IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

ANTHEM, INC. and CIGNA CORP.,

Defendants.

Case No. 1:16-cv-01493-ABJ

ANTHEM'S POST-TRIAL CONCLUSIONS OF LAW
PHASE I: "NATIONAL ACCOUNTS"

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TABLE OF CONTENTS

I. LEGAL STANDARD 1

A. Statutory Standard And Burden Of Proof 1

B. Legal Framework For Merger Analysis 2

II. PLAINTIFFS BEAR THE BURDEN TO PROPERLY DEFINE RELEVANT PRODUCT AND GEOGRAPHIC MARKETS 4

A. Plaintiffs Must Prove A Properly-Defined Relevant Product Market 5

1. The Relevant Product Market Must Be Defined By Interchangeability And Cross-Elasticity Of Demand 5

2. A Determination Of The Relevant Product Market Must Consider The *Brown Shoe* Factors 6

3. Lack Of An Industry-Recognized Definition Of Plaintiffs' Proposed Product Market Weighs Against Finding It To Be A Properly Defined Product Market 7

4. Alternative Solutions, Including Internal Solutions Or Self-Help, Must Be Considered As Part Of The Relevant Product Market 7

5. Customers' Mere Preference For A Product Is Not Sufficient To Define The Relevant Product Market As That Product 8

6. Defining The Product Market By The Type Of Customer Is Not Appropriate Where The Type Of Customer Is Defined By Where Defendants Have Market Power 9

7. A Broader Relevant Product Market Must Be Considered In A Rapidly Changing Industry 9

B. Plaintiffs Must Prove A Properly-Defined Relevant Geographic Market 10

III. PLAINTIFFS MUST PROVE UNDUE MARKET CONCENTRATION 11

IV. EFFICIENCIES STEMMING FROM THE MERGER OVERCOME ANY PURPORTED ANTICOMPETITIVE EFFECTS 14

A. Merger Efficiencies Are A Procompetitive Benefit That Render Anticompetitive Effects Unlikely 15

B. Plaintiffs' Monopsony Allegations Do Not Negate The Merger's Efficiencies 18

V. PLAINTIFFS' *PRIMA FACIE* CASE CAN ALSO BE OVERCOME BY A SHOWING THAT THE MERGER IS UNLIKELY TO SUBSTANTIALLY LESSEN COMPETITION OR THAT PLAINTIFFS' SHOWING IS UNRELIABLE 21

A. Coordinated Anticompetitive Conduct Is Unlikely Where Products Are Differentiated, Priced Are Obscured, And Rivalry Amongst Competitors Remains High....22

B. Unilateral Anticompetitive Effects Are Unlikely Where The Merged Entity Would Not Have A Dominant Position Or Where The Customers Are Sophisticated....23

C. Ease Of Entry Into The Relevant Market Decreases The Likelihood Of Anticompetitive Effects....24

VI. ANTICOMPETITIVE EFFECTS ARE UNLIKELY WHERE MERGER WILL ONLY ENHANCE, NOT INHIBIT, MARKET INNOVATION....25

TABLE OF AUTHORITIES

Page(s)

CASES

Atl. Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990)....................19, 20

Ball Mem'l Hosp. Inc. v. Mut. Hosp. Ins. Inc.,
784 F.2d 1325 (7th Cir. 1986) 24, 25

Bazemore v. Friday,
478 U.S. 385 (1986)....................14

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993)....................16, 19, 20, 22

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

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993)....................14

Fruehauf Corp. v. FTC,
603 F.2d 345 (2d Cir. 1979)....................12

**FTC v. Arch Coal, Inc.*,
329 F. Supp. 2d 109 (D.D.C. 2004) .... passim

FTC v. CCC Holdings Inc.,
605 F. Supp. 2d 26 (D.D.C. 2009) 6, 22, 23

FTC v. Exxon Corp.,
636 F.2d 1336 (D.C. Cir. 1980) 1

FTC v. H. J. Heinz Co.,
246 F.3d 708 (D.C. Cir. 2001) 1, 15, 16, 21

FTC v. Lab Corp. of Am.,
No. SACV 10-1873 AG (MLGx), 2011 U.S. Dist. LEXIS 20354 (C.D. Ca. Feb. 22, 2011) 15

FTC v. Owens-Illinois, Inc.,
681 F. Supp. 27 (D.D.C. 1988) 5

FTC v. R.R. Donnelley & Sons Co.,
No. 90-1619, 1990 U.S. Dist. LEXIS 11361 (D.D.C. Aug. 27, 1990) 5, 9, 24

FTC v. Staples Inc.,
970 F. Supp. 1066 (D.D.C. 1997) 15, 17, 25

FTC v. Sysco Corp.,
113 F. Supp. 3d 1 (D.D.C. 2015) 6, 9

FTC v. Univ. Health, Inc.,
938 F.2d 1206 (11th Cir. 1991) 15

Group Life & Health Insurance Co. v. Royal Drug Co.,
440 U.S. 205 (1979) 18

Hosp. Corp. of Am. v. FTC,
807 F.2d 1381 (7th Cir. 1986) 12, 21

In re Beef Indus. Antitrust Litig.,
907 F.2d 510 (5th Cir. 1990) 20

In re Live Concert Antitrust Litig.,
863 F. Supp. 2d 966 (C.D. Cal. 2012) 6, 13

In re Midcon Corp.
112 F.T.C. 93 (1989) 4

**Kartell v. Blue Shield of Mass., Inc.*,
749 F.2d 922 (1st Cir. 1984) 18, 19

Mohammed v. Obama,
704 F. Supp. 2d 1 (D.D.C. 2009) 13

New York v. Kraft Gen. Foods Inc.,
926 F. Supp. 321 (S.D.N.Y. 1995) 22

Omnicare, Inc. v. UnitedHealthGroup, Inc.,
594 F. Supp. 2d 945 (N.D. Ill. 2009) 18

PepsiCo, Inc. v. Coca-Cola Co.,
114 F. Supp. 2d 243 (S.D.N.Y. 2000) 8, 9

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
792 F.2d 210 (D.C. Cir. 1986) 7

Texaco, Inc. v. Dagher,
547 U.S. 1 (2006) 16

United States v. Baker Hughes, Inc.,
731 F. Supp. 3 (D.D.C. 1990), *aff'd Baker Hughes*, 908 F.2d 981 (D.C. Cir. 1990) 4, 7

*_United States v. Baker Hughes, Inc._,
908 F.2d 981 (D.C. Cir. 1990) .... passim

