UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

IQVIA HOLDINGS INC.,

and

PROPEL MEDIA, INC.

Defendants.

Case No. 1:23-cv-06188-ER

REDACTED VERSION

$\frac{PLAINTIFF'S \; MEMORANDUM \; OF \; LAW \; IN \; SUPPORT \; OF \; ITS \; MOTION \; FOR}{PRELIMINARY \; INJUCTION}$

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I. INTRODUCTION

¹–DeepIntent senior executive

IQVIA, in the midst of a buying spree of multiple companies in the HCP programmatic advertising industry, now seeks to acquire one of its closest direct competitors. On July 22, 2022, Defendant IQVIA (the third-largest provider of HCP programmatic advertising via its Lasso division) signed an agreement to acquire Defendant PMI (the second-largest provider of HCP programmatic advertising via DeepIntent). If consummated, the proposed acquisition would eliminate intense head-to-head competition between Lasso and DeepIntent that has benefited consumers through lower prices and innovation, and it would allow IQVIA to further entrench itself as the dominant company in the HCP programmatic advertising market.

HCP programmatic advertising involves serving individual healthcare professionals ("HCPs") with advertisements across medical (such as Medscape) and non-medical (such as ESPN.com) websites, determining when those professionals engage with an advertisement, and assessing whether they ultimately changed their prescribing behavior. For instance, a pharmaceutical company may want to raise awareness about a new drug for a certain disease by targeting specific doctors who have patients with that disease. HCP programmatic advertising offers a way for that company to target a specific HCP specialist online, time the advertisements to match with the HCP's relevant patient visits, and measure the impact of those ads by matching

¹ PX2571-01 (DeepIntent).

that HCP's prescription data for that drug.² No other form of advertising offers the same capabilities, or the same power to reach specific doctors and influence prescribing behavior.³

For three independent reasons, the Court should grant the FTC's motion for a preliminary injunction. *First*, the evidentiary record in this case establishes that the proposed acquisition would combine two top competitors for HCP programmatic advertising. "The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition." U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 6 (2010) [hereinafter *Horizontal Merger Guidelines*]. *See, e.g., U.S. v. Anthem, Inc.*, 236 F. Supp. 3d 171, 216 (D.D.C. 2017); *U.S. v. Mfrs. Hanover Tr. Co.*, 240 F. Supp. 867, 955 (S.D.N.Y. 1965). Defendants' executives concede that Lasso and DeepIntent are primary competitors for the sale of HCP programmatic advertising. But Lasso and DeepIntent are not just two of many competitors. Instead, as described by IQVIA as recently as June 2023, IQVIA's Lasso, DeepIntent, and are the the primary options for any healthcare advertiser seeking to target HCPs through programmatic advertising. Pharmaceutical companies and their advertising agencies likewise confirm that these three firms are viewed as the primary options for HCP programmatic advertising.

Document after document memorializes how Defendants have closely tracked each other, as well as how they have reduced prices and increased innovation to win business away from

² See, e.g., PX5057 (Case Study, DeepIntent's Eligibility Data Increases Exposure Among HCPs Prior to Patient Visits, an Industry First, DeepIntent, https://info.deepintent.com/Case-Study-Web-Eligibility-Data (last visited Oct. 25, 2023)).

³ See infra § III.A.1.a.i (discussing the relevant product market of HCP programmatic advertising).

⁴ See, e.g., PX0505 (Paquette (DeepIntent) IH) at 86:6-8; PX0532 (Paquette (DeepIntent) Dep.) at 30:10-16; PX0508 (DiNorscio (IQVIA) IH) at 113:23-114:13; PX0540 (DiNorscio (IQVIA) Dep.) at 81:4-82:23; PX0535 (Mangano (DeepIntent) Dep.) at 100:3-14; PX0526 (Sandler (DeepIntent) Dep.) at 151:21-24.

⁵ PX1625-02 (IQVIA); PX0549 (Colarossi (IQVIA) Dep.) at 58:10-15.

⁶ See, e.g., PX0558 Dep.) at 35:16-22, 83:20-84:7; PX0559 Dep.) at 145:4-48:20); PX0555

each other. As the DeepIntent sales team described this intense rivalry, Lasso and DeepIntent are in a "for the same customers. And party documents tell a consistent story from 2021 to the present: DeepIntent has described Lasso as its "(2021), "(2021), "(2022), "(2022), "(2023), "

Second, even apart from the admissions by Defendants, the proposed acquisition is presumptively unlawful because it would result in a combined entity with nearly of the market for HCP programmatic advertising. 12 15 U.S.C. § 18; see U.S. v. Phila. Nat'l Bank ("PNB"), 374 U.S. 321, 363 (1963); U.S. v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 36 (D.D.C. 2022). Here, if anything, market shares understate the competitive clash between Lasso and DeepIntent, considering IQVIA's stated intent to consolidate the market. As one IQVIA executive wrote before the public announcement of this transaction, "

⁷ See infra § III.A.1.b.

⁸ PX2736-04 (DeepIntent); PX0526 (Sandler (DeepIntent) Dep.) at 111; see also PX0555 Dep.) at 21

⁹ PX2571-01 (DeepIntent); PX2511-05 (DeepIntent); PX2880-01 (DeepIntent); PX2506-01 (DeepIntent); PX2843-04 (DeepIntent); PX2812 (DeepIntent) (DI-LIT-0000378223)

PX2816 (DeepIntent) (DI-LIT-0000498267)

When faced with the voluminous record evidence demonstrating the direct head-to-head competition between Defendants in this case, counsel for Defendants resorted to claiming that the record evidence was "outdated." But as the dates on these documents demonstrate, DeepIntent and IQVIA's Lasso have maintained their rivalry and price competition through this year. Third-party testimony likewise demonstrates that Lasso and DeepIntent remain close competitors today.

10 PX1375-02 (IQVIA); PX1056-04 (IQVIA); PX1628-02 (IQVIA); PX1612 (IQVIA) (IQVIA-FTC-003038954)

PX1735 (IQVIA) (IQVIA) (IQVIA-FTC-00680528)

¹¹ *See infra* § III.A.1.b.ii.

¹² PX6500 (Expert Report of Kostis Hatzitaskos (October 11, 2023)) ("Hatzitaskos Report") ¶260-263; Exhibit 14.

