Rpt.) ¶ 225.

²⁴⁰ Nevo Hrg. Tr. at 683:13-684:3; PX61002 (Nevo Reply Rpt.) ¶ 225.

²⁴¹ PX61002 (Nevo Reply Rpt.) ¶¶ 233-235.

²⁴² PX70034 (Israel Dep. Tr. at 245:15-18, 270:2-11).

²⁴³ PX70034 (Israel Dep. Tr. at 272:1-12).

unreliable. The numerous flaws in Dr. Israel's attempted switching study are addressed at length in Dr. Nevo's Reply Report.²⁴⁴ These flaws include:

100. Dr. Israel attempts to identify switching by identifying changes in purchase patterns at the vessel, rather than fleet, level, despite the fact that vessels are not the relevant customers.²⁴⁵

101. Dr. Israel assumes that particular vessels have begun purchasing water treatment from new suppliers based on changes in invoice data.²⁴⁶ But because Dr. Israel only has invoice data from Defendants, he cannot actually observe whether this assumption is true for any vessel, and he did not even attempt to confirm whether any vessels actually did switch suppliers.²⁴⁷

102. Testimony and evidence collected from Global Fleets prior to the submission of Dr. Israel's report suggests the analysis incorrectly treats many vessels as switching to a non-party MWT supplier.²⁴⁸ For example, MSC provided alternative explanations showing that many of the purported switches were not switched at all.²⁴⁹

103. Every vessel that Dr. Israel incorrectly counts as a loss by WSS or Drew to a supplier other than the merging parties further biases his results.²⁵⁰ Dr. Israel applies the same flawed, single-invoice restriction from his vessel-based shares to his vessel switching analysis.²⁵¹

VI. DEFENDANTS FAIL TO SHOW THAT GLOBAL FLEETS WILL HAVE THE POWER TO DISCIPLINE A POST- MERGER PRICE INCREASE

A. Global Fleets Will Not Have Meaningful Post-Acquisition Alternatives

²⁴⁴ PX61002 (Nevo Reply Rpt.) ¶¶ 40-58, 167-193.

²⁴⁵ Israel Hrg. Tr. at 1715:23-1716:1.

²⁴⁶ Israel Hrg. Tr. at 1718:10-1719:5.

²⁴⁷ Israel Hrg. Tr. at 1718:2-9, 1730:3-1731-1.

²⁴⁸ PX70025 (Sarro (Teekay) Dep. Tr. at 116:12-24, 118:5-10); PX70022 (Thompson (CCL) Dep. Tr. at 214:8-24, 218:17-25, 220:14-18); PX40031 (MSC) at 001.

²⁴⁹ PX40031 (MSC) at 001.

²⁵⁰ Israel Hrg. Tr. at 1729:4-1729:13.

²⁵¹ Israel Hrg. Tr. at 1719:6-1721:14. Moreover, Dr. Israel's switching analyses are not limited to live and active vessels. Israel Hrg. Tr. at 1721:15-17. To the extent that Dr. Israel's study identified any vessels that actually did switch from Defendants to another MWT supplier, he does not know why each vessel switched, let alone whether the switch was motivated by price. Israel Hrg. Tr. at 1732:4-15.

104. Under well-settled economic principles, even large customers will generally be harmed by a merger that eliminates a supplier whose presence contributed to their negotiating leverage.²⁵² Dr. Nevo concluded that “global fleets, despite being large customers, can actually be harmed by the proposed merger” because “global fleets play WSS and Drew against one another for better pricing.”²⁵³

105. Even if WSS’s prices went up 50% post-Acquisition or Marichem offered Teekay free product, Teekay would not switch its fleet to Marichem for BWT and CWT.²⁵⁴ Teekay views Drew as its next best alternative when negotiating its framework agreement with WSS, and post-Acquisition, Teekay’s “hands [will be] tied” in negotiations with WSS.²⁵⁵ [REDACTED] does not believe there will be an alternative “viable participant” post-Acquisition when negotiating its framework agreement with WSS, and as a result, [REDACTED] “wouldn’t be able to have a competition.”²⁵⁶ Post-Acquisition, [REDACTED] will be left with no alternatives, and if WSS increased price, [REDACTED] is “just going to be paying more.”²⁵⁷

B. There is No Evidence that Global Fleets Will Sponsor Entry or Vertically Integrate

106. CCL has never considered using a toll blender to make its own MWT chemicals, nor have they considered opening their own blending plant to make its own MWT chemicals.²⁵⁸ Teekay is “not there to help [a new, untested supplier] along.”²⁵⁹ MSC has never tried to sponsor entry, and would not have the authority to do so.²⁶⁰

²⁵² Nevo Hrg. Tr. at 684:7-685:18.

²⁵³ PX61002 (Nevo Reply Rpt.) ¶ 229.

²⁵⁴ Sarro (Teekay) Hrg. Tr. at 100:15-22.

²⁵⁵ Sarro (Teekay) Hrg. Tr. at 157:10-25.

²⁵⁶ [REDACTED]

²⁵⁷ [REDACTED]

²⁵⁸ [REDACTED]

²⁵⁹ Sarro (Teekay) Hrg. Tr. at 127:12-24.

²⁶⁰ JX-0135 (MSC Decl.) ¶ 53.

C. Global Fleets *Already* Carry as Much Product on Board Vessels as They Can

107. Global Fleet customers do not have the capacity to store large amounts of products onboard vessels—MWT products are stored in safety lockers onboard the ship, where space is limited.²⁶¹ If CCL wanted to stock up on double the amount of MWT chemicals, it would have to “construct another locker” because their storage lockers are full, and they must comply with safety and regulatory requirements on storing and handling these chemicals.²⁶² Teekay “does not have the luxury of space” to carry more product on board its vessels.²⁶³ MSC is unable to stock up on MWT chemicals at a few ports because most of MSC’s vessels have very limited space, and do not have areas to store MWT chemicals for a long period of time.²⁶⁴

108. Global Fleet customers also do not want to carry more product on board their vessels. Those vessels are designed to maximize the space available for revenue-generating cargo or passengers, not supplies.²⁶⁵ [REDACTED]²⁶⁶ chemicals contract with WSS includes a provision that the two entities will [REDACTED]

[REDACTED]²⁶⁷

D. There is No Evidence That Global Fleets Can Discipline Prices on MWT Products and Services by Switching Suppliers for Other Products and Services

109. As Dr. Nevo concluded, “there is no economic or empirical basis for the argument that threatening to switch non-water treatment purchases will prevent a post-merger price

²⁶¹ PX80014 (Scorpio Decl.) ¶ 6; PX80012 (RCCL Decl.) ¶ 10; *see also*, Israel Hrg. Tr. at 1692:2-18 (The merger would not make it easier for Global Fleets to have their vessels carry a larger supply of MWT chemicals.).

²⁶² Thompson (CCL) Hrg. Tr. at 266:23-267:13.

²⁶³ Sarro (Teekay) Hrg. Tr. at 92:22-23.

²⁶⁴ Fry (MSC) Hrg. Tr. at 963:19-964:4; PX70017 (Fry (MSC) Dep. Tr. at 217:21-218:6, 220:19-222:3); JX-0135 (MSC Decl.) ¶ 45.

²⁶⁵ Sarro (Teekay) Hrg. Tr. at 92:22-93:9; Fry (MSC) Hrg. Tr. at 964:2-965:4.

²⁶⁶

²⁶⁷

increase.”²⁶⁸ This is because “even if ... customers can use multiproduct bargaining to obtain better pricing, one would expect that they *already* take advantage of any such opportunities to obtain the best possible pricing. Their ability to engage in this behavior is not going to be enhanced by the proposed merger, but rather reduced.”²⁶⁹

VII. DEFENDANTS FAIL TO SHOW ENTRY AND REPOSITIONING WILL BE TIMELY, LIKELY, AND SUFFICIENT TO OFFSET THE COMPETITIVE HARMS

A. There are Numerous Barriers to Entry and Expansion

i. Global Logistics and Distribution Network are Barriers

110. CCL would “rule out a supplier that couldn’t deliver [MWT] chemicals globally.”²⁷⁰ Teekay needs a supplier with a “global distribution network . . . reaching nearly all of the ports [they] may visit.”²⁷¹ Crowley requires a supplier with the largest geographic footprint “that can deliver a consistent product to a fleet of vessels wherever they may travel worldwide.”²⁷²

111. In order to meet the worldwide demands of Global Fleets, MWT suppliers need a robust logistics and distribution network, including a supply chain model that allows for production schedule alterations, capacity flexibility, and a large number of geographically diverse stock points.²⁷³ The “longer” the supply chain, the higher the risk of delay and disruption.²⁷⁴

²⁶⁸ PX61002 (Nevo Reply Rpt.) ¶ 232; *see also*, Israel Hrg. Tr. 1693:14-25 (The merger would not make it easier for Global Fleets to threaten to switch non-MWT purchases to other suppliers, nor would it increase the set of suppliers to which a customer could switch.).

²⁶⁹ PX61002 (Nevo Reply Rpt.) ¶ 223 (emphasis in original).

²⁷⁰ Thompson (CCL) Hrg. Tr. at 265.

²⁷¹ JX-0277 (Teekay Decl.) ¶ 14.

²⁷² JX-0137 (Crowley Decl.) ¶ 14.

²⁷³ Kelleher (Drew) Hrg. Tr. at 482:17-484:10; Franzo (UNI Americas) Hrg. Tr. at 355; PX70019 (Kelleher (Drew) Dep. Tr. at 185:5-24); *see also* PX70005 (Good (Drew) IH Tr. at 81:23-83:15 (testifying that Drew’s biggest challenge is constantly meeting unpredictable customer needs); PX70026 (Deckman (SAI) Dep. Tr. at 111:15-112:3).

²⁷⁴ Kelleher (Drew) Hrg. Tr. at 481:7-21; PX70019 (Kelleher (Drew) Dep. Tr. at 183:13-24).

112. Opening locations at new ports requires permits and licensing for importing, warehousing, and delivering MWT chemicals to a particular port.²⁷⁵ Serving more remote ports is more costly for suppliers for several reasons, including because of lower customer volumes.²⁷⁶ As a result, higher costs at more remote ports translates into higher prices for customers.²⁷⁷ Due to the specific business model and supply chain required to serve marine customers there are relatively few suppliers willing to specialize in the MWT space.²⁷⁸

113. Defendants acknowledge that global logistics and distribution networks are barriers to entry. [REDACTED], and WSS's CEO confirmed, that there are entry barriers related to "logistics, channel, market knowledge, and customer base."²⁷⁹ A 2013 Drew presentation to the ratings agency Moody's stated that Drew has an "[e]xpansive global logistics and distribution network [that] enables swift order fulfillment and is difficult and costly to replicate."²⁸⁰

ii. High-Quality and Consistent MWT Products and Services are Barriers

114. Crowley looks for dependability, and "want[s] the same formula to exist whether you get it in Singapore or Houston."²⁸¹ Teekay needs a supplier that is capable of consistently delivering the right product and the right quality at the right price.²⁸² CCL looks for "consistent quality"

²⁷⁵ PX70019 (Kelleher (Drew) Dep. Tr. at 120:4-121:15).

²⁷⁶ Kelleher (Drew) Hrg. Tr. at 486:2-8; PX70019 (Kelleher (Drew) Dep. Tr. at 115:6-11).

²⁷⁷ Kelleher (Drew) Hrg. Tr. at 486:12-487:6; PX70019 (Kelleher (Drew) Dep. Tr. at 113:19-115:11).

²⁷⁸

²⁷⁹ [REDACTED]; Grimholt (WSS) Hrg. Tr. at 1259:11-23; PX70007 (Grimholt (WSS) IH Vol. 2 Tr. at 553:17-25); [REDACTED]; JX-0231 (WSS) at 157; [REDACTED]

²⁸⁰ JX-0279 (Drew) at 022; PX70020 (Gelosa (Drew) Dep. Tr. at 27:6-12. Similarly, third-party consultant [REDACTED] assessment from [REDACTED] sale noted "[i]t would take vast investment to enter our market from a distribution perspective" and that "even if [others] did [enter], . . . they would inevitably fail to gain any traction" due to lack of brand reputation, customers' reluctance to switch due to high cost of failure for marine chemicals, and an inability to replicate Drew's proprietary blends. [REDACTED] at 003. Notes from investment bank [REDACTED] regarding a Drew management presentation likewise note "The presentation further confirmed thoughts on the business as nichey with high barriers to entry, very long term customer relationships and brand recognition." [REDACTED] at 003.

²⁸¹ Medina (Crowley) Hrg. Tr. at 167.