United States v. Columbia Steel Co.,
334 U.S. 495 (1948) 7

United States v. E.I. du Pont de Nemours & Co.,
353 U.S. 586 (1957) 7

United States v. Gen. Dynamics Corp.,
415 U.S. 486 (1974) 6, 11

United States v. H&R Block Inc.,
833 F. Supp. 2d 36 (D.D.C. 2011) 25

United States v. Long Island Jewish Med. Ctr.,
983 F. Supp. 121 (E.D.N.Y. 1997) 14

United States v. Marine Bancorporation, Inc.,
418 U.S. 602 (1974) 1, 3

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001) 12

*_United States v. Oracle Corp._,
331 F. Supp. 2d 1098 (N.D. Cal. 2004) 9, 11, 22, 23

United States v. Rockford Mem'l Corp.,
717 F. Supp. 1251 (N.D. Ill. 1989) 12

*_United States v. SunGard Data Sys._,
172 F. Supp. 2d 172 (D.D.C. 2001), _stay pending appeal denied United States v. SunGard Data Sys._, No. 01-cv-02196 (D.C. Cir. Nov. 14, 2001) .... passim

United States v. Syufy Enterp.,
903 F.2d 659 (9th Cir. 1990) 20

Valentino v. U.S. Postal Serv.,
674 F.2d 56 (D.C. Cir. 1982) 13

W. Penn Allegheny Health Sys., Inc. v. UPMC,
627 F.3d 85 (3rd Cir. 2010) 19

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,
549 U.S. 312 (2007) 18, 20

STATUTES

Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 1311-1315 (1976)............1

Clayton Act, Section 7, 15 U.S.C. § 18 (2016)...1

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U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006), *available at*: https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf 13, 16, 17, 25

Anthem submits its proposed post-trial conclusions of law regarding "national accounts."

I. LEGAL STANDARD

1. In passing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 1311-1315 (1976), Congress empowered the United States Department of Justice, Antitrust Division (the "Antitrust Division"), with the tools necessary to present facts to the judiciary for the evaluation of a proposed merger under Section 7 of the Clayton Act, 15 U.S.C. § 18 (2016). These tools include the power to gather evidence and to subpoena nonparties nationwide. *See* 15 U.S.C. §§ 1311-14 (2016). The Antitrust Division may also extend its investigatory period multiple times, as it did here, which allowed the Antitrust Division to exercise its broad investigatory powers in connection with the proposed Anthem-Cigna merger for over a year.

A. Statutory Standard And Burden Of Proof

2. By themselves, the Antitrust Division and Plaintiff States lack the power to block a merger. Instead, the Clayton Act enables a federal court to enjoin a merger only where the Antitrust Division and Plaintiff States can prove that the effect of a proposed merger "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Section 7 "involves *probabilities,* not certainties or possibilities." *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) (Thomas, J.) (emphasis original).

3. To block a proposed merger, Plaintiffs must prove that those anticompetitive effects are more than a mere possibility — they must be "sufficiently probable and imminent." *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 623 n.22 (1974). This standard is higher than the mere "likelihood" standard sufficient to enjoin a merger in a preliminary injunction context, as is the case in merger actions brought by the FTC. *See, e.g.*, *FTC v. H. J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) ("In enacting [Section 13(b) of the FTC act], Congress further demonstrated its

concern that injunctive relief be broadly available to the FTC . . . rather than the more stringent, traditional 'equity' standard for injunctive relief.").

4. Plaintiffs "have the burden on every element of their Section 7 challenge, and a failure of proof *in any respect* will mean the transaction should not be enjoined." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004) (emphasis added); *United States v. SunGard Data Sys.*, 172 F. Supp. 2d 172, 185 (D.D.C. 2001) (applying *Baker Hughes* approach) ("any gap in the evidence is a flaw in plaintiff's case — not defendants'"), *stay pending appeal denied United States v. SunGard Data Sys.*, No. 01-cv-02196 (D.C. Cir. Nov. 14, 2001), ECF No. 107.

B. Legal Framework For Merger Analysis

5. The first step under the Section 7 merger analysis framework set forth by the D.C. Circuit in *Baker Hughes*, 908 F.2d at 982-83, is to determine if Plaintiffs have proven relevant product and geographic markets. *See, e.g.*, *SunGard*, 172 F. Supp. 2d at 181. "Not only is the proper definition of the relevant product market the first step in this case, it is also the key to the ultimate resolution of this type of case, since the scope of the market will necessarily impact any analysis of the anticompetitive effects of the transaction." *Id.*

6. If Plaintiffs can establish the relevant product and geographic markets, they must then show that the merger would result in "a firm controlling an undue percentage share of the relevant market, and [would] result[] in a significant increase in the concentration of firms in the market." *Baker Hughes*, 908 F.2d at 990.

7. A high market concentration in a properly defined relevant market is not sufficient, however, for a court to block the transaction. Instead, "[t]he burden of producing evidence to rebut [the government's] presumption then shifts to the defendant." *Id.* at 982.

8. Defendants' burden in rebutting Plaintiffs' *prima facie* case is relatively modest: "[i]n the aftermath of *General Dynamics* and its progeny, a defendant seeking to rebut a

presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition." *Id.* at 991. The Supreme Court has "discarded *Philadelphia Bank's* insistence that a defendant 'clearly' disprove anticompetitive effect, and instead described the rebuttal burden simply in terms of a 'showing.'" *Id.* at 990-91 (citing *Marine Bancorporation*, 418 U.S. at 631; *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 121 (1975)).

9. Defendants can successfully rebut Plaintiffs' presumption in one of two ways: either "by affirmatively showing why a given transaction is unlikely to substantially lessen competition," or by "discrediting the data underlying the initial presumption in the government's favor." *Baker Hughes*, 908 F.2d at 991.

10. "Imposing a heavy burden of production [of evidence] on a defendant would be particularly anomalous where, as here, it is easy to establish a prima facie case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7." *Id.* at 992.

11. "If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Id.* at 983.

12. At bottom, "[a]n application of the burden-shifting approach requires the Court to determine (1) the 'line of commerce' or product market in which to assess the transaction; (2) the 'section of the country' or geographic market in which to assess the transaction; and (3) the

transaction's probable effect on competition in the product and geographic markets." *SunGard*, 172 F. Supp. 2d at 181; *see, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

II. PLAINTIFFS BEAR THE BURDEN TO PROPERLY DEFINE RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

13. Because the *Baker Hughes* burden-shifting framework begins with an assessment of market shares and concentration, the first step of a court's analysis is to determine whether Plaintiffs have proven a properly defined relevant market. *SunGard*, 172 F. Supp. 2d at 181.