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Third, the threat to competition is magnified by the likelihood that IQVIA will use its position as a key supplier of healthcare data to strangle its rivals for HCP programmatic advertising. IQVIA controls critical inputs—detailed and comprehensive data regarding healthcare providers, claims, and prescriptions—which are necessary to offer competitive HCP programmatic advertising services. IQVIA itself boasts that "[t]he breadth of the intelligent, actionable information we provide is not comprehensively available from any other source." According to an IQVIA business development manager, IQVIA is "

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Nearly every firm that offers HCP programmatic advertising relies on IQVIA's data, 16 which IQVIA itself describes as the industry's "17"

Post acquisition, the combined entity would control nearly the HCP programmatic advertising market, which will give it a much greater incentive to limit or deny IQVIA data to any competitors for HCP programmatic advertising. Thus, IQVIA will possess the ability and financial incentive to increase barriers to entry or reduce competition by foreclosing or disadvantaging DeepIntent's competitors from access to a source of supply (i.e., IQVIA's data), substantially lessening competition in violation of the Clayton Act. See Fruehauf Corp. v. FTC,

¹³ PX1377-01 (IQVIA).

¹⁴ PX1137-05 (IQVIA 2022 10-K).

¹⁵ PX1032-01 (IQVIA); see also PX1131-03 (IQVIA)

¹⁶ See infra § III.A.2.a.

¹⁷ See, e.g., PX4164-11 (DeepIntent); PX1740-03 (IQVIA); PX1170-05 (IQVIA); PX2788-03-04 (DeepIntent); see also infra n.174.

603 F.2d 345, 352 (2d Cir. 1979); *Yankees Ent. & Sports Network, LLC v. Cablevision Sys.*Corp., 224 F. Supp. 2d 657, 673 (S.D.N.Y. 2002). Again, the Court need look no further than Defendants' own documents: DeepIntent's CEO analyzed what DeepIntent could do if it controlled IQVIA's data: "

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On July 17, 2023, the FTC's Commissioners voted 3-0 to commence an administrative proceeding to determine whether the proposed acquisition violates the antitrust laws. The administrative trial, which will include up to 210 hours of live testimony, thousands of exhibits, and voluminous briefing, is scheduled to commence on December 20, 2023. The question before this Court is therefore limited: has the FTC shown that it has a "fair and tenable chance" of success on the merits sufficient to maintain the status quo pending a full administrative trial. FTC v. Lancaster Colony Corp., Inc., 434 F. Supp. 1088, 1090-91 (S.D.N.Y. 1977). The evidence before this Court easily meets that standard. Absent preliminary relief, IQVIA can acquire and begin integrating DeepIntent. Customers would be harmed with higher prices and decreased innovation, and Defendants can "scramble the eggs"—that is, immediately merge their operations and make it extremely difficult, if not impossible, for competition to be restored to its previous state. FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 918 (E.D. Mo. 2020) (citing FTC v. Sysco Corp., 113 F. Supp. 3d 1, 87 (D.D.C. 2015)); Lancaster, 434 F. Supp. at 1096-97.

¹⁸ PX2831-31 (DeepIntent); see also PX2576-17 (DeepIntent).

II. STATEMENT OF FACTS

A. HCP PROGRAMMATIC ADVERTISING

The goal of almost every HCP-focused advertising campaign is to change an HCP's prescribing behavior to increase the sales of the product being marketed. ¹⁹ In order to accomplish that goal, pharmaceutical marketers must identify their target audience, reach that audience, and determine whether that outreach resulted in an increase in prescriptions written—the return on investment. HCP programmatic advertising provides for the targeting of advertisements to HCPs on an individualized (1:1) basis, ²⁰ and includes steps generally referred to as planning, activation, optimization, and measurement. ²¹

At the *planning* stage, healthcare marketers will identify a list of HCPs for targeting.

This list may be identified in a number of different ways, from simple to complex, from preexisting pharmaceutical customer lists to lists created by analyzing relevant prescription and
claims data.²² An identified list will then be converted into digital identifiers that can be targeted
online, then *activated* in a demand-side platform ("DSP") for the automated bidding and buying
of digital advertising space for deployment to specific HCPs.²³ As a campaign runs, HCP

¹⁹ See PX0534 (Craigmyle (DeepIntent) Dep.) at 70:11-71:12; PX0540 (DiNorscio (IQVIA) Dep.) at 28:14-19; IH) at 31:20-32:24; PX0523 PX0503 IH) at 35:6-36:24; PX0558 Dep.) at 59:1-18; PX0555 Dep.) at 14:19-15:3, 24:22-25:14; cf. PX0557 Dep.) at 81:8-82:1, 100:11-101:9; PX0565 Dep.) at 192:6-12; PX0576 Dep.) at 131:11-132:9. ¹⁰ See, e.g., PX0508 (DiNorscio (IQVIA) IH) at 22:8-19; PX0540 (DiNorscio (IQVIA) Dep.) at 35:4-36:11; PX0534 (Craigmyle (DeepIntent) Dep.) at 88:20-89:12; PX0549 (Colarossi (IQVIA) Dep.) at 55:24-56:5; see also PX0558 Dep.) at 81:24-82:17; PX0523 IH) at 21:23-22:6; PX0561 Dep.) at 34:9-22; PX0556 Dep.) at 15:6-16:1; PX0565 Dep.) at 153:11-18; PX0575 Dep.) at 101:18-102:4. ²¹ See PX2862-05 (DeepIntent); PX0532 (Paquette (DeepIntent) Dep.) at 55:1-56:14; PX0520 (Werther (DeepIntent) IH) at 23:22-24:1; PX0534 (Craigmyle (DeepIntent) Dep.) at 58:14-20; PX5229-01-02 (The Most Powerful Healthcare Advertising Platform, DeepIntent, https://www.deepintent.com/platform/ (last visited Oct. 25, 2023)); cf. PX0565 Dep.) at 76:11-15 . 174:15-18 ; PX0557 Dep.) at 100:11-101:9 ²² PX0520 (Werther (DeepIntent) IH) at 20:13-21:13, 32:9-33:16, 34:12-38:12; PX0534 (Craigmyle (DeepIntent) IH) at 23:24-24:20; PX0566 Dep.) at 59:13-61:11; PX0503 Dep.) at 26:18-28:4; PX0558 Dep.) at 67:10-17; PX0563 Dep.) at 65:17-66:23. ²³ See PX0520 (Werther (DeepIntent) IH) at 38:13-39:9. PX0571 at 151:17-152:2.

programmatic advertising provides insight into whether an ad campaign is actually reaching the target HCPs—a metric called physician-level data or "PLD."²⁴ Based on PLD reporting, an advertiser can adjust an ongoing campaign to reach the most HCPs possible—*optimization*—and later measure the results of that campaign to determine whether its investment resulted in an increase in prescriptions written—*measurement*.²⁵

Lasso, DeepIntent, and constitute the companies that provide the vast majority of HCP programmatic advertising in the United States. ²⁶ Although some other digital advertising firms (sometimes referred to as "Generalist DSPs") provide DSP services across a wide range of industries, the CEO of DeepIntent explained the material difference between generalist DSPs and the healthcare-focused offerings of companies like the



B. <u>IQVIA CONTROLS KEY DATA USED FOR HCP PROGRAMMATIC</u> ADVERTISING

IQVIA provides critical healthcare data used in HCP programmatic advertising: data used to identify specific HCPs online, and prescription and claims data used to build HCP audiences and measure the effectiveness of healthcare advertising. Market participants have testified to the

Dep.) at 114:7-115:5; PX0503 III) at 36:9-38:6; see also PX0520 (Werther (DeepIntent) III) at 58:11-59:1; PX0534 (Craigmyle (DeepIntent) Dep.) at 92:8-20; PX0565 Dep.) at 154:11-22.