²⁸² Sarro (Teekay) Hrg. Tr. at 81, 83, 85.

from a supplier that can deliver the “same high-quality product at the ports where we need to have the delivery.”²⁸³

115. The President of UNI Americas testified that in order to supply MWT products and services, a potential entrant would need, among other things, quality product formulations and the ability to produce product around the world, which “doesn’t happen overnight.”²⁸⁴

iii. On-Site and Remote Technical Services are Barriers

116. CCL looks for a supplier who is able to help keep MWT systems operating correctly.²⁸⁵

Crowley needs a supplier “that can come in; knows what they’re doing; and do it right.”²⁸⁶ UNI Americas’ president testified that “you just can’t send a chemical salesman on board.”²⁸⁷

117. MSC requires a supplier that can provide monthly training for vessel crews in a variety of locations.²⁸⁸ MSC also requires robust “on shore” technical services; their supply contract with Drew requires that Drew’s offshore lab have a Ph.D. chemist available.²⁸⁹

iv. Reputation and Customer Relationships are Barriers

118. CCL confirmed that it looks “for companies that have reputation and pedigree.”²⁹⁰ Teekay needs a proven supplier, due to safety and reputational risk.²⁹¹

119. Despite being active in the market for 15 years, [REDACTED] has no meaningful MWT sales and is still working on building its reputation as a quality supplier of MWT products and services before it will be able to supply additional customers.²⁹²

²⁸³ Thompson (CCL) Hrg. Tr. at 260:23-264:7.

²⁸⁴ Franzo (UNI Americas) Hrg. Tr. at 354:15-355:21.

²⁸⁵ Thompson (CCL) Hrg. Tr. at 261:13-22.

²⁸⁶ Medina (Crowley) Hrg. Tr. at 171:21-25.

²⁸⁷ Franzo (UNI Americas) Hrg. Tr. at 391:12-19.

²⁸⁸ Fry (MSC) Hrg. Tr. at 957:17-958:20; JX-0135 (MSC Decl.) ¶¶ 22-25.

²⁸⁹ Fry (MSC) Hrg. Tr. at 961:2-14; JX-0135 (MSC Decl.) ¶ 27

²⁹⁰ Thompson (CCL) Hrg. Tr. at 260:20-261:7.

²⁹¹ Sarro (Teekay) Hrg. Tr. at 100:1-22, 127:8-24.

²⁹² [REDACTED] at 129:21-130:18146:13-147:2; 152:8-153:5; 205:19-206:3).

120. A third-party analysis of the MWT market found that customer relationships are important to maintain sales and contract extensions for water treatment, especially for global customers.²⁹³ It would take time for a new entrant to develop the reputation that Defendants have earned over decades, particularly given the high-criticality nature of MWT chemicals.²⁹⁴ Drew incurred costs to develop its reputation over the years, and continues to incur costs in maintaining their reputation and perception in the market.²⁹⁵ WSS's CEO testified that having several years of experience with a customer works to a supplier's advantage.²⁹⁶

v. Scale and Competitive Cost Structure are Barriers

121. In the MWT industry, greater scale confers cost advantages.²⁹⁷ WSS is buying Drew specifically to increase its scale.²⁹⁸ A 2017 document outlining WSS's strategy for rolling out an inflation-based price increase noted that WSS's "economy of scale gives us a cost advantage as well as a quality advantage" and encouraged salespeople to emphasize the benefits of the company's size.²⁹⁹

122. Drew's head of supply chain testified that a large customer base helps Drew operate its distribution network efficiently, and that a smaller customer base would challenge a supplier's ability to operate profitably.³⁰⁰ In addition, Drew needs a critical mass of vessel traffic or vessel purchases in a port in order to hold stock in a cost-effective manner.³⁰¹ Keeping stock at a

²⁹³ JX-0250 (WSS) at 009.

²⁹⁴ Franzo (UNI Americas) Hrg. Tr. at 355:5-21; JX-0135 (UNI Americas Decl.) ¶ 52. J.F. Lehman, the former private equity owner of Drew, stated in an "advisor information package" that one highlight for investing in Drew includes [REDACTED]

²⁹⁵ PX70008 (Knowles (Drew) IH Tr. at 191:20-192:21).

²⁹⁶ PX70007 (Grimholt (WSS) IH Vol. 2 Tr. at 497:12-25).

²⁹⁷ Flaesen Hrg. Tr. at 1319:11-1320:2; PX70012 (Flaesen (WSS) Dep. Tr. at 63:24-64:5).

²⁹⁸ Flaesen Hrg. Tr. at 1319:11-1320:2; PX70012 (Flaesen (WSS) Dep. Tr. at 130:13-131:10).

²⁹⁹ PX20027 (WSS) at 020; *see also*, JX-0155 (WSS) at 010 (identifying WSS's scale as a competitive advantage due to the financial flexibility such scale offers).

³⁰⁰ Kelleher (Drew) Hrg. Tr. at 486:2-16.

³⁰¹ PX70019 (Kelleher (Drew) Dep. Tr. at 48:7-25).

particular location requires resources to cover and manage the stock, and investing the resources needed requires an expectation of a certain return to offset the costs of investment.³⁰²

123. Customers rarely, if ever, commit to purchasing a specified volume of chemicals in a particular port.³⁰³ Overestimating the inventory needs at a particular location can hurt a supplier's cash flow and profitability,³⁰⁴ while underestimating can hurt a supplier's ability to meet customer demands for timely delivery.³⁰⁵ [REDACTED] only keeps products in stock near a few ports in the U.S. where they know they will have business; it is not cost-effective to stock ports that may only receive two or three orders per year.³⁰⁶

124. Drew is also able to obtain lower prices with third party logistics providers based on its volume of business.³⁰⁷ A MWT supplier receives better service from toll manufacturers when they comprise a large part of the toller's business, including prioritizing scheduling, which allows a supplier to deliver product to customers quickly.³⁰⁸ The greater the volume of purchases a MWT supplier makes from a toll manufacturer, the greater the supplier's leverage and the lower the price that supplier pays.³⁰⁹ Further, toll blenders are more expensive than in-house production for smaller volumes.³¹⁰

125. Defendants' scale also provides quality advantages. Drew's CEO admitted that it is easier to gain visibility into and maintain control over the operations of Drew's own tolling facility in order to ensure high quality, consistent product.³¹¹ WSS's CEO testified that having "control"

³⁰² PX70019 (Kelleher (Drew) Dep. Tr. at 48:12-19).

³⁰³ Kelleher (Drew) Hrg. Tr. at 486:17-20.

³⁰⁴ PX70019 (Kelleher (Drew) Dep. Tr. at 87:13-25).

³⁰⁵ PX70019 (Kelleher (Drew) Dep. Tr. at 88:1-17).

³⁰⁶ [REDACTED]

³⁰⁷ PX70019 (Kelleher (Drew) Dep. Tr. at 95:7-14).

³⁰⁸ PX70019 (Kelleher (Drew) Dep. Tr. at 63:15-64:2, 66:24-67:11).

³⁰⁹ PX70019 (Kelleher (Drew) Dep. Tr. at 66:24-25;67:1-6).

³¹⁰ PX70007 (Grimholt (WSS) IH Vol. 2 Tr. at 549:22-550:7).

³¹¹ PX70023 (Knowles (Drew) Dep. Tr. at 103:15-104:5).

over the manufacturing process is an “added benefit” for a supplier because it speaks to the integrity of the product.³¹²

vi. Brand Equity is a Barrier

126. Teekay needs a supplier who “stand[]s behind their product.”³¹³ Scorpio “must purchase quality water treatment chemicals from reputable suppliers.”³¹⁴

127. The Drew brand and reputation are important to sales efforts, and the inability to deliver products consistently would erode that well-established brand.³¹⁵ [REDACTED] found that once a customer chooses a brand of MWT chemical, they generally do not switch away from that brand; customer testimony similarly indicates that switching is rare.³¹⁶

vii. High Customer Retention Rates are a Barrier

128. Given the importance of quality MWT chemicals, vessel operators do not frequently switch MWT suppliers, and when they do, they often want to run tests on the new supplier’s product before switching.³¹⁷ Global Fleet customers are unwilling to switch to new, untested suppliers without a proper vetting.³¹⁸

129. Global Fleet customers generally require a prospective supplier to prove that they can meet their needs before giving them serious consideration.³¹⁹

³¹² PX70006 (Grimholt (WSS) IH Vol. 1 Tr. at 140:15-141:5).

³¹³ Sarro (Teekay) Hrg. Tr. at 99:20-25.

³¹⁴ PX80014 (Scorpio Decl.) ¶ 5.

³¹⁵ Kelleher (Drew) Hrg. Tr. at 473:9-474:20.

³¹⁶ JX-0231 (WSS) at 154.

³¹⁷ Sarro (Teekay) Hrg. Tr. at 85:5-12; Thompson (CCL) Hrg. Tr. at 275:2-11; PX70035 (Cappelen (UNISERVICE Germany and Norway) Dep. Tr. at 52:4-11); PX70011 (Medina (Crowley) Dep. Tr. at 66:8-67:11); JX-0137 (Crowley Decl.) ¶ 18.

³¹⁸ Sarro (Teekay) Hrg. Tr. at 85:5-12; Thompson (CCL) Hrg. Tr. at 273:7-20; JX-0137 (Crowley Decl.) ¶ 18; PX80014 (Scorpio Decl.) ¶ 12. [REDACTED] confirmed that customers do not generally switch brands of water treatment chemicals through field interviews. [REDACTED]

³¹⁹ See, e.g., Medina (Crowley) Hrg. Tr. at 248:5-19 (Crowley is “unlikely” to consider Vecom again.); Sarro (Teekay) Hrg. Tr. at 98:21-99:18 (Marichem admitted it could not meet Teekay’s needs.); PX70030 (Niego (UNISERVICE Italy) Dep. Tr. at 39:9-19) (UNISERVICE Italy testified that vessels prefer to stay with their existing MWT supplier because they are reluctant to change and do not want to retrain crew on a new test protocol.); PX70031 (Bender (Maersk) Dep. Tr. at 38:20-41:15, 44:16-46:15, 119:12-120:3) (When Maersk switched its MWT

130. Switching suppliers for MWT also introduces risk and added cost to fleets, including risks and costs associated with the transition not being done properly and the need to retrain the crew on a new test protocol.³²⁰ The foregoing factors make it difficult for new entrants and existing suppliers to expand, gain business, and achieve the scale necessary to compete as effectively as WSS and Drew today.³²¹

131. Unlike BWT and CWT, switching suppliers of maintenance chemicals or tank cleaning chemicals does not involve the same risks to a vessel's operational systems, and accordingly, fleets find it easier to switch suppliers for these products.³²²

viii. Global Sales and Customer Support Networks are Barriers

132. ██████████ contract with WSS contains specific provisions for WSS to be able to provide customer support at every port.³²³ Crowley similarly contracts with WSS and Drew to provide services and support in regions across the world.³²⁴

133. Many of Drew's sales representatives are marine engineers, and have extensive on-the-job training through internal training programs.³²⁵ As such, Drew sales representatives are able to consult with customers regarding their vessels' technical needs.³²⁶ Drew employs approximately 50 sales representatives in five main regions around the world (SAMEA [South Asia, Middle East and Africa]; Europe; North America; South America; and North Asia).³²⁷

supplier from Drew to WSS, the transition was not done properly by the crew, resulting in the need to replace multiple cylinder heads, each costing \$12,000 to \$15,000, as well as additional costs including the use of tugs, wear and tear on engines, and crew cost for additional maintenance).

³²⁰ See e.g., Sarro (Teekay) Hrg. Tr. at 100:1-22; ██████████; Fry (MSC) Hrg. Tr. at 962:16-963:5.

³²¹ PX60000 (Nevo Rpt.) ¶¶ 355-58.

³²² Franzo (UNI Americas) Hrg. Tr. at 349:24-350:10; PX70035 (Cappelen (UNIService Germany and Norway) Dep. Tr. at 185:15-186:13; 212:10-20).

³²³ ██████████

³²⁴ Medina (Crowley) Hrg. Tr. at 172:1-9.

³²⁵ Knowles (Drew) Hrg. Tr. at 1412:4-18; PX70023 (Knowles (Drew) Dep. Tr. at 27:22-28:7).

³²⁶ PX70023 (Knowles (Drew) Dep. Tr. at 47:20-48:2).

³²⁷ PX70014 (Cassaras (Drew) Dep. Tr. at 10:13-11:9).

