IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

WILH. WILHELMSEN HOLDING ASA,

WILHELMSEN MARITIME SERVICES AS,

RESOLUTE FUND II, L.P.,

DREW MARINE INTERMEDIATE II B.V.,

and

DREW MARINE GROUP, INC.,

Defendants.

Civil Action No. 18-cv-00414-TSC

[redacted]

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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selling commodity products, that customers are all the same, and that entry is a simple matter of outsourcing—cannot withstand close scrutiny. There is both a robust evidentiary record and a legal framework that demonstrates this Acquisition will harm competition, meaning that the FTC is likely to succeed at the administrative trial in proving that the effect of the Acquisition may be to substantially lessen competition in violation of Section 7 of the Clayton Act.

conditions and therefore can be clustered for analytical convenience.[13] Both products maintain active operational equipment on a vessel, with the same customers demanding consistent product on a global basis, in contrast with products like cleaning chemicals where global consistency is less important.[14] This is also borne out in the data, which shows that the Defendants earn higher margins, and have higher market shares, in marine water treatment products than in other marine products.[15] Additionally, Defendants compete against a nearly identical set of competitors for both products, and their water treatment product portfolios overlap with each other to a considerable degree.[16] Thus, here, there is ample record evidence that supports a cluster market including both products.

Second, Defendants' argument that the FTC's market is "underinclusive" by including just marine boiler water treatment products and cooling water treatment products—and not other marine products—is wrong as a matter of fact and law. Products should not be clustered together when "competitive conditions" for the products are not similar.[17] *Staples II*, 190 F. Supp. 3d at 117; *ProMedica*, 749 F.3d at 565-68. For the reasons set out above, marine boiler and cooling water treatment products and services face similar competitive conditions, and those conditions are different from other types of marine products. Therefore, it is proper for the FTC and its expert, Dr. Nevo, to cluster these products together.[18]

Marine cleaning chemicals and marine refrigerants, for example, are less specialized and technical than marine water treatment chemicals, making it easier for customers to purchase these

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[13] *See ProMedica*, 749 F.3d at 565-68 (6th Cir. 2014) (clustering distinct inpatient procedures that are not functionally interchangeable into a single market was appropriate for analytical convenience). Defendants' reliance on *United States v. Grinnell Corp.* is misplaced. *Grinnell* dealt with a single product market—accredited central station services—that were purchased as a bundle or "package-deal" rather than distinct product markets aggregated for analytical convenience, which is the situation here. *United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966); *see also ProMedica*, 749 F.3d at 567-68; *Staples II*, 190 F. Supp. 3d at 117.

[14] PX61002 ¶ 82.

[15] PX61002 ¶¶ 10, 14-15, 17.

[16]

from many different suppliers.[19] Unlike marine water treatment products, marine fuel oil treatment additives, marine welding gases, and pool and spa water treatment chemicals are not used in some vessels.[20] The difference in competitive conditions between marine water treatment products and other marine products is also evident in market share and margin data as noted above.

Defendants argue that the FTC should set aside established principles because customers often negotiate for these other marine products at the same time as they negotiate for marine water treatment chemicals, and may contract to buy all of these products in the same "framework agreements." Def. Br. at 25. This argument, however, has been squarely rejected by courts that have analyzed cluster markets.[21] The FTC's position, by contrast, is well-s s

do), a market based on targeted customers is still appropriate "when prices are individually

more accurately reflect the conditions in which Defendants compete. And yet, Dr. Nevo ran market share calculations and HHIs for each of the three alternative markets Defendants proposed, and for *all three* the result was the same as for the market alleged by the FTC—market shares and concentration levels exceeding the HHI thresholds in the Merger Guidelines. In other words, even using markets identified by *Defendants*, the FTC can establish a presumption that the Acquisition is anticompetitive and illegal.[30] This puts the lie to Defendants' claim that the FTC gerrymandered its market definition to manufacture high shares and concentration figures.