Dep.) at 174:15-18 ; PX0503 Dep.) at 174:15-18 III) at 23:6-24:20; PX0520 (Werther (DeepIntent) III) at 18:18-23, 21:20.

^{114:7-115:5;} PX0503 IH) at 23:6-24:20; PX0520 (Werther (DeepIntent) IH) at 18:18-23, 31:20-32:2; PX0534 (Craigmyle (DeepIntent) Dep.) at 74:5-77:10; see also PX0558 Dep.) at 67:10-

^{17, 79:8-80:18;} PX0576 Dep.) at 109:14-110:1.

²⁶ See infra § III.A.1.a.iii.

²⁷ PX2964-01-03 (DeepIntent).

importance of having consistent data, and specifically IQVIA data, throughout the HCP programmatic advertising process, in part to ensure that steps taken to optimize their campaigns are consistent with later script lift measurement results.²⁸

IQVIA is the preeminent provider of HCP identity data, which allows advertisers to link HCPs to their online identities and digital devices. ²⁹ IQVIA became the [31] IQVIA's HCP identity data is superior to alternative sources due to its reach, depth, accuracy, and the fact that the data is derived from HCPs that have consented to be tracked online. ³²

IQVIA is also the leading source of HCP prescribing data—claims and prescription data that includes detailed information on prescribing behavior by individual doctors. HCP prescribing data is used both to plan an advertising campaign and measure its effectiveness.

According to DeepIntent's own marketing,

³³ HCP prescribing data allows advertisers

²⁸ See PX0563 (Dep.) at 73:19-75:16; PX0558 (Dep.) at 99:22-100:3, 102:11-103:2; PX0520 (Werther (DeepIntent) IH) at 56:12-57:19, 59:5-60:16 (PX0503 (IH) at 39:8-44:2 (: see also PX0568 Dep.) at 136:3-138:11 (²⁹ See infra § III.A.2.a; see also PX0548 (Margolis (IQVIA) Dep.) at 176:8-18); PX0576 (Dep.) at 133:7-135:16. PX2575-01 (DeepIntent). ³¹ PX0527 (Miller (IQVIA) Dep.) at 105:24-107:9, 108:13-19:6; PX1140-01 (IQVIA) ; PX1205-01 (IQVIA) ; see also PX1229-01 (IQVIA); PX1230-01 (IQVIA); PX0555 Dep.) at 48:25-50:23.

³² PX1032-01 (IQVIA); PX1584-02 (IQVIA); see also PX1170-05 (IQVIA); PX0539 (O'Brien (IQVIA) Dep.) at 49:17-50:8; PX0549 (Colarossi (IQVIA) Dep.) at 56:17-57:4.

³³ PX2544-04 (DeepIntent).

to measure how much the HCPs they targeted (i.e., specific cardiologists) increased their prescriptions of the advertised drug (i.e., a new cholesterol medication). According to one estimate, of pharmaceutical companies use IQVIA's data to measure campaign outcomes.³⁴ Due to its control of this critical data for HCP programmatic advertising, IQVIA is uniquely positioned to affect the success (or failure) of Lasso and DeepIntent's competitors.

C. THE PROPOSED ACQUISITION

The proposed acquisition is merely the latest step in IQVIA's attempt to dominate the HCP programmatic advertising market. IQVIA first purchased MDG in 2019, followed by DMD in 2021, for a sequisitions made it "and gave it three leading HCP programmatic advertisers: Lasso and DeepIntent. In an email urging IQVIA to acquire both companies, attended that "and gave it "

IQVIA acquired Lasso first but maintained its original plan to follow up with an acquisition of DeepIntent, originally seeking to close both acquisitions in a near contemporaneous fashion around July to August 2022. 40 The news that IQVIA was acquiring

³⁴ PX0500 (Dep.) 140:11-141:13.

³⁵ PX1284-04 (IQVIA) ("
"); PX0541 (Escalante (IQVIA) Dep.) at 58:11-59:11
(); see also PX1255-01 (IQVIA)
); PX0530

⁽Lin (IQVIA) Dep.) at 87:10-89:17.

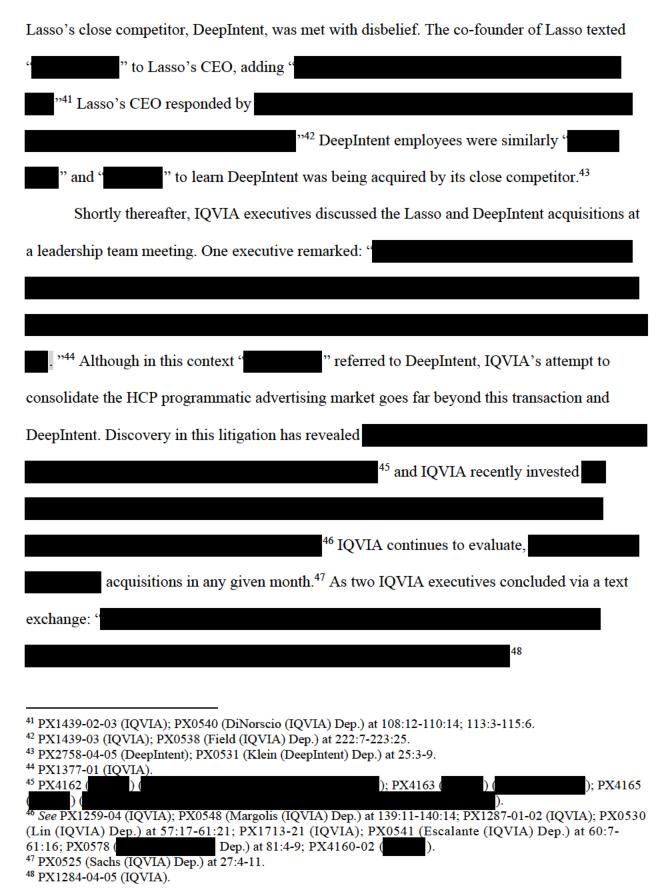
³⁶ Answer at 6, ECF No. 58.