B. Defendants Failed to Demonstrate Sufficient Expansion by Existing MWT Suppliers is Likely; The Evidence Presented is to the Contrary

134. [REDACTED] has no plans to expand its distribution network for MWT products and services due to the necessary capital investment and significant time it would take to find the right partners to supply quality products.³²⁸ In order for [REDACTED] to expand to the size of Drew, it would need to be purchased by a company like WSS, and that “[c]apital investment [is] the big thing. We don’t have any lottery winners.”³²⁹ [REDACTED] overseas network is not well-positioned for growth.³³⁰ While it could make modest expansions to ports near their existing operations, they are unlikely to expand to additional remote ports where they lack connections today.³³¹ The Acquisition would not change [REDACTED] ability to take MWT customers from WSS or its ability to begin bidding for the business of Global Fleet customers such as cruise lines and MSC.³³²

135. UNIservice Italy plans to expand its tank cleaning chemicals business rather than MWT chemicals, and does not plan to open new facilities.³³³ Further, there are no plans to access investment funding from OTI Greentech, UNIservice Italy’s parent, at this time.³³⁴

136. After learning about the Acquisition, Teekay inquired about Marichem’s ability to supply Teekay’s MWT needs, but Marichem admitted they did not have the capability or the service technicians to support Teekay, and no further discussions took place.³³⁵

137. [REDACTED] believes they are at a competitive disadvantage to WSS and Drew because WSS and Drew have broader distribution networks, offer technical services in more areas, and

328 [REDACTED]
329 [REDACTED]
330 [REDACTED]
331 [REDACTED]
332 [REDACTED]

³³³ PX70030 (Niego (UNIservice Italy) Dep. Tr. at 66:17-67:7, 68:18-25).

³³⁴ PX70030 (Niego (UNIservice Italy) Dep. Tr. at 84:9-25).

³³⁵ Sarro (Teekay) Hrg. Tr. at 97:23-99:25.

have bigger product portfolios.³³⁶ [REDACTED] stated that expanding into a new geographic area is “expensive and time-consuming.”³³⁷

138. Many of the suppliers proffered by Defendants as potential expansion candidates have *de minimis* revenues in MWT chemicals,³³⁸ while others testified they cannot compete for MWT customers.³³⁹ Testimony regarding many of these suppliers demonstrates they cannot meet customer needs.³⁴⁰ The remaining suppliers are not considered meaningful by Defendants or other industry participants.³⁴¹

139. Dr. Israel’s opinions regarding expansion are not grounded in any analysis or study of the actual capabilities—i.e., the relative starting points—of current industry participants. In particular, he did not consider the following relevant factors, each critical to a current supplier’s ability to sufficiently replicate Drew: service levels; cost structure; capacity; raw material costs; material procurement costs; or order fulfillment rates.³⁴²

C. Sufficient New Entry is Unlikely

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³⁴¹ See JX-0090 (Drew) at 001 (referring to [REDACTED] and [REDACTED] as “jokers”); [REDACTED] [REDACTED] has “a way to go” in terms of having realistic water treatment, due to lack of a global distribution network); PX10035 (Drew) at 001 (“I have no interest in [REDACTED]”).

³⁴² Israel Hrg. Tr. at 1738:6-1739:8, 1739:21-1740:4, 1743:21-24, 1743:14-20, 1744:4-7.

140. **There is No Evidence that Industrial Suppliers Will Enter.** [REDACTED] exited the MWT business because it “did not want to pour the money into this business that it would take to be competitive”³⁴³ and it has no plans to re-enter.³⁴⁴ The former [REDACTED] MWT business “lacked the logistical excellence necessary to compete in this market”³⁴⁵ and did not fit within [REDACTED] core competencies.³⁴⁶ To compete in the MWT business, [REDACTED] would need to invest in developing a salesforce and distribution, warehouse and port access infrastructure that it lacks today.³⁴⁷

141. Testimony from other industrial suppliers confirms they are neither active in the MWT market today nor do they have plans to enter in the future.³⁴⁸

142. Although Chevron Marine does supply a *de minimis* amount of cooling water treatment chemicals (approximately [REDACTED] of its total non-fuel sales),³⁴⁹ Defendants have offered no evidence to suggest that Chevron Marine plans to expand.³⁵⁰

143. During the sale of Drew in 2013, Drew management represented that industrial water treatment companies do not pose a competitive threat because they “can’t deliver globally and don’t know specific application.”³⁵¹ Through interviews with Solenis, Suez (GE Water) and other industrial suppliers, [REDACTED] learned that entering the marine market is a challenge for industrial players because it “takes time” to become familiar with the marine market and its customers.³⁵²

³⁴³ [REDACTED]
³⁴⁴ [REDACTED] The MWT business was not profitable for [REDACTED] because they did not have a complete product line, correct package sizes, sufficient warehousing, or a wide enough distribution network. [REDACTED]

³⁴⁵ [REDACTED]
³⁴⁶ [REDACTED]
³⁴⁷ [REDACTED]
³⁴⁸ PX80015 (Suez Water Decl.) at ¶ 3 (Suez does not sell to the marine market nor does it have any intention of doing so in the future); [REDACTED]

³⁴⁹ PX80027 (Chevron Marine Decl.) at ¶ 8.

³⁵⁰ Israel Hrg. Tr. at 1648-49 (Dr. Israel testified to lack of knowledge of Chevron Marine’s capacity or Chevron Marine’s plans to expand beyond its current *de minimis* presence.).

³⁵¹ JX-0112 (Drew) at 010.

³⁵² [REDACTED]; see also, PX80015 (Suez Decl.) ¶ 4; JX-0140 (Solenis Decl.) ¶¶ 4-5.

Industrial suppliers would need marine logistics (including warehouses located at worldwide shipping ports), marine sales people, and distribution channels, which would require significant investment.³⁵³

144. **There is No Evidence that Toll Manufacturers Will Enter.** Solenis toll blends for Drew in North America under a non-exclusive tolling agreement, but [REDACTED]

[REDACTED]³⁵⁴ Existing water treatment chemical suppliers are wary of entering new ports due to concerns about finding reputable toll blenders who can manufacture quality water treatment chemicals at a reasonable price.³⁵⁵

145. **There is No Evidence that Testing Equipment Manufacturers Will Enter.** Drew's CEO stated that, to the best of his knowledge, Drew has never lost an RFP for provision of MWT chemicals to a global testing equipment manufacturer such as Hach, Parker Kittiwake and Fisher Scientific.³⁵⁶ Nor was he aware of any global testing equipment manufacturer that also sells MWT chemicals.³⁵⁷ Dr. Israel did not even consider this theory of entry when submitting his expert report, conceding that test kit providers as prospective entrants is "an issue that I've, frankly, become more aware of during the discussion in the trial."³⁵⁸ However, Defendants proffered no evidence that testing equipment manufacturers would enter.

146. **There is No Evidence that Ship Chandlers Will Enter.** Ship chandlers proffered by Defendants have no MWT revenues or have confirmed no plans to sell MWT chemicals directly

³⁵³ PX80015 (Suez Decl.) ¶ 3; JX-0140 (Solenis Decl.) ¶ 3; PX70029 (Lange (Ecolab) Dep. Tr. at 110:10-111:20, 133:16-134:10); *see also*, PX20035 (WSS) at 003 ("In general, the land based ones are either [sic] much bigger in size but do not have a network to serve the marine fleet.").

³⁵⁴ PX70024 (Connors (Solenis) Dep. Tr. at 24:12-25:7, 52:7-53:13) [REDACTED]

[REDACTED] JX-0140 (Solenis Decl.) ¶ 3.

³⁵⁵ PX70010 (Franzo (UNI Americas) Dep. Tr. at 26:11-27:22).

³⁵⁶ Knowles Hrg. Tr. at 1410:16-19.

³⁵⁷ Knowles Hrg. Tr. at 1410:10-15.

³⁵⁸ Israel Hrg. Tr. at 1737:5-1738:5.

to consumers.³⁵⁹ As far as [REDACTED] knows, [REDACTED] has never considered entering the MWT chemicals business, nor does he know how long it would take or what steps [REDACTED] would need to take to enter.³⁶⁰ [REDACTED] does not have any plans to enter this market over the next four years.³⁶¹

147. There is No Evidence that Solenis and Wrist Will Partner Together to Enter.

Defendants theorize that Solenis and Wrist could partner together to create a MWT supplier to rival the size and scale of Drew.³⁶² However, Dr. Israel could not cite to specific evidence to support this idea.³⁶³ In fact, when asked during his deposition if he knew of Wrist, the head of Solenis's industrial water division unequivocally testified "no."³⁶⁴

148. Third-Party Outsourcing Does Not Negate Entry Barriers. Although a prospective entrant can decide to rely on third-party providers such as toll blenders and logistics agents as part of their business model, the barriers to entry outlined above would nevertheless apply to a firm attempting this approach.³⁶⁵ For example, smaller scale still leads to cost disadvantages when dealing with third-party providers.³⁶⁶ The challenges of keeping adequate global inventory to ensure reliable order fulfillment rates exist regardless of whether deliveries are performed in-house or by agents.³⁶⁷ If anything, it is more difficult to ensure consistent product and service

³⁵⁹ JX-0287 (Seven Seas) at 001 (2015 and 2016 revenue from water treatment chemicals is [REDACTED]); [REDACTED]

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³⁶² Defs' Br. at 39 (ECF No. 50).

³⁶³ Israel Hrg. Tr. at 1655:22-1656:15.

³⁶⁴ PX70024 (Connors (Solenis) Dep. Tr. at 48:16-19) ("Q. And that business, the logistics services business, in your view, is that a competitive business? Are there logistics providers out there? A. I wouldn't know. Q. Okay. Do you know a company by the name of Wrist, W-R-I-S-T? A. No.").

³⁶⁵ See *supra* ¶¶ 110-33.

³⁶⁶ Kelleher (Drew) Hrg. Tr. at 485:11-13.

³⁶⁷ Kelleher (Drew) Hrg. Tr. at 481:7-16, 483:15-485:10.

when coordinating with a variety of different sub-contractors.³⁶⁸ Increasing the number of toll blenders increases the risk of quality errors.³⁶⁹ And the need to overcome reputational barriers and establish customer relationships remains the same.³⁷⁰

149. Additionally, using third-party agents cuts into a supplier's profit margins,³⁷¹ making it more difficult to maintain such a network profitably.

150. **Firms Have *Exited*, Not *Entered*, the Market.** NALCO (now owned by Ecolab) sold Nalfleet, a MWT supplier, to WSS at the end of 2010, after conducting an auction [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

151. Ashland divested Drew in 2009 because it viewed the marine business as “a non-strategic market.”³⁷⁵ At the time Ashland divested Drew, it kept its business selling water treatment chemicals to land-based customers (which has since been sold off to Solenis).³⁷⁶ There is no evidence that Ashland has re-entered the MWT market.

D. Economic Outcomes Demonstrate High Barriers to Entry and Expansion

³⁶⁸ See, e.g., Kelleher (Drew) Hrg. Tr. at 485:16-18 (“Q. And do you remember testifying that having more than six toll blenders would add complexity and cost to Drew’s operation? A. Complexity for sure, yes, ma’am.”) PX70023 (Knowles (Drew) Dep. Tr. at 115:4-10); PX70014 (Cassaras (Drew) Dep. Tr. at 98:4-99:16).

³⁶⁹ PX70019 (Kelleher (Drew) Dep. Tr. at 60:3-7).

³⁷⁰ Grimholt (WSS) Hrg. Tr. at 1259:15-23; Franzo (UNI Americas) Hrg. Tr. at 353:18-354:14, 355:5-12; PX70008 (Knowles (Drew) IH Tr. at 192:1-21).

³⁷¹ [REDACTED]

³⁷² Lange (Ecolab) Hrg. Tr. at 1156:19-1157:9; JX-0136 (Ecolab Decl.) ¶ 3.

³⁷³ JX-0136 (Ecolab Decl.) ¶¶ 5, 8.

³⁷⁴ Lange (Ecolab) Hrg. Tr. at 1158:9-1159:17; JX-0136 (Ecolab Decl.) ¶¶ 8-9.

³⁷⁵ PX70024 (Connors (Solenis) Dep. Tr. at 73:14-20); JX-0140 (Solenis Decl.) ¶ 3.

³⁷⁶ PX70024 (Connors (Solenis) Dep. Tr. at 73:14-74:5); JX-0140 (Solenis Decl.) ¶ 3.