14. If the government fails to prove a properly defined product market — *i.e.*, "who is in and who is out of the market," *In re Midcon Corp*. 112 F.T.C. 93, 141 (1989) — competitive effects cannot be predicted with sufficient confidence to enable a court to block the merger. *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 7 (D.D.C. 1990), *aff'd Baker Hughes*, 908 F.2d 981 (D.C. Cir. 1990) (expressing concern that "the relevant product market proposed by [the government] is too amorphous to be subjected to the hard economic analysis required by § 7" and therefore finding for defendants).

15. Because the burden of proving a relevant product market is squarely on Plaintiffs, Defendants need not present or prove an alternative product market. Indeed, if the product market cannot be properly defined due to a gap in the evidence, "any gap in the evidence is a flaw in plaintiff's case — not defendants'." *SunGard*, 172 F. Supp. 2d at 185.

16. Plaintiffs' failure to prove their alleged product or geographic market ends the inquiry and the merger challenge must be denied. *See, e.g.*, *SunGard*, 172 F. Supp. 2d at 192, 193 n.25 (finding because "the Court cannot accept the government's overly narrow and static definition of the product market," the government "failed to meet its burden of establishing the relevant product market" and therefore the court "need not address the remaining disputed issues" and "will not enjoin the proposed transaction"); *FTC v. R.R. Donnelley & Sons Co.*, No.

90-1619, 1990 U.S. Dist. LEXIS 11361, at *8-9 (D.D.C. Aug. 27, 1990) (denying injunction where government "was never able to provide the distinct contours of this product market").

A. Plaintiffs Must Prove A Properly-Defined Relevant Product Market

17. Plaintiffs' "first and most critical" task is to prove a properly defined relevant product market. *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 34 (D.D.C. 1988); *SunGard*, 172 F. Supp. 2d at 181 ("Defining the relevant market is critical in an antitrust case," and "Plaintiff caries the burdens of proof and persuasion regarding market definition."); *see, e.g.*, *Brown Shoe*, 370 U.S. at 324; *Arch Coal*, 329 F. Supp. 2d at 122 (stating burden to establish relevant product market is "squarely" on plaintiff).

1. The Relevant Product Market Must Be Defined By Interchangeability And Cross-Elasticity Of Demand

18. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325; *SunGard*, 172 F. Supp. 2d at 182.

19. To establish interchangeability, courts consider "the degree to which buyers are willing to substitute those similar products for the [defendants'] products," *SunGard*, 172 F. Supp. 2d at 182, and "compare the use or function of [defendants'] product with other products," *Arch Coal*, 329 F. Supp. 2d at 119. However, the court "need not find that *all* buyers will substitute one commodity for another." *Id.* at 122 (emphasis original).

20. Accordingly, products that "have the ability to take significant business from each other" must be included in the relevant product market. *Id.* at 119.

21. Courts employ the "hypothetical monopolist" or "SSNIP" test to define the outer bounds of the relevant product market. "In order to determine the relevant market, the critical question for the Court is whether a hypothetical monopolist could *profitably* raise price. In other

words, there must be a significant number of customers that will not switch to a substitute product in response to a SSNIP [small but significant, non-transitory increase in price] of [defendants' product]." *SunGard*, 172 F. Supp. 2d at 190 (emphasis original); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 8 (2010) ("2010 HMG").

22. *FTC v. Sysco Corp.*, in which economic analysis found a critical loss ratio of 50% on a gross margin of 10%, 113 F. Supp. 3d 1, 35 (D.D.C. 2015), is inapposite here where economic analysis reveals a critical loss ratio of 6.6 to 9.2% on a gross margin of approximately 71%, Proposed Findings of Fact, § IV.D.

2. A Determination Of The Relevant Product Market Must Consider The *Brown Shoe* Factors

23. The Supreme Court in *Brown Shoe* articulated several "practical indicia" for the Court to consider in defining the relevant product market. These include: (1) "industry or public recognition of the submarket as a separate economic entity"; (2) "the product's peculiar characteristics and uses"; (3) "unique production facilities"; (4) whether there are "distinct customers"; (5) whether customers pay "distinct prices"; (6) "sensitivity to price changes"; and (7) "specialized vendors." 370 U.S. at 325; *SunGard*, 172 F. Supp. 2d at 182; *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 993 (C.D. Cal. 2012) (finding an expert's testimony unreliable under Rule 702 where the expert focused on a single *Brown Shoe* factor "with little relevant analysis of the remaining six factors").

24. These "practical indicia" "augment the analyses of interchangeability and cross-elasticity of demand." *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 38 (D.D.C. 2009).

25. Indeed, "the determination of the relevant market in the end is a matter of business reality — how the market is perceived by those who strive for profit in it." *SunGard*, 172 F. Supp. 2d at 182 (internal quotations omitted); *United States v. Gen. Dynamics Corp.*, 415

U.S. 486, 498 (1974) ("Only a further examination of the particular market — its structure, history, and probable future — can provide the appropriate setting for judging the probable anticompetitive effect of the merger.") (quotations omitted).

3. Lack Of An Industry-Recognized Definition Of Plaintiffs' Proposed Product Market Weighs Against Finding It To Be A Properly Defined Product Market

26. "The appropriate line of commerce for Clayton Act purposes must be chosen in terms of the realities of the business situation involved." *Baker Hughes*, 731 F. Supp. at 6 (citing *Brown Shoe*, 370 U.S. at 325).

27. Subjective industry jargon is insufficient for defining a product market when it fails to offer guidance on the existence of demand and supply substitutability. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-94 (1957); *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *see also Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) ("The degree to which a similar product will be substituted for the product in question is said to measure the cross-elasticity of demand, while the capability of other production facilities to be converted to produce a substitutable product is referred to as the cross-elasticity of supply.").

28. This is because jargon, when it lacks a *common definition* among industry participants and experts, cannot be subjected to "hard economic analysis," is "too amorphous," and is "wholly inadequate" for the court to entertain for testing. *Baker Hughes*, 731 F. Supp. at 7 (citing *Carter Hawley Hale Stores, Inc. v. Limited, Inc.*, 587 F. Supp. 246, 253 (C.D. Cal. 1984)).

4. Alternative Solutions, Including Internal Solutions Or Self-Help, Must Be Considered As Part Of The Relevant Product Market

29. Customers' options for internal solutions or self-help must be considered part of the relevant product market where the evidence establishes that the self-help options compete

with the external product. *SunGard*, 172 F. Supp. 2d at 187. This is true "even if one cannot quantify the extent of [the self-help products]" because "[a]s a matter of law, courts have generally recognized that when a customer can replace the services of an external product with an internally-created system, this 'captive output' (i.e. the self-production of all or part of the relevant product) should be included in the same market." *Id.* at 186, 187 (quotations omitted).