³⁷ PX1140-01 (IQVIA); PX1205-01 (IQVIA).

³⁸ PX1296-01 (IQVIA); PX0530 (Lin (IQVIA) Dep.) at 39:15-42:17; PX1254-01 (IQVIA).

³⁹ PX1026-01 (IQVIA).

⁴⁰ PX1093-23 (IQVIA).



III. ARGUMENT

Section 7 of the Clayton Act bars mergers "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or . . . activity affecting commerce in any section of the country." 15 U.S.C. § 18. Section 7 of the Clayton Act is intended to arrest anticompetitive mergers "in their incipiency" and, accordingly, requires a prediction of the merger's likely impact on future competition. *PNB*, 374 U.S. at 362 (internal quotation marks omitted). On July 17, 2023, the Commission found reason to believe that the proposed acquisition violates Section 7 of the Clayton Act and Section 5 of the FTC Act. The Commission initiated proceedings before an administrative law judge ("ALJ") to determine, upon a full evidentiary record, the merger's legality. This evidentiary hearing, which will include up to 210 hours of live testimony before the ALJ, will begin on December 20, 2023.

The Commission simultaneously authorized the filing of this complaint for a preliminary injunction in this Court under Section 13(b) of the FTC Act. 15 U.S.C. § 53(b). The FTC is *not* asking this Court to permanently enjoin the proposed acquisition, only for preliminary relief to preserve the status quo and stave off consumer harm until the Commission has exercised its congressionally vested authority to hold an administrative proceeding and determine whether the proposed acquisition violates Section 7 of the antitrust laws. *See* Joint Statement Regarding Prelim. Inj. Hr'g Schedule at 2, ECF No. 88 [hereinafter "Joint Statement"]. Section 13(b) of the FTC Act "authorizes the Commission to obtain a preliminary injunction '[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." *FTC v. Crescent Publ'g Grp., Inc.*, 129 F. Supp. 2d 311, 319 (S.D.N.Y. 2001) (citing 15 U.S.C. § 53(b)). The FTC "meets its burden . . . if it shows preliminarily, by affidavits or other proof, that it has a fair and tenable chance of ultimate success on the merits." *Lancaster*, 434 F. Supp. at 1090; *see also* Joint Statement at 12-

13. It is not until the administrative proceeding, which provides a forum for all parties to present plenary evidence regarding the probable effects of the merger with up to 210 hours of live testimony, 16 C.F.R. § 3.41, that the FTC will determine, upon a full evidentiary record, the merger's legality. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713-14 (D.C. Cir. 2001). Here, multiple independent bases demonstrate the FTC more than met its burden of showing a fair and tenable chance of success on the merits in the administrative proceeding, and Defendants do not offer any equities that override the strong public equities favoring preliminary relief.

A. THE COMMISSION IS LIKELY TO SUCCEED ON THE MERITS

Section 7 claims are analyzed under a burden-shifting framework. *See, e.g., U.S. v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).⁴⁹ Under this burden-shifting framework, first, the government must establish a *prima facie* case that an acquisition is unlawful. *Baker Hughes*, 908 F.2d at 982-83. The proposed acquisition is the unusual case where the evidence supports *three independent bases* that the merger may substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. First, the proposed acquisition results in market shares and concentrations that establish a presumption that the merger is illegal, meaning that the FTC is entitled to a preliminary injunction unless Defendants can meet their burden to rebut the presumption (which they cannot). *See PNB*, 374 U.S. at 363-64; *Lancaster*, 434 F. Supp. at 1094-95, n.4 (collecting cases); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 62-66 (D.D.C. 2018). Second, the elimination of fierce head-to-head competition between Defendants may result in a substantial lessening of competition, which is a violation in itself. *See, e.g., U.S. v. H&R Block*, 833 F. Supp. 2d 36, 88-89 (D.D.C. 2011); *FTC v. Staples*, 970 F. Supp. 1066, 1082-83 (D.D.C. 1997); *Consolidated Gold Fields PLC v. Minorco*, 871 F.2d

⁴⁹ The same burden-shifting framework applies to both horizontal and vertical mergers. *See U.S. v. AT&T Inc.*, 310 F. Supp. 3d 161, 191 n.17 (D.D.C. 2018).

252, 258 (2d Cir. 1989); *see also Mfrs. Hanover Tr.*, 240 F. Supp. at 955. Third, the proposed acquisition would act as a "clog on competition" by giving IQVIA—the provider of critical healthcare data—the ability to disadvantage other competitors in the market for HCP programmatic advertising. *Brown Shoe v. U.S.*, 370 U.S. 294, 323-24 (1962).

1. The Proposed Acquisition is an Illegal Horizontal Merger

a. <u>The Proposed Acquisition is Presumptively Illegal Based on Market Shares</u>

The proposed acquisition is presumptively illegal because it would significantly increase concentration in the already concentrated HCP programmatic advertising market. In *PNB*, the Supreme Court held that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." 374 U.S. at 363. Applying *PNB*, courts have held that "[b]y showing that the proposed transaction . . . will lead to undue concentration [for a particular product], the Commission establishes a presumption that the transaction will substantially lessen competition." *Staples*, 970 F. Supp. at 1083; *see also Heinz*, 246 F.3d at 715. Once the presumption is established, the burden of rebutting the *prima facie* case shifts to Defendants. *See U.S. v. Marine Bancorp*., 418 U.S. 602, 631 (1974); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 167 (D.D.C. 2000).

i. The Relevant Product Market is HCP Programmatic Advertising

- IQVIA Senior Principal, Client Success, Omnichannel Marketing

"HCP programmatic advertising" is not a term or market invented by the FTC—it is the precise term Defendants use to describe their offerings and is a relevant antitrust product

⁵⁰ PX1123-03 (IQVIA).

market.⁵¹ The relevant product market is the "line of commerce" affected by a proposed merger. Brown Shoe, 370 U.S. at 324. A relevant product market's "outer boundaries' are determined by the 'reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 198 (D.D.C. 2018) (quoting Brown Shoe, 370 U.S. at 325); Lancaster, 434 F. Supp. at 1092. That is, "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." H&R Block, 833 F. Supp. 2d at 51 (citation omitted). Within a broad relevant market, effective competition often occurs in narrower relevant markets. See Brown Shoe, 370 U.S. at 325. In fact, when defining relevant markets, courts are to construe product market "narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn[.]" Times-Picayune Publ'g Co. v. U.S., 345 U.S. 594, 612 n.31 (1953). If a merger may substantially lessen competition in any relevant market, it is prohibited by the Clayton Act.⁵² See 15 U.S.C. § 18 (prohibiting merger that may substantially lessen competition "in any line of commerce") (emphasis added). Here, the Brown Shoe practical indicia, as well as application of the "hypothetical monopolist test," show that HCP programmatic advertising is a relevant market.