152. Consistent with basic economic principles, Dr. Nevo testified that “[p]rofit maximizing firms should seek out opportunities to enter an industry that has low barriers to entry and high returns.”³⁷⁷ WSS’s and Drew’s gross margins for water treatment products are in the [REDACTED] range under various measures.³⁷⁸ WSS’s and Drew’s variable cost margins on sales of MWT products to Global Fleet customers in 2016 were [REDACTED] and [REDACTED], respectively.³⁷⁹ WSS’s accounting margin for its maritime services segment was [REDACTED] in 2017.³⁸⁰ Drew’s 2016 accounting margin was approximately [REDACTED].³⁸¹ WSS and Drew have maintained high market shares of 78.7% to 82.8%.³⁸² Absent meaningful barriers to entry and expansion in the present market, Defendants’ high margins and shares should attract competition from other firms seeking the same profit opportunity and this entry should have driven Defendants’ shares and margins down already. Thus, Dr. Nevo found that the lack of meaningful entry and expansion in this industry despite high margins and market shares is fundamentally inconsistent with barriers to entry being low.³⁸³ Accordingly, Dr. Nevo concluded that entry and expansion will not mitigate the effect of the Acquisition on competition in the market for the supply of MWT products and services to Global Fleets.³⁸⁴

153. Dr. Nevo concluded that “[t]he fact that WSS is paying approximately \$400 million for Drew is . . . inconsistent with low barriers to entry.”³⁸⁵ Dr. Nevo also observed that “WSS is paying [REDACTED] times revenue for Drew [c]ompare[d] . . . to the multiple of [REDACTED] that WSS paid for Nalfleet, or the [REDACTED] that JF Lehman paid in 2009 for Drew” and concluded that “[t]he amount

³⁷⁷ PX61000 (Nevo Rpt.) ¶ 379; *see also*, Nevo Hrg. Tr. at 689:7-91:16.

³⁷⁸ PX61000 (Nevo Rpt.) ¶ 219.

³⁷⁹ PX61001 (Rothman Rpt.) ¶¶ 70, 75.

³⁸⁰ PX61000 (Nevo Rpt.) ¶ 379.

³⁸¹ PX61002 (Nevo Reply Rpt.) ¶ 246.

³⁸² *See supra* ¶ 56.

³⁸³ PX61000 (Nevo Rpt.) ¶ 379; PX61002 (Nevo Reply Rpt.) ¶ 244; Nevo Hrg. Tr. at 689-91.

³⁸⁴ PX61000 (Nevo Rpt.) ¶ 381.

³⁸⁵ PX61000 (Nevo Rpt.) ¶ 380; Nevo Hrg. Tr. at 692:24-693:25.

that WSS is willing to pay for Drew is at odds with entry and expansion being easy and inexpensive, and suggests that Drew has substantial intangible assets that an entrant or expanding firm may have difficulty replicating.”³⁸⁶

154. Dr. Nevo observed that entry or expansion has not replaced Nalfleet in the years since it was acquired by WSS and in fact, “Nalfleet’s ██████████ in 2010 marine water treatment revenue would have been many times larger than Marichem’s 2016 revenue, which was only ██████████.”³⁸⁷ Dr. Nevo explained that “[c]laims that barriers to entry are low are fundamentally inconsistent with the fact that, more than seven years after WSS’s acquisition of Nalfleet, the third largest [MWT] supplier, Marichem, has revenues that are only ██████████ of Drew’s, and less than ██████████ of WSS’s.”³⁸⁸

VIII. EFFICIENCIES DO NOT REVERSE THE ANTICOMPETITIVE HARM

A. WSS’s Claimed Efficiencies Cannot Be Verified

155. WSS claims cost savings in four major areas: production, supply chain, sourcing, and sales, back office, and administrative.³⁸⁹ WSS consultant Cardo Partners (“Cardo”) calculated projected cost savings in several Excel spreadsheets.³⁹⁰ WSS did not produce anything else explaining these calculations beyond the spreadsheets themselves and a summary of their contents.³⁹¹

156. Geir Flaesen, WSS’s VP of Strategy, Mergers & Acquisitions, and its primary efficiencies fact witness, received only one of Cardo’s five calculation Excel files and had “very limited knowledge” of the file beyond its outputs.³⁹²

³⁸⁶ PX61000 (Nevo Rpt.) ¶ 380; Nevo Hrg. Tr. at 692:24-693:25.

³⁸⁷ PX61000 (Nevo Rpt.) ¶ 375.

³⁸⁸ PX61000 (Nevo Rpt.) ¶ 377.

³⁸⁹ Rothman Hrg. Tr. at 1027:4-12.

³⁹⁰ Flaesen (WSS) Hrg. Tr. at 1311:3-10.

³⁹¹ PX70009 (Flaesen (WSS) IH Tr. at 174:15-21); Flaesen (WSS) Hrg. Tr. at 1312:5-8.

³⁹² PX70012 (Flaesen (WSS) Dep. Tr. at 31:9-19); PX70009 (Flaesen (WSS) IH Tr. at 63:4-13; 174:22-175:9).

157. Cardo’s calculations relied on many inputs and assumptions that are not explained in the Excel files.³⁹³ In general, Mr. Flaesen testified that Cardo received its inputs and assumptions from WSS’s “functional leads” or “workstream leads” for different areas.³⁹⁴ Mr. Flaesen did not take part in the functional teams’ work and could only describe their process in general terms.³⁹⁵

158. Dr. Dov Rothman, the FTC’s efficiencies expert, reviewed and assessed WSS’s efficiencies claims and supporting evidence. He concluded that WSS did not provide enough information for him to verify the likelihood and magnitude of any of WSS’s claimed efficiencies.³⁹⁶

159. **WSS Did Not Substantiate Its Supply Chain Cost Savings.** To estimate WSS’s supply chain cost savings, Cardo first assumed that Drew’s post-Acquisition supply chain costs would equal WSS’s on a revenue-adjusted basis.³⁹⁷ This step actually increased Drew’s post-Acquisition supply chain costs from [REDACTED] per year.³⁹⁸ WSS then applied various percent reductions that dropped the figure to [REDACTED] per year.³⁹⁹ The descriptions of these reductions are unclear—“[REDACTED] discount fixed fee reduction,” “[n]o additional cost,” “[i]ncreased efficiency,” etc.—and otherwise unexplained.⁴⁰⁰ Without any explanation of how WSS estimated these reductions, Dr. Rothman could not verify WSS’s predicted supply chain cost savings.⁴⁰¹

160. **WSS Did Not Substantiate Its Sourcing Cost Savings.** Cardo calculated [REDACTED] in expected sourcing cost savings by assuming a [REDACTED] across-the-board reduction in Drew’s cost of goods sold.⁴⁰² WSS offered no support for this calculation other than listing three potential ways

³⁹³ Flaesen (WSS) Hrg. Tr. at 1311:17-19, 1314:11-15.

³⁹⁴ Flaesen (WSS) Hrg. Tr. at 1311:7-16.

³⁹⁵ Flaesen (WSS) Hrg. Tr. at 1315:5-14, 13:18:8-17; PX70012 (Flaesen (WSS) Dep. Tr. at 23:1-6; 68:21-69:5).

³⁹⁶ Rothman Hrg. Tr. at 1031:2-9; PX61001 (Rothman Rpt.) ¶ 10.

³⁹⁷ PX61001 (Rothman Rpt.) ¶ 52.

³⁹⁸ PX61001 (Rothman Rpt.) ¶ 52.

³⁹⁹ PX61001 (Rothman Rpt.) ¶ 52.

⁴⁰⁰ PX61001 (Rothman Rpt.) ¶ 51, Ex. 4b.

⁴⁰¹ Rothman Hrg. Tr. at 1034:22-1035:8; PX61001 (Rothman Rpt.) ¶ 53.

⁴⁰² PX61001 (Rothman Rpt.) ¶ 38.

a merger can result in sourcing cost savings.⁴⁰³ Mr. Flaesen was unfamiliar with any work that informed the assumed cost reduction.⁴⁰⁴ Therefore, Dr. Rothman found WSS's claimed sourcing cost savings unverified.⁴⁰⁵

161. WSS Did Not Substantiate Its Production Cost Savings. While WSS has not set a post-Acquisition production plan, Cardo projected ██████████ in annual production cost savings based on moving all volume Drew produces with toll blenders to WSS's Norway plant.⁴⁰⁶ Cardo assumed that WSS could produce what Drew currently buys from toll blenders for the same cost as the products WSS currently makes at its Norway plant, without any increase in overhead costs.⁴⁰⁷ WSS did not provide information sufficient to verify this high-level assumption.⁴⁰⁸

162. WSS Did Not Substantiate Its Sales and Back Office Savings. Dr. Rothman also could not verify WSS's predicted back office and administrative savings because WSS's functional teams did not provide enough detail for their analysis of employee workloads.⁴⁰⁹

163. Dr. Israel Does Not Attempt to Verify WSS's Efficiencies and Relies on WSS's Business Judgment. Dr. Israel did not conduct any independent analysis to confirm Cardo's calculations or substantiate the assumptions that Cardo relied upon.⁴¹⁰ For example, Dr. Israel did not rely on input from any members of the functional teams or any Cardo representatives.⁴¹¹ Instead, Dr. Israel credited these potential cost savings because the approach seemed reasonable

⁴⁰³ PX61001 (Rothman Rpt.) ¶ 37.

⁴⁰⁴ Flaesen Hrg. Tr. 1312:23-1313:15; PX70012 (Flaesen (WSS) Dep. Tr. at 67:10-69:5).

⁴⁰⁵ PX61001 (Rothman Rpt.) ¶ 39.

⁴⁰⁶ PX61001 (Rothman Rpt.) ¶¶ 24-26.

⁴⁰⁷ PX61001 (Rothman Rpt.) ¶¶ 27, 29.

⁴⁰⁸ PX61001 (Rothman Rpt.) ¶ 29. For example, Dr. Rothman could not determine whether Drew's products could be more expensive to produce or whether Drew's toll blenders produced a greater proportion of high-cost products than WSS's Norway plant. Rothman Hrg. Tr. at 10:40:13-1041:24.

⁴⁰⁹ PX61003 (Rothman Reply) ¶¶ 41, 44.

⁴¹⁰ Rothman Hrg. Tr. at 1026:10-19; PX61003 (Rothman Reply) ¶ 5; Israel Hrg. Tr. at 1765:11-1766:21, 1767:23-1768:2.

⁴¹¹ PX70034 (Israel Dep. Tr. at 39:4-40:12); DX-0060 (Israel Rpt.) Ex. 2.

to him.⁴¹² He believes that WSS arrived at their assumptions based on their business experience and judgment, but undertook no further efforts to verify these savings.⁴¹³

164. Dr. Israel and Defendants’ Counsel Misstated Dr. Rothman’s Opinions. Dr. Israel suggested that Dr. Rothman only evaluated WSS’s cost savings as apportioned to the relevant market, and Defendants’ counsel repeated this during the closing.⁴¹⁴ This is wrong. Dr. Rothman, as an input to Dr. Nevo’s analysis, did calculate what portion of WSS’s potentially merger-specific, variable cost savings applied to the relevant market (setting aside verifiability).⁴¹⁵ Dr. Rothman’s opinions on the verifiability and merger specificity of WSS’s cost savings, however, *applied to all* the cost savings, not simply those related to the relevant market.⁴¹⁶

165. Unsubstantiated Statements that a 2011 Transaction Met Its Synergy Goals Do Not Verify the Claimed Drew Efficiencies. Dr. Israel frequently cited WSS’s “track record of meeting cost savings goals in previous acquisitions” to verify WSS’s claimed cost savings for the Drew transaction.⁴¹⁷ Dr. Israel identified one acquisition, WSS’s purchase of Nalfleet over seven years ago, as support for the alleged “track record.”⁴¹⁸

166. Dr. Israel did not independently analyze the Nalfleet deal, including how WSS predicted its cost savings there, how that process compared to the one used here, whether WSS met its cost savings goals there, or whether WSS customers benefited.⁴¹⁹

⁴¹² PX61003 (Rothman Reply) ¶ 5.

⁴¹³ Israel Hrg. Tr. at 1765:19-1766:10, 1767:14-1768:9; *see also* PX70034 (Israel Dep. Tr. at 315:7-316:7).

⁴¹⁴ Israel Hrg. Tr. at 1606:11-16; Roush Hrg. Tr. at 1874:5-11.

⁴¹⁵ PX61001 (Rothman Rpt.) ¶¶ 76-84, Exhibit 9.

⁴¹⁶ PX61001 (Rothman Rpt.) ¶¶ 10-11 (“The merging parties have not provided information that would enable *any* of these claimed cost savings to be verified . . . Even if the merging parties’ claimed cost savings could be verified, only a fraction of those claimed would be merger-specific.”) (emphasis provided).

⁴¹⁷ DX-0060 (Israel Rpt.) ¶¶ 24, 298, 305; Israel Hrg. Tr. at 1765:19-1766:10.

⁴¹⁸ DX-0060 (Israel Rpt.) ¶ 298; Israel Hrg. Tr. at 1771:8-10.

⁴¹⁹ Israel Hrg. Tr. at 1768:19-1770:20; Indeed, Dr. Israel is not even sure the data to do so is actually available. PX70034 (Israel Dep. Tr. at 317:9-14).