30. Similarly, when a plaintiff's proposed product market "encompass[es] a variety of solutions that often complement each other, rather than a discrete product. . . . [T]here may well be combinations of these services that can be substituted" for the product at issue. *Id.* at 190 n.20. In fact, any particular product itself may be "just one particular way to achieve a goal." *Id.*

31. Furthermore, whether or not an internal solution is a competitive option is not determined by customers' current behavior, but instead how customers would respond in response to a SSNIP. *See id.* at 187 ("[W]hat is significant is not whether the companies that currently use internal solutions have the capacity to enter the market as vendors for others, but whether the customers that currently use shared hotsites would switch to an internal hotsite in response to a SSNIP.").

32. Even where customers have merely "threatened to switch to an internal [] solution," those internal solutions must be included in the relevant product market because they are considered a "main competitive threat." *Id.* at 188.

5. Customers' Mere Preference For A Product Is Not Sufficient To Define The Relevant Product Market As That Product

33. Customers' mere *preference* for one product over potential alternatives is not sufficient to limit a relevant product market. *See PepsiCo, Inc. v. Coca-Cola Co.*, 114 F. Supp. 2d 243, 246, 250 (S.D.N.Y. 2000) (finding evidence did not support Pepsi's alleged product market as "fountain-dispensed soft drinks distributed through independent food service

distributors" because "while customers view fountain syrup delivered through independent foodservice distributors as preferential and advantageous, they view fountain syrup delivered through other means as acceptable"); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1131 ("Customer preferences towards one product over another do not negate interchangeability.").

34. In particular, "[i]solated segments with isolated customers do not make for a separate product market" and "pointing out the personal preferences of a distinct group of consumers does not suffice for defining a separate product market." *R.R. Donnelley & Sons*, No. 90-169 SSH, 1990 U.S. Dist. LEXIS 11361, at *5 (D.D.C. Aug. 27, 1990); *see, e.g.*, *Brown Shoe*, 370 U.S. at 325 (identifying "distinct customers" as only one of the several "practical indicia" useful in determining the relevant product market).

6. Defining The Product Market By The Type Of Customer Is Not Appropriate Where The Type Of Customer Is Defined By Where Defendants Have Market Power

35. Although a customer's requirements may be a factor in defining the product market in some circumstances, *see Sysco*, 113 F. Supp. 3d at 39, the relevant product market cannot be defined by type of customer if the parameters for defining the type of customer are drawn by where defendants have market power, because "[m]arket power is determined *after* defining the relevant market, including the customer base, not before." *PepsiCo*, 114 F. Supp. at 249. Plaintiffs cannot "cho[ose] to define the elements of the relevant market to suit [their] desire for high [defendants'] market share, rather than letting the market define itself." *Id.*

7. A Broader Relevant Product Market Must Be Considered In A Rapidly Changing Industry

36. The court must consider the "rapid changes" to the industry at issue — here, the health insurance industry — when defining the relevant product market. *See SunGard*, 172 F. Supp. 2d at 182. Where the industry is quickly evolving, the product market must be defined to

err on the side of including a broader set of products. *Id.* at 182 ("Given the rapid changes in computer capabilities and the reduced costs of both hardware and communications, the evidence does not permit the exclusion of either internal hotsites or quick-ship services from any market that includes shared hotsites.").

B. Plaintiffs Must Prove A Properly-Defined Relevant Geographic Market

37. To successfully enjoin a merger under Section 7, Plaintiffs must also carry their burden in defining a relevant geographic market in addition to proving an appropriate relevant product market. *See Brown Shoe*, 370 U.S. at 324.

38. "The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market." *Id.* at 336. "The geographic market selected must, therefore, both correspond to the commercial realities of the industry and be economically significant." *Id.* at 336-37 (quotes omitted).

39. "[T]he boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." *Id.* at 326. In other words, the relevant geographic market is "the region in which the seller operates, and to which the purchaser can practicably turn for supplies." *Arch Coal*, 329 F. Supp. 2d at 123 (citation omitted).

40. The Merger Guidelines "also provide guidance" in defining the relevant geographic market: "if buyers would respond to the SSNIP by shifting to products produced *outside* the proposed geographic market, and this shift were sufficient to render the SSNIP unprofitable, then the proposed geographic market would be too narrow." *Id.* (citing U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1.21 (1997) ("1997 HMG")).

III. PLAINTIFFS MUST PROVE UNDUE MARKET CONCENTRATION

41. Plaintiffs' flawed market definition renders their market concentration measurements a nullity. *Oracle*, 331 F. Supp. 2d at 1154 (observing "the obvious point that if the market is not precisely defined, then the market participants and their relative shares will be economically inaccurate") (quotations omitted).

42. In any event, even if Plaintiffs were able to prove any properly defined relevant product and geographic markets, to achieve any presumption of illegality Plaintiffs must then prove that the merger would result in undue concentration in those markets. *Id.* at 1165 ("But it is plaintiffs, not defendant, who carry the burden of proving market shares *and concentration* in order to invoke the presumptions of the case law or to sustain a showing in accordance with the Guidelines.") (emphasis added).

43. Any sound measurement of market concentration must include all market participants. *Arch Coal*, 329 F. Supp. 2d at 124 (explaining market concentration calculations consider "the individual market shares of all of the participants in the market"); *Oracle*, 331 F. Supp. 2d at 1154.

44. There is no set market concentration threshold that is *per se* anticompetitive. *See Gen. Dynamics*, 415 U.S. at 498 (finding market share was not conclusive of a violation of Section 7); *Brown Shoe*, 370 U.S. at 328 (same); *Oracle*, 331 F. Supp. 2d at 1123 (finding presumption of anticompetitive effects from a combined market share at a set percentage was "unwarranted").

45. "In *Brown Shoe v. United States*, [the Supreme Court] cautioned that statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects." *Gen. Dynamics*, 415 U.S. at 498. Indeed, the Supreme Court warned that "share of the market" will "seldom be determinative." *Brown Shoe*, 370 U.S.

at 328. The D.C. Circuit has further clarified that merely "looking to current market share alone can be 'misleading'" particularly in industries where "today's sales do not always indicate power over sales and price tomorrow." *United States v. Microsoft*, 253 F.3d 34, 54 (D.C. Cir. 2001) (en banc) (citations omitted).