Indeed, in a failed attempt to deny their own dominance in the market, Defendants' expert is forced to rely on convoluted and deeply flawed approaches to calculating market shares in his attempt to downplay the high market concentration. He calculates shares based on counting the number of ships in a cherry-picked subset of vessels, regardless of the actual revenues associated with those vessels. In other words, when determining market shares, Defendants' expert would count a vessel purchasing $100 of marine water treatment products the same as one purchasing $10,000. These unreliable methods lead Defendants' expert to many faulty conclusions and claims that strain credulity, including his proclamation that "head-to-head competition between WSS and

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consistently supporting the unassailable fact that Wilhelmsen and Drew are each other's closest competitor and vigorously compete to secure business from owners and operators of Global Fleets. FTC Br. at 23-27.[32] Defendants are literally peerless in this market, as follows from their large market shares, and validated by customer testimony. Despite Defendants' dismissive suggestion that the FTC presented "limited anecdotal evidence" of head-to-head competition, the FTC provided four unrebutted *specific* examples of recent head-to-head competition between Wilhelmsen and Drew that resulted in lower prices for owners and operators of Global Fleets. FTC Br. at 26-27. Defendants' own documents reveal many other examples.[33]

Defendants also attack a strawman, claiming that the FTC "ignore[s] . . . many existing competitors."[34] To the contrary, the FTC has accounted for every supplier identified in the table in Defendants' brief, as well as others.[35] The stark reality, however, is that these firms have only a small fraction of the marine water treatment chemical sales to Global Fleets that either Wilhelmsen or Drew have.[36] That gap speaks volumes 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." *Merger Guidelines* § 5.2.

Still, Defendants devote pages and pages of argument and myriad footnotes to website citations and other speculative sources as support for its contention that the market is compity, mpity, vef,

Wilhelmsen and Drew—that could meet their global needs and provide reliable, consistent, and high quality marine water treatment products and services across the globe, and outreach efforts to other suppliers confirmed this.[38]

Chevron Marine is typical of Defendants' jury-rigged arguments. Defendants tout Chevron Marine as a "massive" global competitor that distributes cooling water treatment chemicals "around the world" and whose mere presence "will discipline the merged entity." Def. Br. at 32-35. However, when Defendants met with staff during the FTC's investigation and provided a list of *39* purported competitors, Chevron Marine failed to even make the cut.[39] And the facts are that Chevron sold [redacted] in marine cooling water treatment chemicals in 2017, a small fraction of what Defendants

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Global Fleets have the ability and incentive to vertically integrate upstream or sponsor entry? *Merger Guidelines* § 8; *Sysco*, 113 F. Supp. 3d at 48. The answer to each question is a clear "no."

Owners and operators of Global Fleets will not have alternatives post-Acquisition to prevent a price increase. These customers currently rely on competition between Wilhelmsen and Drew in order to obtain better pricing[41] and have consistently testified that their options to a post-Acquisition Wi nsen will be minimal to r xistent.[42] Similarly, owners and operators of Global Fleets e -2.3 Td[(W)8

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apply to outsourcing arrangements as well.[51] And the scale gap here is enormous. The notion that remaining firms will somehow grow sufficiently to replicate the competitive constraint posed by Drew today is pure speculation.

Defendants' story about [redacted] recent inquiry to Vecom is a perfect example of their failure to support their entry claims. [redacted], a long-time customer of both Defendants, sent Vecom an RFQ after learning about the Acquisition. Def. Br. at 12. However, Defendants tell only part of the story. Vecom was unable to supply all of the products on [redacted] RFQ, and quoted one boiler water treatment chemical at a price 60% higher than Wilhelmsen.[52] Additionally, Vecom required a three-day lead-time to serve Houston, one of the world's major ports and [redacted] largest port (unlike Wilhelmsen, which had product readily available in stock in Houston).[53] In fact, Vecom could not serve [redacted] in a price-effective or timely manner—unlike both Drew and Wilhelmsen. As a result, [redacted] eliminated Vecom as a potential supply option.[54]

Defendants claim that Global Fleet customers will take a leap of faith and trust unknown and untested suppliers to supply reliable and consistent products and services for highly critical components of their vessels across the globe. But they do not mention the utter lack of evidence that any Global Fleet customer would do so.

iv. Defendants Misstate the Willingness of Firms Who Do Not Currently Supply Marine Water Treatment Products and Services to Enter