167. Instead, Dr. Israel cited two sources on Nalfleet.⁴²⁰ First, he cited testimony from Mr. Flaesen,⁴²¹ but Mr. Flaesen testified that he was not part of WSS's Nalfleet acquisition and had not seen analysis showing whether WSS achieved its predicted synergies.⁴²² Second, Dr. Israel cited WSS's statements about Nalfleet in its Second Request response submitted to the FTC.⁴²³ The response only cited one document that discussed at a high level whether WSS achieved its Nalfleet savings goals.⁴²⁴ Dr. Rothman examined the underlying two-page summary, DX-1404 (WSS), and concluded it was not useful because it was "basically conclusory" and contained "no analysis."⁴²⁵ Mr. Flaesen admitted that the document was "[j]ust a high-level summary."⁴²⁶

B. Defendants Did Not Establish that the Claimed Savings Are Merger-Specific

168. Dr. Rothman also analyzed whether the projected cost savings would be merger-specific, meaning they are "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."⁴²⁷ Dr. Rothman concluded that the Defendants did not establish that some of their claimed cost savings would be merger-specific,⁴²⁸ based on Drew documents and testimony stating that it could achieve certain savings without the Acquisition.⁴²⁹

169. Drew's CEO drafted a presentation titled "Project Doubleday"⁴³⁰ which he presented to WSS.⁴³¹ This document cites both cost savings that Defendants could achieve together through the Acquisition,⁴³² and cost savings that Drew could achieve on its own.⁴³³

⁴²⁰ DX-0060 (Israel Rpt.) ¶ 298, n.309.

⁴²¹ DX-0060 (Israel Rpt.) ¶ 298, n.309.

⁴²² PX70009 (Flaesen (WSS) IH Tr. at 165:20-166:1, 166:24-168:2, 215:24-216:9).

⁴²³ DX-0060 (Israel Rpt.) ¶ 298, n.309.

⁴²⁴ JX-0248 (WSS) at 076.

⁴²⁵ Rothman Hrg. Tr. at 1125:1-14.

⁴²⁶ Flaesen (WSS) Hrg. Tr. at 1321:12-15.

⁴²⁷ PX61003 (Rothman Reply) ¶6.

⁴²⁸ Rothman Hrg. Tr. at 1054:10-15; PX61003 (Rothman Reply) ¶ 6.

⁴²⁹ PX61003 (Rothman Reply) ¶¶ 16, 25.

⁴³⁰ JX-0209 (Drew).

⁴³¹ PX70008 (Knowles (Drew) IH Tr. at 218:13-219:6).

170. Project Doubleday showed that Drew, standalone, could save ██████████ per year shifting production from toll blenders to its Singapore plant.⁴³⁴ A spreadsheet with detailed, chemical-by-chemical analysis corroborated these figures.⁴³⁵ It also projected that Drew could reduce sourcing costs on its own by “nearly ██████████ ... nearly ██████████ of which has been either validated through quotes or benchmarked against sister companies and consultant information.”⁴³⁶ It also showed that Drew could reduce supply chain costs on its own by almost ██████████.⁴³⁷ Dr. Israel agreed that Drew’s projected standalone savings reduced the amount of WSS’s claimed supply chain efficiencies that could be merger-specific.⁴³⁸

171. Other documents and testimony indicate that Drew could achieve additional savings without the Acquisition. An email from Drew’s CEO stated that Drew has “numerous projects that we could ramp up without the encumbrance of the [WSS acquisition].”⁴³⁹ If WSS does not acquire Drew, it will reinstate the suspended cost savings initiatives.⁴⁴⁰

C. Defendants Have Not Established that their Claimed Savings will Benefit Customers

172. Defendants have not established that their claimed savings will benefit customers. First, ██████████ of the total ██████████ of claimed savings related to fixed costs like SG&A.⁴⁴¹ Reductions of variable costs are more likely to provide an incentive for a firm to lower its price, while reductions of fixed costs are unlikely to do so.⁴⁴²

⁴³² JX-0209 (Drew) at 003.

⁴³³ JX-0209 (Drew) at 006 (“[s]tandalone case and does not assume savings from combined entity”), 007 (“savings below are based on a standalone cost”), 008 (“[r]epresents only that which Drew Marine can execute as standalone; combined entity savings likely higher due to improved purchasing power”).

⁴³⁴ JX-0209 (Drew) at 006.

⁴³⁵ PX10351 (Drew); PX61003 (Rothman Reply) ¶ 16, fn.26.

⁴³⁶ JX-0209 (Drew) at 007.

⁴³⁷ JX-0209 (Drew) at 008.

⁴³⁸ DX-0060 (Israel Rpt.) ¶ 305, fn.315; PX61001 (Rothman Rpt.) ¶ 54.

⁴³⁹ JX-0097 (Drew) at 001.

⁴⁴⁰ Knowles Hrg. Tr. at 1422:19-1423:9.

⁴⁴¹ PX61001 (Rothman Rpt.) ¶ 9; JX-0248 (WSS) at 057. Just ██████████ relate to variable cost. *Id.*

⁴⁴² PX61001 (Rothman Rpt.) ¶ 19; PX 61002 (Nevo Reply Rpt.) ¶ 259; JX-0151 at 061 (Commentary, pp. 57-58).

173. Moreover, it is unlikely that any efficiencies would be passed through to Global Fleet customers, given that the combined firm would face no close competition that customers could use to drive lower prices, and the next-best alternative supplier would be a distant one.⁴⁴³

174. The fact that WSS may need to lower prices to customers who will not be happy post-Acquisition does not indicate that WSS is lowering prices or improving its product offering.⁴⁴⁴

175. Finally, WSS's projected revenue dis-synergies are not efficiencies under the *Guidelines*, but rather indicate that WSS may lose customers because it believes that customers will be unhappy with the Drew acquisition.⁴⁴⁵ In order to attempt to retain customers WSS believes may be at risk due to the Acquisition, it is authorized to consider price reduction on case-by-case basis.⁴⁴⁶ However, it will not reduce price if it does not have to, and Mr. Flaesen "would rather keep [this money] in [his] pocket."⁴⁴⁷ WSS has not assigned price reductions to any particular customers, or communicated a commitment to lower price to particular customers.⁴⁴⁸

176. WSS's claim that it expects either customer or revenue losses because of customer dissatisfaction with the Acquisition is inconsistent with cognizable efficiencies being passed on to customers.⁴⁴⁹

⁴⁴³ PX61000 (Nevo Rpt.) ¶¶ 387-89.

⁴⁴⁴ Rothman Hrg. Tr. at 1026:20-1027:3 (efficiencies are improvements in product offering or reductions in cost), 1114:3-13 (revenue dissynergies indicate customer dissatisfaction with the acquisition).

⁴⁴⁵ Rothman Hrg. Tr. at 1112:1-1113:6; *see also*, JX-0121 at 035 ("Lost customers will stem mainly from overlapping customers with dual supplier strategy and customers that love [Drew] and 'hate' WSS."); PX70008 (Knowles (Drew) IH Tr. at 105:7-106:15) (Mr. Knowles testified he would not own shares in WSS because it had difficulties integrating the Nalfleet business).

⁴⁴⁶ Flaesen (WSS) Hrg. Tr. at 1336:12-15; PX70009 (Flaesen (WSS) IH Tr. at 155:9-24).

⁴⁴⁷ Flaesen (WSS) Hrg. Tr. at 1336:23-1337:1; PX70009 (Flaesen (WSS) IH Tr. at 155:9-24).

⁴⁴⁸ Grimholt (WSS) Hrg. Tr. at 1248:1-4; Flaesen (WSS) Hrg. Tr. at 1336:16-22.

⁴⁴⁹ Nevo Hrg. Tr. at 707:7-708:6; PX 61000 (Nevo Reply Rpt.) ¶ 267-68.

PLAINTIFF’S PROPOSED CONCLUSIONS OF LAW

I. THE COURT HAS JURISDICTION OVER THIS ACTION

1. This action seeks a preliminary injunction pending an administrative trial on the question of whether Defendants’ proposed merger violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 53(b).
2. At all relevant times, Defendants have been engaged in “commerce” as defined in 15 U.S.C. § 44 and 15 U.S.C. § 12.
3. Defendants have consented to personal jurisdiction in the District of Columbia in this case. Venue is proper.⁴⁵⁰

II. THE STANDARD FOR A PRELIMINARY INJUNCTION IS MET HERE

4. Plaintiff “seek[s] a preliminary injunction to prevent a merger pending the Commission’s administrative adjudication of the merger’s legality.”⁴⁵¹ Preliminary injunctions are “readily available” under 15 U.S.C. § 53(b) “to preserve the status quo while the FTC develops its ultimate case.”⁴⁵²
5. The Court should issue a preliminary injunction under 15 U.S.C. § 53(b) whenever “such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission’s likelihood of success on the merits.”⁴⁵³
6. To evaluate the FTC’s “likelihood of success” at the administrative trial, this Court need only “measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger ‘*may be* substantially to lessen

⁴⁵⁰ 28 U.S.C. § 1391(b)-(c); 15 U.S.C. § 53(b).

⁴⁵¹ *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (internal quotation marks omitted).

⁴⁵² *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008).

⁴⁵³ *Heinz*, 246 F.3d at 714; accord *Whole Foods*, 548 F.3d at 1034-35.

competition, or to tend to create a monopoly’ in violation of section 7 of the Clayton Act.”⁴⁵⁴

The FTC “is not required to *establish* that the proposed merger would [] violate Section 7.”⁴⁵⁵

7. “The equities will often weigh in favor of the FTC” because “effective enforcement of the antitrust laws was Congress’s specific public equity consideration in enacting Section 13(b).”⁴⁵⁶

8. Here, Plaintiff has demonstrated a strong likelihood of success on the merits to support relief under Section 13(b), and the equities weigh strongly in favor of a preliminary injunction.

III. PLAINTIFF HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Proposed Acquisition is Presumptively Unlawful

9. Plaintiff’s underlying antitrust claims are brought under Section 7 of the Clayton Act and Section 5 of the FTC Act.⁴⁵⁷ Section 7 of the Clayton Act prohibits mergers “the effect of [which] may be substantially to less competition” in “any line of commerce.”⁴⁵⁸

10. Section 7 of the Clayton Act was intended to arrest anticompetitive mergers “in their incipency.”⁴⁵⁹ “Congress used the words ‘*may be to substantially lessen competition*’ . . . to indicate that its concern was with probabilities, not certainties”—even on the ultimate merits.⁴⁶⁰

11. Courts typically assess whether a merger violates Section 7 by determining: (1) the “line of commerce,” or relevant product market; (2) the “section of the country,” or relevant geographic market; and (3) the merger’s probable effect on competition in the relevant product and geographic markets.⁴⁶¹

⁴⁵⁴ *Heinz*, 246 F.3d at 714 (quoting 15 U.S.C. § 18) (emphasis added).

⁴⁵⁵ *Id.* (emphasis in original); *see also*, *CCC Holdings*, 605 F. Supp. 2d at 35 (“[T]o establish a violation of Section 7, the FTC need . . . only [show] that the loss of competition is a ‘sufficiently probable and imminent’ result of the merger or acquisition.”) (quoting *U.S. v. Marine Bancorp*, 418 U.S. 602, 623 n.22 (1974)).

⁴⁵⁶ *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009) (quoting 15 U.S.C. §53(b)).

⁴⁵⁷ An acquisition that violates the Clayton Act by definition also violates Section 5 of the FTC Act. *See, e.g.*, *FTC v. PPG Indus.*, 798 F.2d 1500, 1501 n.2. (D.C. Cir. 1986).

⁴⁵⁸ 15 U.S.C. § 18.

⁴⁵⁹ *U.S. v. Phila. Nat’l Bank*, 374 U.S. 321, 362 (1963) (internal quotation marks omitted).

⁴⁶⁰ *Heinz*, 246 F.3d at 713 (quoting *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 323 (1962) (emphasis in original)).

⁴⁶¹ *Marine Bancorp*, 418 U.S. at 618-23; *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 422-23 (5th Cir. 2008).

12. “By showing that the proposed transaction . . . will lead to undue concentration in the market,” the FTC “establishes a presumption that the transaction will substantially lessen competition.”⁴⁶² This presumption establishes a *prima facie* case that the merger is unlawful.⁴⁶³

13. Defendants bear the burden of production to rebut Plaintiff’s *prima facie* case.⁴⁶⁴ Indeed, a presumptively unlawful merger “must be enjoined,”⁴⁶⁵ unless Defendants produce evidence demonstrating “that the market-share statistics give an inaccurate account of the merger’s probable effects on competition in the relevant market.”⁴⁶⁶ The “more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully.”⁴⁶⁷ Only if Defendants produce evidence sufficient to rebut the presumption does the burden of producing “additional evidence of anticompetitive effect” shift back to the FTC, which retains the burden of persuasion at all times.⁴⁶⁸

14. Evidence from customers, other industry participants, industry observers, and the merging parties is all relevant to “address the central question of whether a merger may substantially lessen competition.”⁴⁶⁹

i. The Relevant Product Market is the Supply of MWT Products and Services to Global Fleets

15. Market definition (i) “helps specify the line of commerce and section of the country in which the competitive concern arises” and (ii) “allows the Agencies to identify market participants and measure market shares and market concentration.”⁴⁷⁰

⁴⁶² *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1083 (D.D.C. 1997) (“*Staples I*”); accord *Heinz*, 246 F.3d at 715.