46. Plaintiffs' inclusion of companies other than the merging parties in the merging parties' market shares (here, treating the Blues and Anthem as a single competitor) is unprecedented, absent evidence of common ownership or control. *See, e.g.*, *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986).

47. Although the Merger Guidelines suggest that increases in a highly concentrated market's Herfindahl-Hirschman Index ("HHI") score of more than 200 points are presumed to be likely to enhance market power, 2010 HMG § 5.3, the Guidelines are just that — merely guidelines to instruct the Antitrust Division and FTC as to when they should investigate or seek to block a merger. The Guidelines "do not establish the illegality of a merger which does fit the criteria used by the Justice Department in deciding whether to challenge a merger"; they reflect only the Antitrust Division's preferences for which mergers to investigate or challenge. *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353-54 (2d Cir. 1979) ("Accordingly, whether or not the degree of market concentration, the height of entry barriers, the size of the merging firms, and the extent of foreclosure match or exceed the benchmarks incorporated into the Justice Department's guidelines, the Commission still bears the burden of showing the likelihood that the future effect of [a merger] may be substantially to lessen competition.").

48. Notably, research has not revealed any case — and the Antitrust Division has not cited any case — since 1992 where the government has sought to block a merger with post-

merger market shares below 35%. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §§ 1.5, 2.211 (1992); U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines § 2, at 26 (2006) ("Commentary") ("As an empirical matter, the unilateral effects challenges made by the Agencies nearly always have involved combined shares greater than 35%.").

49. Simply undermining Plaintiffs' data is sufficient to rebut Plaintiffs' *prima facie* case because "[t]o allow the government virtually to rest its case" by "simply by presenting market concentration statistics" would "leav[e] the defendant to provide the core of the dispute [and] would grossly inflate the role of statistics in actions brought under section 7." *Baker Hughes*, 908 F.2d at 991-92 (stating defendants can also defeat plaintiffs' market share calculations by "discrediting the data underlying the initial presumption in the government's favor"). "The Herfindahl-Hirschman Index cannot guarantee litigation victories." *Id.*

50. Because of antitrust law's "unique" relationship to statistics and economics, cases often turn on the factfinder's assessment of each side's economic experts, econometric models, and underlying assumptions regarding the marketplace and market share calculations. *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 973 (C.D. Cal. 2012).

51. A court need not weigh both parties' expert evidence equally as it relates to analytical methodology but rather, this Court is free to assess "the reliability of the evidence for itself" "based on a long, non-exclusive list of factors that any neutral fact-finder must consider" including the "consistency or inconsistency with other evidence." *Mohammed v. Obama*, 704 F. Supp. 2d 1, 6 (D.D.C. 2009) (alteration in original) (citations omitted).

52. Other factors impacting the reliability of experts and their models include: (a) the appropriateness of the expert's baselines, *see Valentino v. U.S. Postal Serv.*, 674 F.2d 56, 71

(D.C. Cir. 1982) ("Statistics tuned to the proper time period are more probative than statistics not so tuned"); (b) the inclusion of all regression variables, *see Bazemore v. Friday*, 478 U.S. 385, 400 (1986) ("[T]he omission of variables from a regression analysis may render the analysis less probative than it otherwise might be"); and (c) the fit of the economic model to the market reality, *see Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590-592 (1993).

53. Without a sound market concentration calculation premised on a properly defined product and geographic market, Plaintiffs are not entitled to a presumption that the merger is likely to substantially lessen competition and Plaintiffs retain the full burden to prove actual anticompetitive effects. *See Baker Hughes*, 908 F. 2d at 982.

IV. EFFICIENCIES STEMMING FROM THE MERGER OVERCOME ANY PURPORTED ANTICOMPETITIVE EFFECTS

54. The "prospect of efficiencies from merger" is among the "hornbook law" factors that "can rebut a prima facie case." *Id.* at 985.

55. Courts in this Circuit have acknowledged that efficiencies can be a full defense to Plaintiffs' *prima facie* Section 7 case. *Arch Coal*, 329 F. Supp. 2d at 150; *see Heinz*, 246 F. 2d at 720 (acknowledging "trend" to recognize the efficiencies defense and listing cases); 2010 HMG § 10; *see also United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 146-47 (E.D.N.Y. 1997) ("The courts have recognized that 'in certain circumstances, a defendant may rebut the government's *prima facie* case with evidence that the intended merger would create significant efficiencies in the relevant market.'") (citing *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991)).

56. Courts considering the efficiencies defense conduct a balancing test: where the merged firm's ability to generate downward pricing pressure outweighs the upward pricing

pressure generated from the merger, the presumption of illegality is overcome. 2010 HMG § 10; *see, e.g.*, *Univ. Health,* 938 F.2d at 1222; *Heinz*, 246 F.3d at 721.

57. "[E]ven where evidence of efficiencies in the relevant market will not support an outright defense to an anticompetitive merger, such evidence is relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition." *Arch Coal*, 329 F. Supp. 2d at 151; *FTC v. Lab Corp. of Am.*, No. SACV 10-1873 AG (MLGx), 2011 U.S. Dist. LEXIS 20354 (C.D. Cal. Feb. 22, 2011) ("In evaluating the legality of a merger or acquisition under Section 7, courts consider the procompetitive benefit of efficiencies related to the transaction.").

58. "[L]ike all rebuttal evidence in Section 7 cases," the defendants' efficiencies "must simply rebut the presumption that the merger will substantially lessen competition by showing that the Commission's evidence gives an inaccurate prediction of the proposed acquisition's probable effect." *FTC v. Staples*, 970 F. Supp. 1066, 1089 (D.D.C. 1997).

59. Defendants need not perform "the nearly impossible task of rebutting a possibility with a certainty," and must merely provide a "prediction backed by sound business judgment" to weigh when plaintiffs' asserted harms are speculative. *Id.*; *see Heinz*, 246 F.3d at 720 (suggesting proper treatment of efficiencies is to weigh the size of the defendants' efficiencies against the speculated harm to competition).

A. Merger Efficiencies Are A Procompetitive Benefit That Render Anticompetitive Effects Unlikely

60. "A primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." 2010 HMG § 10.

61. In *Arch Coal*, this Court recognized that "[e]fficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." 329 F. Supp. 2d at 150 (citation omitted). *See also Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 n.1, 8 (2006) (holding pricing agreement created by two existing competitors' joint venture to be lawful because the arrangement's synergies and cost savings facilitated greater market competition).