Brown Shoe Test: In *Brown Shoe*, the Supreme Court set forth "practical indicia" for defining a relevant product market. 370 U.S. at 325. Such factors, as described in *Brown Shoe* and its progeny, include "the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices," the existence of classes of customers who desire particular products, "industry or public recognition" of the market, and how Defendants'

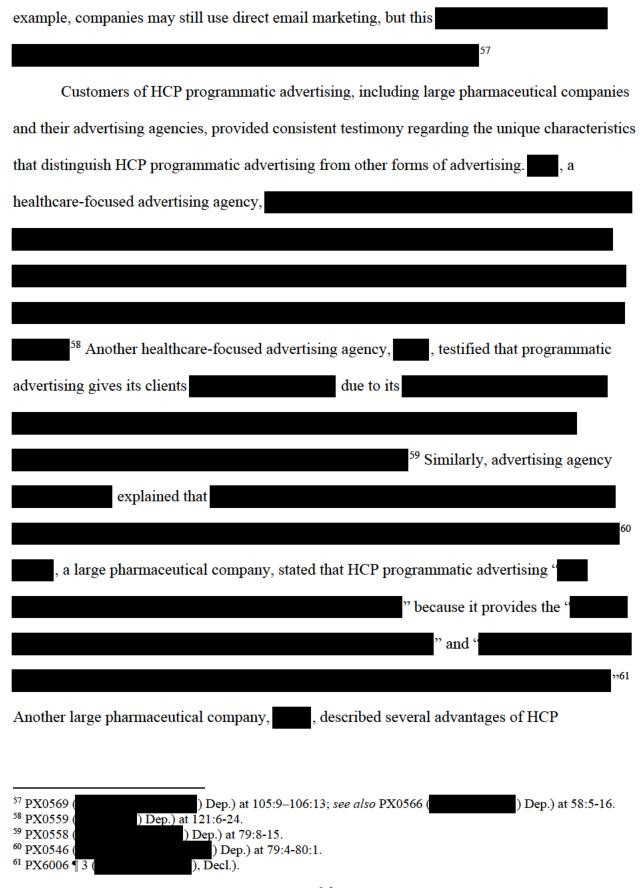
⁵¹ See, e.g., PX1614-02, -05 (IQVIA); PX1745-01 (IQVIA); PX1746-02 (IQVIA); PX1747-01 (IQVIA); PX1749-01 (IQVIA); PX2862-04 (DeepIntent).

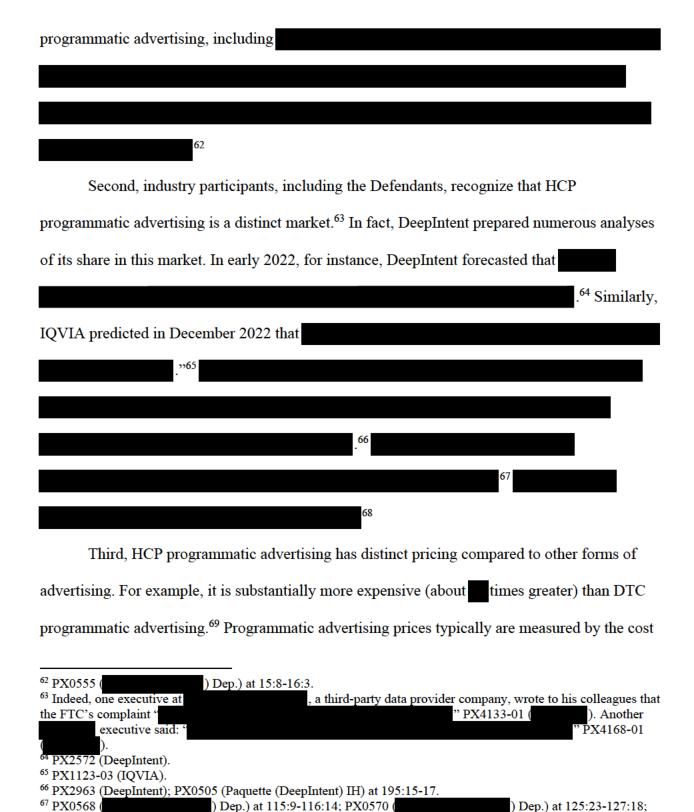
⁵² See PX6500-97 (Hatzitaskos Report) ¶¶ 197-98 (

documents portray the reality of the market. *Brown Shoe*, 370 U.S. at 325; *Lancaster*, 434 F. Supp. at 1092; *see also United States v. Grinnell Corp.*, 384 U.S. 563, 572-75 (1966).

HCP programmatic advertising has peculiar characteristics and uses that distinguish it from other types of advertising. Unlike other methods of delivering advertisements to HCPs, such as through mail, email, social media, and direct buys with online publishers, programmatic advertising provides advertisers with unparalleled access to content publishers, fast delivery of performance data, flexibility, and control over advertising budgets and the frequency of advertising placements. Healthcare companies can use HCP programmatic advertising to deliver advertisements across thousands of different publishers, determine which HCPs interact with the advertisements, and analyze whether those HCPs changed their prescribing behavior—all with """ No other form of advertising offers those combined capabilities. Other forms of advertising, such as direct-to-consumer ("DTC") programmatic advertising (which targets cohorts of patients, rather than individuals), direct buys, and non-digital advertising, either do not involve one-to-one targeting, do not offer the efficiency and flexibility of HCP programmatic advertising, or are less effective at impacting prescribing behavior. For

⁵³ See, e.g., PX0503 IH) at 19:3-20:24; PX0558 (Dep.) at 70:6-74:4; PX0559) Dep.) at 107:25-115:5; PX0555 () Dep.) at 15:8-16:16; see also PX0553 (Dep.) at 33:19-34:17; PX0556 (Dep.) at 73:14-17; PX0576 (Dep.) at 129:22-130:4. 54 PX0503 () IH) at 20:3-20:24; see also PX0558 () Dep.) at 70:9-75:13; PX0559) Dep.) at 107:25-109:22; PX6006 ¶ 3 (), Decl.); PX0569 Dep.) at 95:4-97:2. 55 See PX0504 () IH) at 14:16-25 (describing programmatic advertising as ; PX0561 () Dep.) at 22:18-25:11) Dep.) at 178:13-180:14); PX0568 (: cf. PX0558 () Dep.) at 74:18-76:1 (explaining ⁵⁶ See, e.g., PX0534 (Craigmyle (DeepIntent) Dep.) at 49:8-22; PX0526 (Sandler (DeepIntent) Dep.) at 27:6-28:21; PX0564 (Dep. Tr.) at 63:5-22 (**) "); PX0576 Dep.) at 131:11-132:9.