⁴⁶³ See *Heinz*, 246 F.3d at 715.

⁴⁶⁴ *Marine Bancorp*, 418 U.S. at 631.

⁴⁶⁵ *Phila. Nat’l Bank*, 374 U.S. at 363.

⁴⁶⁶ *Heinz*, 246 F.3d at 715; *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).

⁴⁶⁷ *Heinz*, 246 F.3d at 725; accord *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 72 (D.D.C. 2011).

⁴⁶⁸ *H&R Block*, 833 F. Supp. 2d at 50; *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 23 (D.D.C. 2015).

⁴⁶⁹ *Guidelines* § 2. In particular, “[i]nformation from customers about how they would likely respond to a price increase, and the relative attractiveness of different products or suppliers, may be highly relevant . . .” *Id.* § 2.2.2. Additionally, “[s]uppliers, indirect customers, distributors, other industry participants, and industry analysts can . . . help illuminate how the market operates.” *Id.* § 2.2.3.

16. In defining a product market, “[t]he outer boundaries . . . are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”⁴⁷¹ Specifically, “courts look at whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.”⁴⁷² Product market definition turns on inclusion of all reasonable *substitute* products.⁴⁷³

17. Courts look to the HMT as an analytical method for defining relevant markets.⁴⁷⁴ The test “queries whether a hypothetical monopolist who has control over the products in an alleged market could profitably raise prices on those products,” typically using a SSNIP of 5%.⁴⁷⁵ If imposing a SSNIP would not divert enough sales to sources outside the candidate market to render the price increase unprofitable, then the candidate market passes the test and comprises a relevant product market.⁴⁷⁶ Courts have recognized that the sale and distribution of products to a distinct category of customers may constitute a relevant product market.⁴⁷⁷

a. Cluster Markets in Product Market Definition

18. In some instances, otherwise separate individual relevant product markets can be grouped together into a cluster market for analytical convenience.⁴⁷⁸ If individual products and services face similar competitive conditions, then those products and services can be clustered together, and the product market analysis will be the same whether conducted for each product

⁴⁷⁰ *Guidelines* § 4.

⁴⁷¹ *Brown Shoe*, 370 U.S. at 325.

⁴⁷² *H&R Block*, 833 F. Supp. 2d at 51.

⁴⁷³ *Id.*

⁴⁷⁴ *See id.* at 51-52; *Staples II*, 190 F. Supp. 3d at 121-22.

⁴⁷⁵ *Staples II*, 190 F. Supp. 3d at 121-22; *see also Guidelines* § § 4.1.1-4.1.3.

⁴⁷⁶ *See H&R Block*, 833 F. Supp. 2d at 51-52; *Staples II*, 190 F. Supp. 3d at 121-22.

⁴⁷⁷ *See e.g., Staples II*, 190 F. Supp. 3d at 127 (relevant product market defined as “the sale and distribution of consumable office supplies to large [business-to-business] customers”); *Sysco*, 113 F. Supp. 3d at 48 (broadline foodservice distribution and broadline foodservice distribution to national customers); *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 45-46 (D.D.C. 1998) (“wholesale distribution of prescription drugs”).

⁴⁷⁸ *See Staples II*, 190 F. Supp. 3d at 117; *ProMedica Health Sys., Inc., v. FTC*, 749 F.3d 559, 565-68 (6th Cir. 2014).

individually or for the cluster as a whole.⁴⁷⁹ This combination of products for analytical convenience does not alter the determination that the individual markets are relevant product markets independent from one another – that is, that they are not substitutes for one another.

19. Although Defendants have argued that the product market alleged here does not comport with “commercial realities” because customers also include other products in their negotiations or because documents do not specifically reference the exact cluster alleged, the Court in *Staples II* considered and rejected that very argument.⁴⁸⁰ The *Staples II* Court noted that the “critical question that must be answered when determining whether a particular product should be included in a cluster market” is whether the clustered items face similar competitive conditions.⁴⁸¹ The existence of similar competitive conditions is the “commercial reality” that is relevant when considering whether a cluster market is appropriate.

b. Targeted Customers in Product Market Definition

20. It can also be appropriate to define a relevant market based on a distinct category of customers.⁴⁸² “A price increase for targeted customers may be profitable even if a price increase for every customer would not be profitable because too many other customers would substitute

⁴⁷⁹ See *Staples II*, 190 F. Supp. 3d at 117 (“Defining the market as a cluster market is justified . . . because market shares and competitive conditions are likely to be similar for the distribution of pens to large customers and the distribution of binder clips to large customers.”); *ProMedica*, 749 F.3d at 565-66; see also *Brown Shoe*, 370 U.S. at 327-28 (market for men’s, women’s, and children’s shoes need not be subdivided when “considered separately or together, the picture of this merger is the same.”).

⁴⁸⁰ *Staples II*, 190 F. Supp. 3d at 122-25 (defining a cluster market of office supplies that did not include ink, toner, and other products even though market participants referred to the excluded products as “office supplies” and even though customers had contracts that covered all of these products); see also *ProMedica*, 749 F.3d at 565-66 (affirming a cluster market for primary and secondary hospital services, but excluding obstetrics and tertiary services, even though health insurance companies typically bargained for all of the services together).

⁴⁸¹ *Staples II*, 190 F. Supp. 3d at 123 (citing *ProMedica Health*, 749 F.3d at 566).

⁴⁸² See *Staples II*, 190 F. Supp. 3d at 122 (product market defined around targeted “large [business-to-business] customers”); *Sysco*, 113 F. Supp. 3d at 38-48 (relevant targeted market for sales to “national customers”); *Spirit Airlines, Inc., v. Nw. Airlines, Inc.*, 431 F.3d 917, 933-95 (6th Cir. 2005) (target product market defined as “leisure or price-sensitive passengers” rather than all passengers).

away. When discrimination is reasonably likely, the Agencies may evaluate competitive effects separately by type of customer.”⁴⁸³

21. Markets serving targeted customers are also known as “price discrimination markets.”⁴⁸⁴

Defining a market around distinct categories of customers is appropriate when a firm can price discriminate – that is, “profitably target a subset of customers for price increases.”⁴⁸⁵ For price discrimination to be feasible, “there must be differentiated pricing and limited arbitrage.”⁴⁸⁶

c. Application of Cluster Markets and Targeted Customers to Plaintiff’s Market Definition

22. The relevant product market here clusters marine BWT products and services to Global Fleets and marine CWT products and services to Global Fleets together for analytical convenience.

23. Plaintiff’s market of MWT products and services is an appropriate “cluster market” because marine BWT products and services and CWT products and services face similar competitive conditions.⁴⁸⁷ Both sets of products are used to maintain critical operational equipment on a vessel (boilers and engines), and customers make similar demands on suppliers of each product—high quality, consistent products available in a timely manner at any port where its vessels may call.⁴⁸⁸ Also, the Defendants have similar market shares, earn similar margins, and face a nearly identical set of competitors for both sets of products.⁴⁸⁹

⁴⁸³ *Guidelines* §§ 3, 4.1.4 (“If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP”).

⁴⁸⁴ *Sysco*, 113 F. Supp. 3d at 39 (quoting *Guidelines* § 4.1.4).

⁴⁸⁵ *See Sysco*, 113 F. Supp. 3d at 38, 46; *see also Guidelines* §§ 3, 4.1.4; *Staples II*, 190 F. Supp.3d at 117-18.

⁴⁸⁶ *Staples II*, 190 F. Supp. 3d at 118; *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW*. 533d (Supp. 1992) (“[S]ellers may be able to discriminate against buyers who have fewer alternatives or for whom the product performs a more valuable function.”).

⁴⁸⁷ *See Staples II*, 190 F. Supp. 3d at 117 (“Although a pen is not a functional substitute for a paperclip, it is possible to cluster consumable office supplies into one market for analytical convenience.”).

⁴⁸⁸ PFF ¶¶ 19-20.

⁴⁸⁹ PFF ¶ 26.

24. Plaintiff's product market appropriately focuses on a distinct set of customers—Global Fleets. Defendants recognize that global customers as a category have distinct requirements compared to customers that only operate locally or regionally,⁴⁹⁰ and such customers account for the clear majority of Defendants' business in terms of revenue, number of vessels, and tonnage served.⁴⁹¹ Defendants could profitably target Global Fleets for price increases.⁴⁹² Differentiated pricing is possible here as Global Fleets negotiate unique framework agreements with individualized pricing for BWT and CWT products, and there is no evidence of arbitrage.⁴⁹³ Global Fleets have distinct needs related to centralized negotiation of agreements for delivery to geographically dispersed locations, product consistency, and product availability.⁴⁹⁴ Thus, it is appropriate to define the market around Global Fleets.⁴⁹⁵

25. Courts have used the *Brown Shoe* practical indicia factors to distinguish the functional substitutability of different distribution methods as well as to define a group of targeted customers as distinct.⁴⁹⁶ In the same manner, the *Brown Shoe* practical indicia support Plaintiff's product market. First, industrial suppliers and ship chandlers are not functional substitutes for suppliers of marine BWT products and services and CWT products and services. The delivery and distribution methods are different, the customer service and value-added services are

⁴⁹⁰ PFF ¶¶ 35, 42, 45-46.

⁴⁹¹ PFF ¶¶ 45-46; Global Fleets are defined as fleets of 10 or more globally trading vessels, which are vessels above 1,000 gross tons in size that have traded at two ports at least 2,000 nautical miles apart in the preceding 12 months. PFF ¶¶ 13, 33.

⁴⁹² See *Sysco*, 113 F. Supp. 3d at 38; see *Staples II*, 190 F. Supp. 3d at 117-18, 126; (“Antitrust laws exist to protect competition, even for a targeted group that represents a relatively small part of an overall market.”).

⁴⁹³ PFF ¶ 32; see also *Guidelines* § 4.1.4 (a market based on targeted customers can be appropriate “when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product.”).

⁴⁹⁴ PFF ¶¶ 43-44.

⁴⁹⁵ See *Staples II*, 190 F. Supp. 3d at 122; *Sysco*, 113 F. Supp. 3d at 37-48.

⁴⁹⁶ See *Sysco*, 113 F. Supp. 3d at 27-30 (distinguishing broadline foodservice distribution from other modes of foodservice distribution); *Staples II*, 190 F. Supp. 3d at 118-22 (distinguishing large B-to-B customers from other customers); see also *Brown Shoe*, 370 U.S. at 325.

different, the customers are distinct, and the industry recognizes them as distinct.⁴⁹⁷ Second, Global Fleets are distinct from other customers of MWT products and services. Global Fleet customers require global distribution and specialized services, have distinct prices, and value brand and reputation, and Defendants themselves recognize that the needs of large, globally trading fleets are different from the needs of smaller, locally trading fleets.⁴⁹⁸

26. Plaintiff's product market also satisfies the HMT. A hypothetical monopolist supplier of MWT products and services could profitably impose a SSNIP on Global Fleets.⁴⁹⁹ It is unrealistic to think that the closest options outside the relevant market here – land-based industrial suppliers and ship chandlers – would be a sufficient competitive constraint.

27. The supply of MWT products and services to Global Fleets is a relevant product market.

28. Defendants incorrectly claim that a “bundle” market definition⁵⁰⁰ consisting of all the products that Defendants sell is appropriate. A group of non-substitute products may together constitute a relevant product market where customers seek to purchase the products jointly as a bundle or package from a single supplier.⁵⁰¹ Here, however, some customers buy different marine products from multiple suppliers while others do not, and Defendants told the FTC that customers generally do not “one-stop shop” across marine product categories.⁵⁰² Additionally, Defendants' proposed product market definition combines multiple, non-substitute products but relies on neither a cluster nor bundle rationale. Such a market is unsupported by any relevant

⁴⁹⁷ See PFF ¶¶ 33-40; see also *Sysco*, 113 F. Supp. 3d at 27-30.

⁴⁹⁸ See PFF ¶¶ 45-46; see also *Staples II*, 190 F. Supp. 3d at 118-22.

⁴⁹⁹ PFF ¶¶ 50-53.

⁵⁰⁰ “Bundle” markets are also called “package deal” or “one-stop shop” markets. *ProMedica*, 749 F.3d at 657 (describing a “package-deal” market in which the relevant product is a “package [of products] as a whole”); *Sysco*, 113 F. Supp. 3d at 16 (“one-stop shop” offering of broadline foodservice distributors as a relevant market.)