62. Indeed, the Merger Guidelines acknowledge that efficiencies "may lead to new or improved products, even if they do not immediately and directly affect price," and they command that "[t]he Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market." 2010 HMG § 10; *see, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993) (stating one of the "traditional concerns" of antitrust law is the enhancement of "consumer welfare").

63. The Division and FTC concede that they should not challenge mergers where efficiencies "likely would be sufficient to reverse the merger's potential harm to consumers in the relevant market, e.g. by preventing price increases in that market." Commentary § 4, at 49.

64. To be cognizable, merger efficiencies need only be "merger-specific" and "verifiable by reasonable means." *Arch Coal*, 329 F. Supp. 2d at 150.

65. An efficiency is "merger-specific" when it "cannot be achieved by either company alone." *Heinz*, 246 F.3d at 722. "[M]ergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction." *Arch Coal*, 329 F. Supp. 2d at 150 (quoting 1997

HMG § 4); *see also* Commentary § 4, at 50 ("Any efficiency that enables the combined firm to achieve lower costs for a given quantity and quality of product than the firms likely would achieve without the proposed merger is merger-specific."); 2010 HMG § 10 ("[M]erger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets. . . . Efficiencies also lead to new or improved products, even if they do not immediately and directly affect price.").

66. An efficiency is "verifiable" when the predicted savings can be "reasonably verified by an independent party." *See* 2010 HMG § 10, *see also* Commentary § 4, at 50 (stating full consideration must be given "to the parties' reasonable and well-supported explanations of merger-specific cost savings"). Conflicting testimony regarding the precise quantification of expected efficiencies does not negate the verifiable nature of the asserted efficiencies. *See Arch Coal*, 329 F. Supp. at 153 (recognizing existence of some efficiencies "even if the savings are neither as great as defendants have claimed nor capable of precise quantification"); *see also Staples*, 970 F. Supp. at 1089 (recognizing potential efficiencies defense, despite noting that "it is impossible to quantify precisely" the efficiencies that an unconsummated merger will generate).

67. Efficiencies that satisfy the above test include reductions in short-term production-related variable costs, as well as general and administrative variable and fixed costs because of consumer benefit over the longer term and where contractual arrangements allow savings "to be passed through." Commentary § 4, at 58; *see also Staples*, 970 F. Supp. at 1089 (considering volume purchasing discounts as a short-term production-related variable cost).

68. The Merger Guidelines and Commentary concede that a defendant's efficiencies merit procompetitive weight when they further consumers' welfare by "preventing price increases" and reducing consumer costs. 2010 HMG § 10; Commentary § 4, at 49.

69. While "virtually no case law establishes standards for determining when premerger discussions are anticompetitive," the Division and FTC have shown a commitment to prosecuting those who undertake "egregious conduct" in violation of the gun jumping rules. *Omnicare, Inc. v. UnitedHealthGroup, Inc.*, 594 F. Supp. 2d 945, 968 (N.D. Ill. 2009).

70. *Group Life & Health Insurance Co. v. Royal Drug Co.* is inapposite because the *only* issue before the Supreme Court in that case was whether certain agreements were exempt from antitrust laws under the McCarran-Ferguson Act. 440 U.S. 205, 210 (1979).

B. Plaintiffs' Monopsony Allegations Do Not Negate The Merger's Efficiencies

71. Plaintiffs' attempt to mischaracterize procompetitive purchasing efficiencies as anticompetitive monopsony is legally flawed. At the outset, should the Court accept the "economic similarity between monopsony and monopoly," *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co*., 549 U.S. 312, 322 (2007), the Court must then apply the *Baker Hughes* framework in full to Plaintiffs' monopsony allegations. Accordingly, Plaintiffs bear the full burden of defining the relevant monopsony product and geographic markets, proving increased concentration, and showing anticompetitive effects. *See Baker Hughes*, 908 F.2d at 983.

72. But importantly, while monopoly and monopsony share a "close theoretical connection," the Supreme Court has recognized that monopoly and monopsony are not truly mirror images. *Weyerhaeuser*, 549 U.S. at 321-22, 325 (comparing monopolistic predatory pricing with monopsonistic predatory bidding and noting unlike a monopolist, a monopsonist "can use its power as the predominant buyer of inputs to force down input prices and capture monopsony profits" without "raising prices on the output market to recoup its losses"). This is because "the relevant economic considerations may be very different when low prices, rather than high prices, are at issue." *Kartell v. Blue Shield*, 749 F.2d 922, 931 (1st Cir. 1984) (Breyer, J.).

73. Unlike a seller's market power, which may lead to higher prices, a buyer's market power leads to lower prices, which is beneficial for consumers. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990); *Kartell*, 749 F.2d at 930-31 ("the prices at issue here are low prices, not high prices" and "the Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high*, not too low") (emphasis original); *Brooke Group*, 509 U.S. at 224 ("That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for the protection of *competition*, not *competitors*.") (quotations omitted) (emphasis original).

74. "Antitrust law rarely stops the buyer of a service from trying to determine the price or characteristics of the product that will be sold." *Kartell*, 749 F.2d at 925. "[T]he antitrust laws interfere with a firm's freedom to set even uncompetitive prices only in special circumstances, where, for example, a price was below incremental cost." *Id.* at 927.

75. Indeed, the use of buying power to effectuate lower, efficient pricing from providers is not illegally monopsonistic because "[a] legitimate buyer is entitled to use its market power to keep prices down." *Id.* at 930. Moreover, using "significant market power" to "obtain lower than competitive prices," is not anticompetitive as a matter of law. *Kartell*, 749 F.2d at 927 (finding proposition "that the law forbids a buyer with market power to bargain for 'uncompetitive' or 'unreasonable' prices" is "false").

76. "A firm that has substantial power on the buy side of the market (*i.e.*, monopsony power) is generally free to bargain aggressively when negotiating the prices it will pay for goods and services. This reflects the general hesitance of courts to condemn unilateral behavior, lest vigorous competition be chilled." *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85,

103 (3rd Cir. 2010) (internal citations omitted) (distinguishing "independent action" from conspiracy to exercise monopsony power, which "is subject to more rigorous scrutiny").