Dep.) at 87:5-23; PX0568 (

⁶⁹ PX6500 (Hatzitaskos Report) ¶ 233; *see also* PX0527 (Miller (IQVIA) Dep.) at 50:2-22; PX1261-01 (IQVIA); PX0534 (Craigmyle (DeepIntent) Dep.) at 51:20-53:2; PX0526 (Sandler (DeepIntent) Dep.) at 28:18-21; PX0553

) Dep.) at 91:24-92:25; PX0568 (

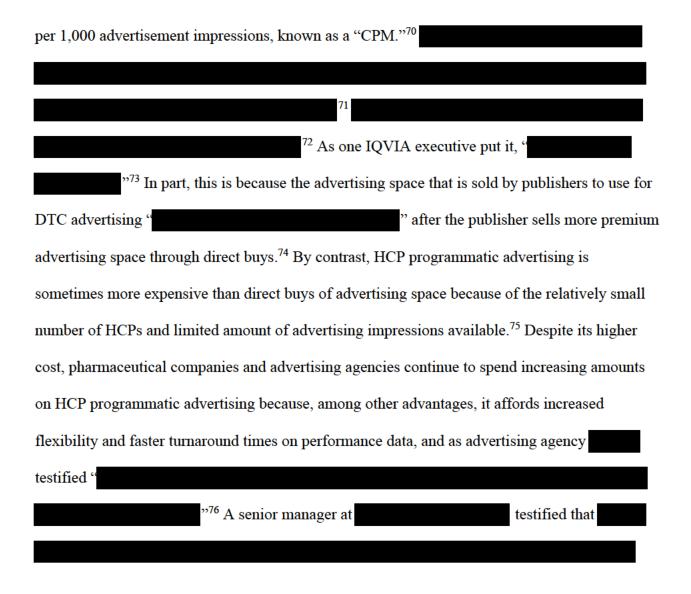
PX0557 Proclivity depo (

68 PX0570 (

) Dep.) at 125:23-127:18;) Dep.) at 116:1-24.

Dep.) at 191:17-192:9.

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Dep.) at 90:17-92:11; cf. PX0555 (
                                                               ) Dep.) at 32:21-33:17
                                                      ; PX6007 ¶ 7 (
                                                                                   Decl.)
                                                                            ).
<sup>/0</sup> See, e.g., PX0527 (Miller (IQVIA) Dep.) at 50:8-12 (
           ); PX0569 (
                                               ) Dep.) at 61:20–62:7
                                                                     ); PX0548 (Margolis (IQVIA) Dep.) at 285:14-17
<sup>71</sup> PX0008-09 (IQVIA); PX0548 (Margolis (IQVIA) Dep.) at 285:21-286:18.
72 PX0008-09 (IQVIA).
73 PX1530-03 (IQVIA).
74 PX0559 (
                          Dep.) at 115:6-116:15.
<sup>75</sup> PX0559 (
                         Dep.) at 115:6-116:15.
<sup>76</sup> PX0563 (
                            Dep.) at 18:8-25; see also PX0559 (
                                                                               Dep.) at 117:1-15, 207:11-15; PX0576
                    Dep.) at 132:10-15.
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Fourth, HCP programmatic advertising has distinct customers with specialized needs: healthcare companies and their advertising agencies. "[T]he specific needs of the healthcare marketer are more nuanced and complex than the needs of the typical marketer," explained DeepIntent's CEO. RCP programmatic advertising requires the precise delivery of advertisements to the targeted healthcare professionals on an individualized, one-to-one basis after matching their identities to their digital footprint. Additionally, unlike more generalized advertising, healthcare advertisers expect the accurate measurement of a campaign's effectiveness by evaluating whether a specifically targeted individual has changed their prescribing behavior subsequent to viewing the ads.

Finally, HCP programmatic advertising is performed by specialized vendors: healthcare DSPs. As an IQVIA Vice President noted, "

"82 The three main healthcare DSPs—DeepIntent, Lasso, and possess a variety of capabilities that make them the top choices for many HCP programmatic advertising customers. See infra § III.A.1.b. These capabilities include the ability to reach

) Dep.) at 50:14-52:1

); PX0565 () Dep.) at 153:11-154:22

81 PX1044-27 (IQVIA) (

; PX0565 () Dep.) at 152:18-153:18; PX0503

) IH) at 31:20-32:24.

⁷⁷ PX0555 () Dep.) at 16:17-17:10.

⁷⁸ PX5001 (How COVID-19 Has Coronated Digital King of Healthcare Marketing, https://martechseries.com/tv-advertising/covid-19-coronated-digital-king-healthcare-marketing (last accessed Oct. 24, 2023)).

⁷⁹ PX0529 (Aalderink (IQVIA) Dep.) at 36:10-38:11; PX0539 (O'Brien (IQVIA) Dep.) at 41:12-42:13; PX0535 (Mangano (DeepIntent) Dep.) at 74:21-75:16; PX0508 (DiNorscio (IQVIA) IH) at 22:20-23:6; *see also* PX0568

⁸⁰ PX0548 (Margolis (IQVIA) Dep.) at 196:11-15; PX0527 (Miller (IQVIA) Dep.) at 74:8-25; PX0526 (Sandler (DeepIntent) Dep.) at 112-13; PX0534 (Craigmyle (DeepIntent) Dep.) at 67:22-68:13.