⁵⁰¹ See *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966) (endorsing an “accredited central station service” market, which included several distinct services, because the central service stations offered “a single base service.”); see also *Sysco*, 113 F. Supp. 3d at 26-27 (defining a market for “broadline” food distribution).

⁵⁰² PFF ¶ 31.

legal precedent (or economic theory) and is contrary to Supreme Court precedent that product markets must be based on product substitution, along with cluster or bundle principles.⁵⁰³

29. Defendants' criticisms of Dr. Nevo's definition of Global Fleets are also misplaced. Dr. Nevo defined Global Fleets as fleets with 10 or more globally trading vessels, relying on WSS's own ordinary course of business definition of "globally trading."⁵⁰⁴ The cutoff of 10 vessels is similar to analogous cutoffs used in other targeted customer cases.⁵⁰⁵ Moreover, Dr. Nevo confirmed that the 10-vessel cutoff is not driving his results, as his analysis holds true using alternative cutoffs of 5 or 15 globally trading vessels and by considering all globally trading vessels regardless of fleet, a grouping that corresponds directly to WSS's own usage.⁵⁰⁶

ii. The Relevant Geographic Market is Global

30. The relevant geographic market "identifies the geographic area in which the defendants compete"⁵⁰⁷ and must "correspond to the commercial realities of the industry."⁵⁰⁸ Here, Defendants agree that the relevant geographic market is global.⁵⁰⁹

iii. The Acquisition is Presumptively Illegal Because It Would Create Extraordinarily High Market Shares and Concentration in the Relevant Market

31. An acquisition that results in an "undue percentage share of the relevant market" and "a significant increase in concentration" is presumed unlawful under Section 7 of the Clayton Act.⁵¹⁰ Such an acquisition "is so inherently likely to lessen competition substantially that it *must*

⁵⁰³ See *Brown Shoe*, 370 U.S. at 325.

⁵⁰⁴ PFF ¶ 35.

⁵⁰⁵ See, e.g., *Staples II*, 190 F. Supp. 3d at 118 (accepting the FTC's targeted customer definition where the FTC had used a \$500,000 spending threshold to define "large [business to business] customers").

⁵⁰⁶ PFF ¶ 36.

⁵⁰⁷ *H&R Block*, 833 F. Supp. 2d at 50 n.7 (quoting *CCC Holdings*, 605 F. Supp. 2d at 37); see also *Cardinal Health*, 12 F. Supp. 2d at 49; *Guidelines* § 4.2.

⁵⁰⁸ *Brown Shoe*, 370 U.S. at 336.

⁵⁰⁹ PFF ¶ 56; see also *Staples II*, 190 F. Supp. 3d at 116.

⁵¹⁰ *Phila. Nat'l Bank*, 374 U.S. at 363.

be enjoined” unless Defendants can rebut the presumption.⁵¹¹ Courts in this Circuit have repeatedly ruled that acquisitions that seek to combine the top two firms in a concentrated market are likely to harm competitive and should be enjoined.⁵¹²

32. According to the *Guidelines*, “[t]he Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects [and] in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.”⁵¹³

33. Courts employ the HHI, a statistical measure to measure market concentration.⁵¹⁴ This index calculates market concentration by summing the squares of the individual market share of each market participant.⁵¹⁵ A merger is presumptively unlawful if it increases the HHI by more than 200 points and results in a post-acquisition HHI exceeding 2500.⁵¹⁶

34. The Acquisition would result in a single dominant supplier controlling more than 80% of the market with an HHI in excess of 7,214 and a post-Acquisition increase of at least 3,563, figures that far exceed the thresholds triggering a presumption of illegality.⁵¹⁷ The post-Acquisition increase in concentration alone is more than *seventeen times* the point at which a combination is presumptively “likely to enhance market power.”⁵¹⁸ Indeed, the market share and concentration levels that would result from this Acquisition easily meet or exceed the levels in other proposed combinations that courts in this Circuit have enjoined.⁵¹⁹

⁵¹¹ See *id.* (emphasis added); see also *Heinz*, 246 F.3d at 715.

⁵¹² *Staples II*, 190 F. Supp. 3d at 138 (“There can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market.”) (citing *Sysco*, 113 F. Supp. 3d at 66 (quoting *Whole Foods*, 548 F.3d at 1043 (Tatel, J.)).

⁵¹³ *Guidelines* § 5.

⁵¹⁴ See e.g., *Heinz*, 246 F.3d at 716; *H&R Block*, 833 F. Supp. 2d at 71.

⁵¹⁵ See *Sysco*, 113 F. Supp. 3d at 52-53.

⁵¹⁶ *Guidelines* § 5.3; *Sysco*, 113 F. Supp. 3d at 52-53; *Heinz*, 246 F.3d at 716.

⁵¹⁷ PFF ¶¶ 55-57.

⁵¹⁸ *Guidelines* § 5.3; *Sysco*, 113 F. Supp. 3d at 52.

⁵¹⁹ See FTC Br. at 23 (ECF No. 45) at 3.

35. Dr. Nevo calculated market shares and HHIs based on revenue data produced by the Defendants as well as submissions from numerous other competitors identified by Defendants.⁵²⁰ Dr. Nevo used revenues because “[r]evenues in the relevant market tend to be the best measure of attractiveness to customers, since they reflect the real-world ability of firms to surmount all of the obstacles necessary to offer products on terms and conditions that are attractive to customers.”⁵²¹ While the data available in this matter are not perfect, “[t]he FTC need not present market shares and HHI estimates with the precision of a NASA scientist. The closest available approximation often will do.”⁵²²

36. Dr. Nevo conducted robustness checks using several different formulations, and for these tests, combined shares for the two merging parties ranged from 75.6% to 85.9% with post-Acquisition HHIs between 5,741 and 7,416 and changes in HHIs between 2,833 and 3,661, all of which far exceed the thresholds triggering the presumption of illegality.⁵²³

37. Using an alternative approach based on the PSM,⁵²⁴ Dr. Nevo found that Defendants’ combined shares were at least 69% in 2017. Although, this alternative approach likely inflates the overall market size in the Defendants’ favor, these shares still easily establish a presumption of anticompetitive effects.⁵²⁵

38. Dr. Nevo also analyzed multiple alternative market definitions, including alternatives not limited to Global Fleets, as well as proposed market definitions advanced by Defendants.⁵²⁶ For

⁵²⁰ See *Staples II*, 190 F. Supp. 3d at 129 (“Antitrust economists rely on data from third parties through surveys, and therefore the measure of market shares is normally imperfect.”) (internal quotations omitted); see also *H&R Block, Inc.*, 833 F. Supp. 2d at 72 (“A reliable, reasonable, close approximation of relevant market share data is sufficient[.]”).

⁵²¹ *Guidelines* § 5.

⁵²² *Sysco*, 113 F. Supp. 3d at 54 (internal quotation omitted).

⁵²³ PFF ¶¶ 55-57.

⁵²⁴ See PFF ¶¶ 55, 58-59.

⁵²⁵ See PFF ¶¶ 60-61.

⁵²⁶ PFF ¶ 65.

all of these alternative markets, the shares and HHIs easily establish a presumption of anticompetitive effects.⁵²⁷

39. To try to reduce their high market shares, Defendants have proposed a non-standard and unreliable metric for calculating shares that ignores available revenue data and instead attempts to count individual vessels. Unweighted vessel count shares are misleading because water treatment spend can vary depending on vessel size and type, a fact that Defendants acknowledge in the ordinary course of business.⁵²⁸ By treating all vessels exactly the same, despite the obvious differences in their commercial significance and trade patterns, Defendants' unweighted vessel count shares deviate dramatically from revenue shares and all other metrics and create an unreliable and unrealistic view of the market.⁵²⁹ Dr. Israel attempts to justify his unusual market share method by referring to inapposite comments in the *Guidelines* about unit sales, but accounting for unit sales in this industry would clearly require measuring the volume of products (i.e., units) sold—not just counting vessels—and Dr. Israel has made no attempt to do so.⁵³⁰ Another novel set of market shares Dr. Israel presented for the first time at the hearing draws on a misapplication of the WSS PSM. These shares rely on recalibrating the model using assumptions that contradict WSS's ordinary-course usage and result in an unrealistically large market size estimate that is about 60-122% larger than *all* MWT revenues collected from marine *and* industrial suppliers in this case. The Court should disregard Defendants' unreliable, last-ditch attempts to engineer artificially low market shares.

⁵²⁷ PFF ¶ 66.

⁵²⁸ PFF ¶ 61.

⁵²⁹ PFF ¶ 104; Dr. Israel suggested in his testimony that his market share approach was somewhat similar to approaches used in analyzing hospital mergers. Unlike in the hospital context, however, Dr. Israel only has limited data on vessel usage from Defendants alone, and not from any other competitor, while detailed hospital patient data is generally available for all hospitals in a relevant geographic market. Moreover, the use of revenue as the relevant metric in the healthcare context is complicated by industry-specific factors like the multi-stage nature of competition involving insurance companies, providers, and patients; such complicating factors are not applicable here.

⁵³⁰ *Id.*

iv. Evidence of Competitive Effects Corroborates the Presumption of Illegality

40. In addition to the *prima facie* case based on market shares and concentration, Plaintiff also provided direct evidence of likely anticompetitive effects that buttresses the *prima facie* case.⁵³¹

As noted in the *Guidelines*, “[t]he extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral prices effects.”⁵³²

41. District courts in this Circuit have repeatedly held that transactions that would eliminate significant head-to-head competition are likely to result in anticompetitive effects.⁵³³

42. This common sense notion is reflected in the *Guidelines*. As the *Guidelines* explain, a “merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations.”⁵³⁴ The risk of anticompetitive effects is magnified when the merging firms, as is the case with WSS and Drew, are particularly close competitors.⁵³⁵

43. Plaintiff has produced significant evidence that benefit from head-to-head competition between Defendants through lower prices, increased services, and better contract terms.⁵³⁶ The proposed Acquisition will eliminate that head-to-head competition. Moreover, Dr. Nevo’s analysis also confirms that Defendants are each other’s closest competitor.⁵³⁷

⁵³¹ See generally PFF § V.

⁵³² *Guidelines* § 6.1; (“The Agencies consider any reasonably available and reliable information to evaluate the extent of direct competition between the products sold by the merging firms. . . . This includes documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patters, and customer surveys.”).

⁵³³ See e.g., *Staples II*, 190 F. Supp. 3d at 131 (“Mergers that eliminate head-to-head competition between close competitors often result in a lessening of competition.”); *Sysco*, 113 F. Supp. 3d at 61 (“Courts have recognized that a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition.”); see also *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000); *H&R Block*, 833 F. Supp. 2d at 88-89; *Staples I*, 970 F. Supp. at 1083.

⁵³⁴ *Guidelines* § 6.2.

⁵³⁵ *Guidelines* § 6.2 (“These [anticompetitive] effects are likely to be greater, the greater the advantage the runner-up merging firm has over other suppliers in meeting customers’ needs.”).

⁵³⁶ PFF ¶¶ 67-82.

⁵³⁷ PFF ¶ 71.

44. This documented closeness of competition also indicates the likelihood of significant anticompetitive effects. Dr. Nevo further confirmed the likely loss of head-to-head competition using well-accepted economic models.⁵³⁸

45. Finally, Plaintiff is not “required to show that *all* competition will be eliminated as a result of the merger in order to obtain an injunction.”⁵³⁹ Plaintiff must only show that the merger may substantially *lessen* competition.⁵⁴⁰ Here, the fact that the Acquisition removes competition between the largest and second-largest providers by far in the market for the supply of MWT products and services to Global Fleets leaves “little doubt” that the Acquisition “will tend to harm competition in that market.”⁵⁴¹

B. Defendants Failed To Rebut the Strong Presumption of Illegality

46. Defendants have the burden of production to rebut the presumption.⁵⁴² Defendants bear a heavy burden given the strength of Plaintiff’s *prima facie* case.⁵⁴³

i. The Size of Global Fleets Does Not Protect Them from Harm

47. As explained in *Sysco*, “[t]he ability of large buyers to keep prices down, functioning as what is known in antitrust literature as ‘power buyers’ . . . depends on the alternatives these large buyers have available to them. . . . If a merger reduces alternatives, the power buyers’ ability to constrain price and avoid price discrimination can be correspondingly diminished.”⁵⁴⁴ Even large customers can be harmed by a merger, particularly where, as here, the merger takes away the

⁵³⁸ PFF ¶¶ 93-98.

⁵³⁹ *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1083 (N.D. Ill. 2012) (emphasis added).

⁵⁴⁰ See 15 U.S.C. § 18.

⁵⁴¹ *Whole Foods*, 548 F.3d at 1043.

⁵⁴² *Heinz*, 246 F.3d at 714 (quoting *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975)).

⁵⁴³ See *Sysco*, 113 F. Supp. 3d at 23 (the stronger the *prima facie* case, the more evidence defendants must present to rebut the established presumption).