77. Instead, Plaintiffs must allege and prove a "cognizable theory" under which the alleged monopsonist has at least a "dangerous probability" of recouping a profit by imposing a small but significant non-transitory reduction in price ("SSNRP"). *See, e.g.*, *Weyerhaeuser*, 549 U.S. at 325 (finding plaintiffs unable to prove that monopsonist was using predatory bidding to drive them out of the market since theory made "no economic sense because it would involve short-term losses with no likelihood of offsetting long-term gains"). Without such a theory, Plaintiffs cannot succeed on a claim of monopsony. *See, e.g.*, *id.*; *United States v. Syufy Enterp.*, 903 F.2d 659, 663 (9th Cir. 1990) (finding government unable to prove theater owner exercised monopsony power in purchasing rival theaters where owner lacked power to exclude new entrants and failed to extract concessions in prior negotiations with supplier despite high market share because "all antitrust cases [] must make economic sense"); *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 515-16 (5th Cir. 1990) (finding producers unable to prove monopsony where prices remained stable among competing "major packers" and no efforts were made to "compound its monopoly profits" by reducing upstream output).

78. Even if Plaintiffs were able to prove a cognizable theory under which the alleged monopsonist could profitably impose a SSNRP, Defendants, again, can show procompetitive justifications, including procompetitive consumer savings via price reductions. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury." *Atl. Richfield Co.*, 495 U.S. at 339-40; *Brooke Group*, 509 U.S. at 222 (quoting *Atl. Richfield Co.*, "[w]e have adhered to this principle regardless of the type of antitrust claim involved").

79. As noted by Judge Posner in *Hospital Corp. of America v. FTC*, typically "the federal government and the insurance companies" put hospitals under great pressure to cut costs. 807 F.2d at 1389. Hospitals are the ones "resisting this pressure" by "presenting a united front in negotiations with third-party payors" and "routinely exchang[ing] intimate information on prices and costs in connection with making joint applications to insurers for higher reimbursement schedules." *Id.*

V. PLAINTIFFS' *PRIMA FACIE* CASE CAN ALSO BE OVERCOME BY A SHOWING THAT THE MERGER IS UNLIKELY TO SUBSTANTIALLY LESSEN COMPETITION OR THAT PLAINTIFFS' SHOWING IS UNRELIABLE

80. In addition to procompetitive efficiencies, Defendants may also rebut Plaintiffs' *prima facie* case by showing that Plaintiffs' market share statistics "give an inaccurate account of the merger's probable effects on competition in the relevant market." *SunGard*, 172 F. Supp. 2d at 180; *Heinz*, 246 F.3d at 715. Courts have thus credited qualitative evidence that market participants yield to other competitive restraints — even where they may overestimate the sincerity or extent of the competitive threat posed. *See, e.g.*, *SunGard*, 172 F. Supp. at 188 (crediting evidence that the merging parties themselves considered "internal solutions" to be "their main competitive threat"). Defendants are not required to "clearly" disprove any potential anticompetitive effects, but rather their rebuttal burden is "in terms of a showing." *Baker Hughes*, 908 F. 2d at 982 (citing *Marine Bancorporation*, 418 U.S. at 631).

81. The absence of resulting anticompetitive effects can be shown by a variety of factors, including, among others, weakness of data underlying Plaintiffs' *prima facie* case, ease of entry, sophistication of customers, the absence of a risk of unilateral effects, and the presence of a "maverick" in the market post-merger. *Baker Hughes*, 908 F. 2d at 985 ("Indeed, that a

variety of factors other than ease of entry can rebut a prima facie case has become hornbook law," including the "prospect of efficiencies from merger."); *id.* at 985-86 (discussing factors).

82. Instead, evidence "on a variety of factors can rebut a prima facie case," and the Supreme Court has adopted a "totality-of-the-circumstances approach to the statutes, weighing a variety of factors to determine the effects of particular transactions on competition." *Id.* at 984.

A. Coordinated Anticompetitive Conduct Is Unlikely Where Products Are Differentiated, Priced Are Obscured, And Rivalry Amongst Competitors Remains High

83. Anticompetitive effects are unlikely to result from "coordinated effects" of the merger unless "the acquisition will make it easier for the firms in the market to collude and thereby force price above or farther above the competitive level." *Arch Coal*, 329 F. Supp. 2d at 140 (internal quotations omitted); *New York v. Kraft Gen. Foods*, 926 F. Supp. 321, 363-64 (S.D.N.Y. 1995).

84. However, without homogeneity in the product offered or transparency in product pricing, "the market conditions are not conducive to coordinated effects, either tacit or express." *Oracle*, 331 F. Supp. 2d at 1165-66; *CCC Holdings*, 605 F. Supp. 2d at 62 (citing *Oracle*).

85. Even in instances where some degree of pricing visibility is possible, for over twenty years, the Merger Guidelines have advised looking at each market's underlying structure before determining the likelihood of coordinated effects, rather than theoretical "propensities." *Arch Coal*, 329 F. Supp. 2d at 131, 146. Where competitive advantages are hard for rivals to observe, the competitive reward for attracting additional customers is high, and the competitive risk of customer switching is great, a market is unlikely to be considered vulnerable to coordinated effects. 2010 HMG § 7.2; *cf. Brooke Group*, 509 U.S. at 227 (noting, in dicta, even acts as egregious as conscious upward parallel price movements to supracompetitive levels would not qualify as a coordinated effect under § 1 of the Sherman Act).

B. Unilateral Anticompetitive Effects Are Unlikely Where The Merged Entity Would Not Have A Dominant Position Or Where The Customers Are Sophisticated

86. For a plaintiff to successfully block a proposed merger on the ground that it will have adverse unilateral effects, "a plaintiff must prove a relevant market in which the merging parties would have essentially a monopoly or dominant position." *Oracle*, 331 F. Supp. 2d at 1123. By definition, if competitors with market power comparable to the merged entity will remain in the market post-merger, the merged entity would not have "essentially a monopoly or dominate position." *Id.* Put differently, if the merging parties are not each other's closest competitors, competition will remain in the market post-merger.

87. Indeed, of the 16 antitrust merger cases alleging violations of Section 7 of the Clayton Act cited by the Antitrust Division in its pre-trial brief, in all but six, the two merging parties were each other's closest competitor. Of the remaining six, four had evidence of nefarious anticompetitive behavior, such as collusion and price-fixing. *See* Appendix A.

88. "Without credible evidence that [any single competitor] is a more distant third choice for a significant share of the market to support the predictions of [an expert's] models, the Court cannot conclude that the merger is likely to result in unilateral price elevations." *CCC Holdings*, 605 F. Supp. 2d at 72.

89. Similarly, the sophistication of customers is "likely to promote competition even in a highly concentrated market." *Baker Hughes*, 908 F. 2d at 986; *id.* at 992 (finding trial court "credited the evidence concerning the sophistication of [the] customers and the insignificance of barriers to entry," which "amply justified the court's conclusion that the prima facie case inaccurately depicted the probable anticompetitive effect" of the merger).