⁸² PX1124-02 (IQVIA).

targeted HCPs with a high match rate, use of opted-in HCP data, delivery of ads to HCPs in endemic (i.e., HCP-related content) inventory, reporting physician level data ("PLD"), facilitating measurement, and having a healthcare focus. Reflecting these specialized capabilities, DeepIntent, Lasso, and are often the top competitors for various customers. See infra § III.A.1.b. For instance, in discussing DeepIntent's effort to win business from a leading healthcare advertising agency, DeepIntent's CEO reported that have a leading healthcare advertising agency, DeepIntent's CEO reported that have been been an email discussing agency, Lasso co-founder Mike DiNorscio stated that he weeklifted that have been been also been

Hypothetical Monopolist Test: Courts also rely on the "hypothetical monopolist test" to define a product market. This test asks, assuming all products or services in the candidate market were controlled and sold by a monopolist, whether that hypothetical monopolist could profitably impose a small but significant and non-transitory increase in price ("SSNIP"), typically five percent, over a product or service (if so, that is a relevant market), or whether customers switching to alternative products or services would make such a price increase unprofitable (if so, the market is too narrow). See, e.g., FTC v. Penn State Hershey Med. Center, 838 F.3d 327,

⁸³ See e.g., PX6006 ¶¶ 6, 7 (), Decl.); see also PX2764-02 (DeepIntent); PX2860 (DeepIntent); PX0556 () Dep.) at 23:17-24:7; PX0538 (Field (IQVIA) Dep.) at 236:24-238:9; PX0531 (Klein (DeepIntent) Dep.) at 52:12-23; PX0568 () Dep.) at 117:12-118:18, 119:8-120:3; PX0558 () Dep.) at 89:6-90:8; PX0503 () IH) at 27:17-28:17, 29:13-30:19, 31:20-32:24.

84 PX1125-01 (IQVIA).
85 PX1070-02 (IQVIA).
86 PX0500 () IH) at 51:17-23; see also PX0568 () Dep.) at 116:19-24 (), 177:19-178:1.

338 (3d Cir. 2016); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1075 (N.D. Ill. 2012) (quoting Horizontal Merger Guidelines § 4.1.1); H&R Block, 833 F. Supp. 2d at 51-52.

ii. The Relevant Geographic Market is Worldwide

The relevant geographic market is "the 'area of effective competition' . . . in which the seller operates and where consumers can turn, as a practical matter, for supply of the relevant product." *Concord Associates, L.P. v. Ent. Properties Trust*, 817 F.3d 46, 53 (2d Cir. 2016) (quoting *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 227 (2d Cir. 2006)). Because programmatic advertising suppliers and their customers could theoretically be located anywhere, the relevant antitrust geographic market is global, with participants targeting U.S. HCPs.⁸⁹

PX6500-123 (Hatzitaskos Report) § 4.2.5. Dr. Hatzitaskos

PX6500-123 (Hatzitaskos Report) ¶ 239; see generally PX6500-123 (Hatzitaskos Report) ¶¶ 227
241. Courts have routinely relied on these types of empirical analyses in assessing the hypothetical monopolist test.

See, e.g., Sysco, 113 F. Supp. 3d at 34-35; Wilhelmsen, 341 F. Supp. 3d at 57-58.

PX6500-123 (Hatzitaskos Report) § 4.2.2.

iii. The Proposed Acquisition Results in Presumptively Illegal Market Shares

– DeepIntent executive, October 2022

A merger is presumed to violate the antitrust laws if it produces a firm controlling an "undue concentration in the relevant market." *In re ProMedica Health Sys., Inc.,* No. 9346, 2012 WL 1155392, at *12 (F.T.C. Mar. 28, 2012) (citing *PNB*, 374 U.S. at 363). Traditionally, courts employ a statistical measure called the Herfindahl-Hirschman Index ("HHI") to measure market concentration. It calculates market concentration by summing the squares of the individual market share of each market participant. *See FTC v. Cardinal Health, Inc.,* 12 F. Supp. 2d 34, 53 (D.D.C. 1998). A merger is presumed anticompetitive if it increases the HHI by more than 200 points and results in a post-merger HHI exceeding 2,500. *Horizontal Merger Guidelines* § 5.3; *H&R Block*, 833 F. Supp. 2d at 71-72; *Heinz*, 246 F.3d at 716. Here, the proposed acquisition results in a combined market share () and HHIs which far exceed the established thresholds and trigger a presumption of competitive harm:



⁹⁰ PX2570-01 (DeepIntent).

⁹¹ PX6500-123 (Hatzitaskos Report) § 3.3.2, Exhibit 13; PX6500-010 (Hatzitaskos Report) § 1.4, Exhibit 13.

These market shares result in an HHI of and a delta HHI of specific post-acquisition well above the specific post-acquisition and a delta HHI of specific post-acquisition here. See, e.g., FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 172-73 (3d Cir. 2022) (enjoining merger where post-acquisition HHI of specific post-acquisition here. Supp. 3d at 37 (enjoining merger where post-acquisition here. Supp. 3d at 37 (enjoining merger where post-acquisition here.)

The market share estimates calculated by Dr. Hatzitaskos are consistent with internal estimates by Defendants and other market participants. For example, Defendants' internal documents regularly identify

as the three largest HCP programmatic advertising competitors, 93 and DeepIntent projected that,

94 As recently as June 2023,

95 Similarly,

estimated in September 2022 that

would control ' ..., 996 And third-party market participants uniformly agree that

are currently the top three providers of HCP programmatic advertising. 97

⁹² PX6500-125 (Hatzitaskos Report) § 3.3.2, Exhibit 15. These estimates likely understate Lasso's and DeepIntent's combined share, as Dr. Hatzitaskos (Hatzitaskos Report) § 6.3.

⁹³ See, e.g., PX1380-01 (IQVIA); PX2581-29-30 (DeepIntent); PX2799-01 (DeepIntent); PX1026-01 (IQVIA).

⁹⁴ PX2572-01 (DeepIntent).

⁹⁵ PX1625-02 (DeepIntent); PX0549 (Colarossi (IQVIA) Dep.) at 58:10-15. 96 PX4072-01 (See also PX0517 (See a

b. <u>The Proposed Acquisition Eliminates Substantial Competition between Lasso</u> <u>and DeepIntent</u>

Having demonstrated that the proposed acquisition is presumed to be illegal based on Defendants' market shares, the burden shifts to Defendants to try to rebut the presumption by "produc[ing] evidence that 'show[s] that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market," *Heinz*, 246 F.3d at 715 (quoting *U.S. v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)). Defendants cannot do so. First, IQVIA's ability to disadvantage—if not eliminate—entry or expansion in HCP programmatic advertising through control of critical data buttresses the presumption of illegality and suggests that, if anything, the market shares *underestimate* IQVIA's post-acquisition market power. In the presumption of illegality is bolstered by existing market concentration and the history of IQVIA acquisitions in the industry. *U.S. v. Continental Can Co.*, 378 U.S. 441, 461-62 (1964) ("[W]here there has been a 'history of tendency toward concentration in the industry,' tendencies toward further concentration 'are to be curbed in their incipiency.'" (quoting *Brown Shoe*, 370 U.S. at 345)).