⁵⁴⁴ *Id.* at 48.

customer's best alternative for competitive negotiations.⁵⁴⁵ The "loss of one competitor . . . alters the . . . negotiating dynamic, even with strong advocates on the other side."⁵⁴⁶

48. The Acquisition would eliminate even the most powerful buyer's ability to "swing back and forth between competitors to lower bids post-acquisition."⁵⁴⁷ While Global Fleets may have some negotiating leverage today, they will be harmed by the increase in WSS's leverage that results from eliminating its closest alternative, *i.e.*, Drew.⁵⁴⁸ In other words, the Acquisition eliminates the best alternative to WSS, and in some cases the only viable alternative, for the supply of MWT products and services to Global Fleets.⁵⁴⁹ As the *Guidelines* explain, "a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer."⁵⁵⁰ Moreover, Defendants arguments' that large customers use various techniques or "levers" in negotiations, such as threatening to switch other categories of products to different suppliers, are beside the point. To the extent these levers are credible negotiating tools, customers already have the ability to use them today, and such techniques will not be made any stronger by the Acquisition.⁵⁵¹ The focus under the Clayton Act is whether the *changes* brought about by the Acquisition will *lessen competition*.⁵⁵²

49. Additionally, Defendants have put forth no evidence that Global Fleet customers would be likely to leverage their size or purported sophistication to sponsor entry or vertically integrate.⁵⁵³

Defendants' argument that Global Fleet customers are powerful buyers, or that their size protects

⁵⁴⁵ See *Staples II*, 190 F. Supp. 3d at 126-27; *Sysco*, 113 F. Supp. 3d at 47-48; *Guidelines* § 8 ("Even buyers that negotiate favorable terms may be harmed by an increase in market power.").

⁵⁴⁶ *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 221 (D.D.C. 2017).

⁵⁴⁷ See *Chi. Bridge & Iron*, 534 F.3d at 440.

⁵⁴⁸ See *Sysco*, 113 F. Supp. 3d at 48 ("The ability of large buyers to . . . function[] as . . . 'power buyers,' . . . depends on the alternatives these large buyers have available to them If a merger reduces alternatives, the power buyers' ability to constrain price and avoid price discrimination can be correspondingly diminished. ").

⁵⁴⁹ PFF ¶ 104-05.

⁵⁵⁰ *Guidelines* § 8.

⁵⁵¹ PFF ¶¶ 104-09.

⁵⁵² 15 U.S.C. § 18.

⁵⁵³ See *Cardinal Health*, 12 F. Supp. 2d at 58-60; *Guidelines* § 8 (powerful buyers may be able to constrain post-merger price increases if they "have the ability and incentive to vertically integrate upstream or sponsor entry").

them from harm, is contrary to the evidence and law, and insufficient to rebut Plaintiff's presumption of anticompetitive harm.

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

50. Entry and expansion must be “timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.”⁵⁵⁴ That is, “[t]he Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence” and “will not presume that a powerful firm in an adjacent market or a large customer will enter the relevant market unless there is reliable evidence supporting that conclusion.”⁵⁵⁵

51. As Judge Mehta explained in *Sysco*: “Defendants bear the burden of demonstrating the ability of other distributors to ‘fill the competitive void’ that will result from the proposed merger. . . . [A]lthough all it may take is a ‘guy and a truck’ to become a foodservice distributor, becoming a *broadline* foodservice distributor with the ability to compete for national customers is another thing altogether.”⁵⁵⁶

52. Defendants must show at least a “reasonable probability of sufficient entry.”⁵⁵⁷ It is not enough merely to point to other competitors that might possibly expand.⁵⁵⁸

53. “In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect.”⁵⁵⁹ Thus, to consider entry timely, it must be

⁵⁵⁴ *Guidelines* § 9; see also *Staples II*, 190 F. Supp. 3d at 133; see also *Staples I*, 970 F. Supp. at 1086; *Swedish Match*, 131 F. Supp. 2d at 170.

⁵⁵⁵ *Guidelines* § 9.

⁵⁵⁶ *Sysco*, 113 F. Supp. 3d at 80.

⁵⁵⁷ *Chi. Bridge*, 534 F.3d at 430 n.10.

⁵⁵⁸ See *H&R Block*, 833 F. Supp. 2d at 73-76.

⁵⁵⁹ *Guidelines* § 9.1.

“rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to entry.”⁵⁶⁰

54. Entry or expansion is not likely if it would not be profitable for a firm to enter or expand into the market after considering the expense and risk associated with it.⁵⁶¹

55. A finding of high entry barriers “eliminates the possibility that the reduced competition caused by the merger will be ameliorated by new competition from outsiders and further strengthens the FTC’s case.”⁵⁶²

56. Defendants failed to produce evidence that existing competitors can expand in the near term to provide a meaningful alternative to a post-Acquisition WSS or that any new entrant is likely to enter the market in a timely and sufficient manner to replace the lost competition.⁵⁶³

57. The relevant market is characterized by significant barriers to entry, including the need a global logistics and distribution network, high-quality and consistent MWT products and services, on-board and remote technical services, as well as scale and competitive cost structure advantages for larger competitors, and high customer retention rates.⁵⁶⁴ All of these barriers operate holistically, and are barriers both independently and collectively.

58. Additionally, Global Fleet customers value suppliers with strong reputations for supplying high quality and consistent products.⁵⁶⁵ Defendants’ reputations and brands not only provide them with a built-in advantage over existing competitors, but they also serve as a considerable

⁵⁶⁰ *Id.*

⁵⁶¹ *Guidelines* § 9.2. (“Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exits.”); *see Swedish Match*, 131 F. Supp. 2d at 171 (finding entry unlikely where it required “substantial sunk costs” with “little hope of gaining market share”).

⁵⁶² *Heinz*, 246 F.3d at 717.

⁵⁶³ *See generally* PFF ¶¶ § VII.

⁵⁶⁴ PFF ¶¶ 110-33.

⁵⁶⁵ PFF ¶¶ 118-20.

barrier for any existing supplier or new entrant to replace the competition lost between WSS and Drew.⁵⁶⁶

iii. Defendants' Efficiencies Defense Fails as a Matter of Law

59. Defendants bear the burden of providing an efficiencies defense.⁵⁶⁷ Given the high market concentration levels here, Defendants must present “proof of extraordinary efficiencies” to rebut the presumption of likely anticompetitive effects, and “courts ‘generally have found inadequate proof of efficiencies to sustain a rebuttal of the government’s case.’”⁵⁶⁸ Indeed, no court has ever relied on efficiencies to rescue an otherwise unlawful transaction.⁵⁶⁹

60. Claimed efficiencies are not cognizable unless they are (1) “merger-specific,” and (2) “reasonably verifiable by an independent party.”⁵⁷⁰ “Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms.⁵⁷¹ It is therefore incumbent upon Defendants “to substantiate efficiency claims” so that an independent party “can verify by reasonable means the likelihood and magnitude of each asserted efficiency . . . and why each would be merger specific.”⁵⁷²

61. Defendants have failed to substantiate their claimed efficiencies. Defendants offer “mere speculation and promises about post-merger behavior” without substantial proof.⁵⁷³ Defendants’ efficiencies estimates are largely based on their business judgment, rather than any analysis or

⁵⁶⁶ *Id.*; see also *Sysco*, 113 F. Supp. 3d at 80 (“[i]ncumbency is a powerful force”); *H&R Block*, 833 F. Supp. 2d at 75 (“importance of reputation and brand in driving consumer behavior”); *CCC Holdings*, 605 F. Supp. 2d at 54-55 (“reputation can be a considerable barrier to entry where customers and suppliers emphasize the importance of reputation and expertise”); *Chi. Bridge*, 534 F.3d at 437-38 n.17.

⁵⁶⁷ See *H&R Block*, 833 F. Supp. 2d at 89.

⁵⁶⁸ *Id.* (quoting *Heinz*, 246 F.3d at 721).

⁵⁶⁹ See, e.g., *id.* at 72; *Heinz*, 246 F.3d at 720-21.

⁵⁷⁰ *Staples II*, 190 F. Supp. 3d at 137 n.15.

⁵⁷¹ *Guidelines* § 10.

⁵⁷² *Id.*

⁵⁷³ See *Heinz*, 246 F.3d at 721.

concrete planning.⁵⁷⁴ And, “[w]hile reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable by the Court. If this were not so, then the efficiencies defense “might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise.”⁵⁷⁵

62. Defendants fail to demonstrate that their claimed efficiencies are merger-specific. Significant portions of their claimed cost savings appear to be achievable independent of the merger.⁵⁷⁶ Furthermore, most of the claimed efficiencies are out-of-market efficiencies, as they relate to products outside the relevant market or sales to customers who are not Global Fleet customers.⁵⁷⁷

63. Nor have Defendants presented any credible evidence that their purported efficiencies would benefit customers.⁵⁷⁸ Accordingly, Defendants have failed to rebut Plaintiff’s presumption of anticompetitive harm.

IV. THE EQUITIES FAVOR A PRELIMINARY INJUNCTION

64. A preliminary injunction is in the public interest.⁵⁷⁹ No court has denied relief in a Section 13(b) proceeding in which the FTC “has demonstrated a likelihood of success on the merits.”⁵⁸⁰

65. The overriding public equity favoring a preliminary injunction is “the public interest in effective enforcement of the antitrust laws.”⁵⁸¹ After all, “competition is our fundamental

⁵⁷⁴ PFF ¶¶ 155-67.

⁵⁷⁵ *H&R Block*, 833 F. Supp. 2d at 91.

⁵⁷⁶ *H&R Block*, 833 F. Supp. 2d at 90; PFF ¶¶ 168-71.

⁵⁷⁷ See *Guidelines* § 10 n.14; see also *Phila Nat’l Bank*, 374 U.S. 371 (1963) (rejecting claim anticompetitive merger would bring benefits outside the relevant market); *Anthem, Inc.*, 855 F.3d at 363-64 (rejecting savings claims that, among other “analytic flaws,” were “unmoored from the actual market at issue”).

⁵⁷⁸ See *FTC v. Univ. Health*, 938 F.2d 1206, 1223 (11th Cir. 1991); *CCC Holdings*, 605 F. Supp. 2d at 74-75.

⁵⁷⁹ See generally PFF § V; see *Heinz*, 246 F.3d at 726.

⁵⁸⁰ *FTC v. ProMedica Health Sys.*, 3:11-cv-47, 2011 WL 1219281, at *60 (N.D. Ohio Mar. 29, 2011)); see also *PPG Indus.*, 798 F.2d at 1508 (quoting *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085 (D.C. Cir. 1986)).

national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy.”⁵⁸² An equally important public equity is the preservation of the FTC’s ability to obtain effective relief if the Acquisition is ultimately found to violate Section 7 of the Clayton Act. Without a preliminary injunction Defendants can “scramble the eggs”—that is, combine their operations and make it difficult, if not impossible, for competition to be restored to its previous state.⁵⁸³

66. Private equities are “subordinate to public interests and cannot alone support the denial of preliminary relief.”⁵⁸⁴ Indeed, “[o]nly ‘public equities’ that benefit consumers” can trump the FTC’s showing of likely success on the merits.⁵⁸⁵ The “‘risk that the transaction will not occur at all,’ by itself, is a private consideration that cannot alone defeat the preliminary injunction.”⁵⁸⁶ Defendants’ assertion that they will abandon the Acquisition and not proceed with the administrative trial on the merits if a preliminary injunction issues does not elevate the FTC’s burden under Section 13(b).⁵⁸⁷

* * * * *

66. After considering the FTC’s likelihood of ultimate success and weighing the relevant equities, it is in the public interest that the Court enter a preliminary injunction enjoining WSS’s proposed acquisition of Drew pending completion of the FTC’s administrative proceeding.

⁵⁸¹ *Heinz*, 246 F.3d at 726.

⁵⁸² *Phila. Nat’l Bank*, 374 U.S. at 372; *see also Whole Foods*, 548 F.3d at 1035

⁵⁸³ *Heinz*, 246 F.3d at 726 (citing *FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n.5 (1966))

⁵⁸⁴ *FTC v. Illinois Cereal Mills, Inc.*, 691 F. Supp. 1131, 1146 (N.D. Ill. 1988) (citing *Weyerhaeuser*, 665 F.2d at 1083).

⁵⁸⁵ *CCC Holdings*, 605 F. Supp. 2d at 75-76 (citing *Whole Foods*, 548 F.3d at 1041 (Brown, J.)).

⁵⁸⁶ *Whole Foods*, 548 F.3d at 1041 (citing *Heinz*, 246 F.3d at 726).

⁵⁸⁷ *See Heinz*, 246 F.3d at 727 (“[T]hat is at best a ‘private’ equity which does not affect our analysis . . .”).

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