90. "Well-established precedent and the United States Department of Justice Merger Guidelines recognize that the sophistication and bargaining power of buyers play a significant

rule [sic] in assessing the effects of a proposed transaction." *Donnelley*, 1990 U.S. Dist. LEXIS 11361, at *10-11 (citing *Baker Hughes*, 908 F. 2d at 984); 2010 HMG § 8 ("The agencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices."). Where "the evidence demonstrates that even if the [] customers constituted a separate market, their own size and economic power, and the other characteristics of the 'market,' make any anti-competitive consequences very unlikely." *Donnelley*, 1990 U.S. Dist. LEXIS 11361, at *10-11.

91. The Merger Guidelines specifically recognize that "if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry," they may "constrain the ability of the merging parties to raise prices." 2010 HMG § 8.

C. Ease Of Entry Into The Relevant Market Decreases The Likelihood Of Anticompetitive Effects

92. "A defendant may successfully rebut a prima facie case by showing quick and effective entry" because "[i]n the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time." *Baker Hughes*, 908 F. 2d at 987.

93. Barriers to entry are lower where industry participants "do not own any assets that block or delay entry." *Ball Mem'l Hosp. Inc. v. Mut. Hosp. Ins. Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986). Courts have found emphasized lower barrier in industries where "the 'productive asset' . . . is money, which may be supplied on a moment's notice, plus the ability to spread risk, which many firms possess and which has no geographic boundary." *Id.*

94. "If barriers to entry are insignificant," even "the *threat* of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs." *Baker Hughes*, 908 F. 2d at 988.

95. Indeed, "the lower the barriers to entry, and the shorter the lags of new entry, the less power existing firms have. When the supply is highly elastic, existing market share does not signify power." *Ball Mem'l*, 784 F.2d at 1335.

VI. ANTICOMPETITIVE EFFECTS ARE UNLIKELY WHERE MERGER WILL ONLY ENHANCE, NOT INHIBIT, MARKET INNOVATION

96. "An important consideration when analyzing possible anticompetitive effects is whether the acquisition would result in the elimination of a particularly aggressive competitor in a highly concentrated market." *Arch Coal*, 329 F. Supp. 2d at 146 (internal quotes omitted).

97. "What [this] Court finds particularly germane for the 'maverick' or 'particularly aggressive competitor' analysis in this case is this question: Does [the competitor] consistently play a role within the competitive structure of this market that constrains prices?" *United States v. H&R Block*, 833 F. Supp. 2d 36, 79-80 (D.D.C. 2011) (noting standard cannot be met by labeling an acquired firm's basic competitive activity as "disruptive").

98. The critical factor in addressing this question is whether the "aggressive" acquired competitor is, in fact, serving in that price-constraining capacity, either through actual discounting and price leadership or some material difference in its business model reflecting "economic incentives to deviate" from industry practice. *Arch Coal*, 329 F. Supp. 2d at 146; *see Staples*, 970 F. Supp. at 1083.

99. "The loss of a firm that does not behave as a maverick is unlikely to lead to increased coordination." *Arch Coal*, 329 F. Supp. 2d at 146.

100. The court may also look at the incentives of the acquiring firm and ask whether the strategic or economic incentives "that are expected to guide the merged firm's behavior" would be any different from their behavior with the "maverick" in the marketplace. 2010 HMG § 2.1.5; Commentary § 2, at 24.

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Respectfully submitted,

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APPENDIX A

Section 7 Cases Cited in Antitrust Division's Pre-Trial Brief	**Industry**	**Merger Impact on Competitive Landscape**	**Merging Parties Each Other's Closest Competitor?**
Chi. Bridge & Fire Co. N.V. v. FTC, 534 F.3d 410 (5th Cir. 2008)	Construction	2 to 1	Yes (because market only has two competitors)
FTC v. Advocate Health Care Network, No. 16-2493, 2016 U.S. App. LEXIS 19535 (7th Cir. Oct. 31, 2016)	Hospital	Unspecified	Yes, at 31 n. 5
FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001)	Baby Food	3 to 2	Yes, at 718 (because the "second shelf" market only has two competitors)
FTC v. PPG Indus., Inc., 798 F.2d 1500 (D.C. Cir. 1986)	Aircraft Transparencies	4 to 3	Yes, at 1502-03 (because merger was between the firms with the 1st and 2nd most market share)
FTC v. Staples, Inc., 2016 U.S. Dist. LEXIS 64909 (D.D.C. May 10, 2016)	Office Supplies	3 to 2	Yes, at 45
FTC v. Swedish Match N. Am., Inc., 131 F. Supp. 2d 151 (D.D.C. 2000)	Chewing Tobacco	6 to 5	No, at 166 (but the court notes that the market already exhibits "anticompetitive behavior" having never cut prices to stem "declining demand," at 168)
FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015)	Food Distribution	2 to 1	Yes, at 59 (because market only has two competitors)
FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008)	Organic Supermarkets	2 to 1	Yes, at 1041 (because market only has two competitors)
Hosp. Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986)	Hospital	5 to 4	No, at 1388 (but industry / market history of collusion)
Penn State Hershey, 838 F.3d 327 (3d Cir. 2016)	Hospital	Unspecified	Yes, at 333 (because merger was between the firms with the 1st and 2nd most market share)

Section 7 Cases Cited in Antitrust Division's Pre-Trial Brief	**Industry**	**Merger Impact on Competitive Landscape**	**Merging Parties Each Other's Closest Competitor?**
ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559 (6th Cir. 2014)	Hospital	4 to 3	Yes, at 572 (within the market for general acute care and OB/GYN services)
St. Alphonsus Med. Ctr. - Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015)	Hospital	3 to 2	Yes, at 786
United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011)	Tax Software	3 to 2	No, at 83 (listing it as the "second closest" substitute, but one merging competitor was a "maverick")
United States v. Pennzoil Co., 252 F. Supp. 962 (W.D. Pa. 1965)	Crude Oil	3 to 2	No, at 985 (but suspicious price-fixing-like behavior)
United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963)	Banking	Multiple	No, at 364-365 (top three firms have 22%, 21%, and 16%; merger would have been between 2 and 3); *but see id*. at 367 (describing the market as an "oligopoly")
United States v. Rice Growers Ass'n, No. S-84-1066 EJG, 1986 U.S. Dist. LEXIS 30507 (E.D. Cal. Jan. 13, 1986)	Rice Milling	4 to 3	No, at 1-4 (but suspicious shell-game like transaction prior to deal)