Defendants' suggestion that industrial suppliers, ship chandlers, and others are waiting in the wings and ready to replace the competitive significance of Drew is more unsupported speculation. For example, Defendants suggest that Suez

not.[55] Defendants also suggest that industrial suppliers like Solenis and [redacted] could enter the market and replicate Drew's capabilities by using third-party distributors. Def. Br. at 39. Both Solenis and [redacted], however, testified they have no desire to do so.[56] [redacted],[57] in fact, [redacted] because it lacked the global marine distribution network and scale to effectively compete for business, even though [redacted].[58] Similarly, Defendants tout Wrist, a ship chandler that delivers some products for Drew and Wilhelmsen, as a potential entrant even though [redacted].[59]

Industrial chemical suppliers do not sell marine water treatment products, do not market chemicals to marine customers, and do not have a global marine distribution network and dedicated marine sales force and technical service.[60]

Even if industrial chemical suppliers partnered with [redacted] [illegible]

was "severely cost prohibitive."[67] This example illustrates the risk of switching even with leading firms like Wilhelmsen and Drew, and that risk is only magnified with the far smaller and less well-established firms that will remain if Drew disappears.

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Marichem represents on its website, Marichem is incapable of meeting Teekay's needs as a supplier of marine water treatment products and services. As Teekay's Director of Global Procurement stated when asked for his views on Marichem, "[a]nybody can tell you that they deliver. . . . [W]hether they have product in those ports when you need it, when you require it, that's another story."[70]

3. Defendants Fail to Present "Proof of Extraordinary Efficiencies"

Faced with the *prima facie* presumption of competitive harm and high market concentration levels, Defendants try to save their illegal merger with claims of extraordinary efficiencies. But Defendants fall far short of proffering "proof of extraordinary efficiencies," let alone any substantiation for these efficiencies. FTC Br. at 36-37. In an attempt to verify their purported efficiencies, Defendants devote eleven total lines of text in their brief and cite to a single paragraph from their expert's report, which in turn cites to a single piece of testimony from one of Defendant Drew's executives as the sole support for the expert's efficiencies "analysis". Def. Br. at 46-47. Such a dearth of validation does not com3.00t 36- Td0.002 a e. at 46dantsæ s (e)5 (e-0.0019 Tw 7.355.016518.56-37.

efficiencies that Defendants assert are too thinly supported and too speculative to play any significant role in balancing the equities. Instead, there is an overriding "public interest in effective enforcement of the antitrust laws [which] was Congress's specific public equity consideration in enacting [Section 13(b)]." *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (quoting *Heinz*, 246 F.3d at 726). "Moreover, if the benefits of a merger are available after a trial on the merits, they do not constitute public equities weighing against a preliminary injunction." *ProMedica*, 2011 WL 1219281, at *60; *see also FTC v. Penn State Hershey*, 838 F.3d 327, 353 (3d Cir. 2016). Defendants have offered no valid equities weighing against a preliminary injunction.

Further, Defendants curiously suggest that the impact on American consumers of this unlawful merger will be miniscule. Def. Br. at 6. Beyond the absence of any *de minimis* exception to U.S. antitrust laws, many of Defendants' customers, including witnesses in this proceeding, are based in and have vessels calling on the United States and whose vessels call to port at dozens of domestic locations. Indeed, one of Defendant Drew's (a New Jersey-based company) biggest customers is Military Sealift Command, the "primary sea-based transportation provider for the U.S. Department of Defense."[73] The balance of equities decisively weighs in favor of enforcement of the antitrust laws and a preliminary injunction.

III. THE FTC'S CONCLUSIONS ARE CONSISTENT WITH CONCLUSIONS REACHED BY TWO FOREIGN COMPETITION AUTHORITIES

Two other competition authorities—the United Kingdom's Competition and Markets Authority ("CMA") and Singapore's Competition & Consumer Commission ("CCCS")—have already assessed the competitive effect of the proposed Acquisition. The CMA concluded that for, *inter alia* "the supply of marine water treatment chemicals", the Acquisition "will give rise to a realistic prospect of a substantial lessening of competition," and that "entry and expansion into would

[73] PX80000 ¶ 2.

Dated: May 25, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of May, 2018, I served the foregoing on the following counsel via electronic mail:

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