Second, Defendants' own documents and testimony, as well as third-party evidence, demonstrate that Lasso and DeepIntent vigorously compete for HCP programmatic advertising

⁹⁸ PX1062-01-02 (IQVIA).

⁹⁹ PX2804-01 (DeepIntent).

¹⁰⁰ At this stage, the Court need not embark upon a detailed analysis of Defendants' rebuttal arguments or resolve factual disputes. *See FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) ("Because the issue in this action for preliminary relief is a narrow one, we do not resolve the conflicts in the evidence, compare concentration ratios and effects on competition in other cases, or undertake an extensive analysis of the antitrust issues") (*citing Lancaster*, 434 F. Supp. at 1094, 1096).

¹⁰¹ See infra, § III.A.2.

business. Where the two merging parties are close competitors, the elimination of close competition is itself a basis to conclude that the merger results in competitive harm such as higher prices, reduced quality, and less innovation. *See, e.g., Staples*, 970 F. Supp. at 1083 (finding competitive harm where the transaction "would eliminate significant head-to-head competition" between the merging parties); *see also H&R Block*, 833 F. Supp. 2d at 88-89 (finding "that HRB and TaxACT are head-to-head competitors, that TaxACT's competition has constrained HRB's pricing, and that, post-merger, overall prices in the DDIY products of the merged firms are likely to increase"); *Swedish Match*, 131 F. Supp. 2d at 169 ("[T]he weight of the evidence demonstrates that a unilateral price increase by Swedish Match is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors.").

Indeed, economic expert Dr. Hatzitaskos explained that

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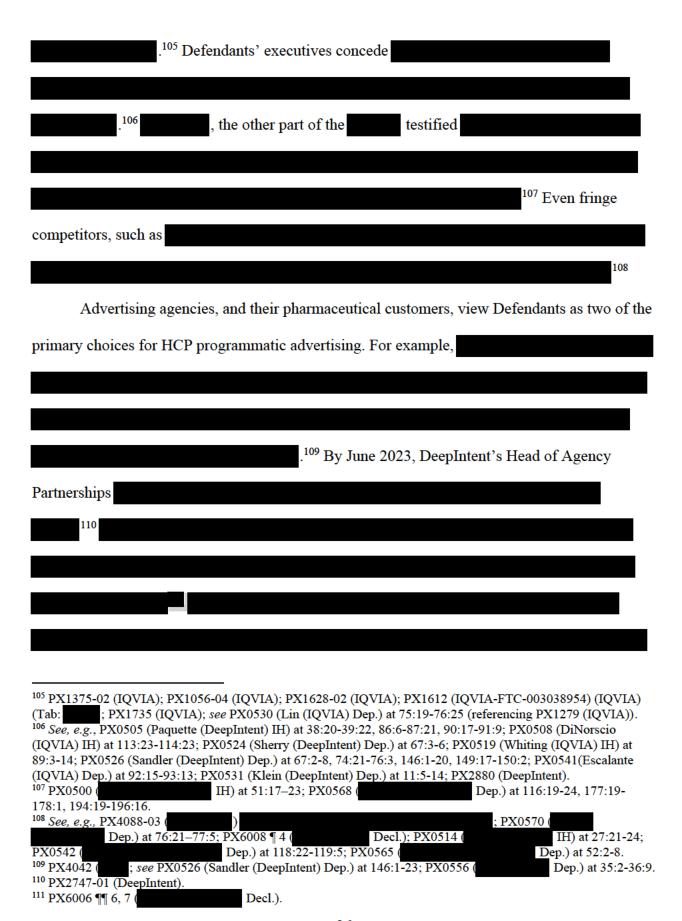
i. <u>Defendants (and other Market Participants) View DeepIntent and Lasso as Direct Competitors</u>

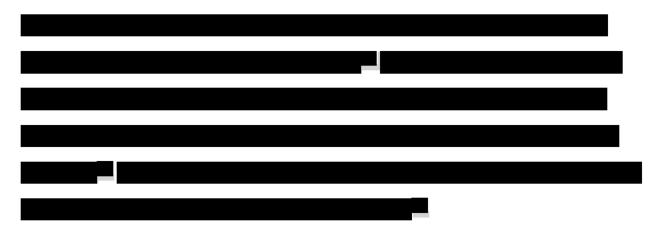
For HCP programmatic advertising customers, Lasso and DeepIntent are indisputably close competitors.

¹⁰² PX6500-62 (Hatzitaskos Report) ¶ 123.

¹⁰³ PX6500-84 (Hatzitaskos Report) § 3.1.4.

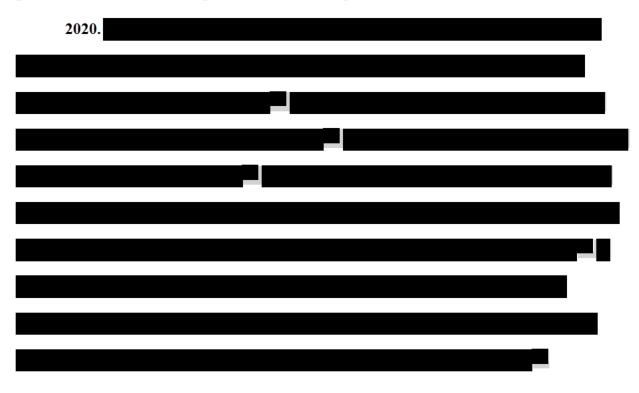
¹⁰⁴ PX2571-01 (DeepIntent); PX2511-05 (DeepIntent); PX2880-01 (DeepIntent); PX2506-01 (DeepIntent); PX2843-04 (DeepIntent); PX2843-04 (DeepIntent); PX2812 (DI-LIT-0000378223) (DeepIntent) (Tab:); PX2816 (DI-LIT-0000454960) (DeepIntent) (Tab:); PX2818 (DI-LIT-0000498267) (DeepIntent) (Tab:).





ii. Defendants Compete Vigorously on Price and Innovation

Defendants' documents are rife with examples of intense competition resulting in lower prices and innovative offerings for customers. The period from 2020 to 2023 is illustrative.



¹¹² PX0511 (IH) at 18:10-19:21.

IH) at 43:6-21; see PX0555 (Dep.) at 20:21-21:7. Dep.) at 96:15-19; see also PX4171-121-124 ().

¹¹⁵ PX1064-02 (IQVIA); PX0508 (DiNorscio (IQVIA) IH) at 113:23-114:23.

¹¹⁶ PX1064-03 (IQVIA).

¹¹⁷ PX1062-02 (IQVIA).

¹¹⁸ PX1064-02 (IQVIA).

¹¹⁹ PX1452-01 (IQVIA); PX0540 (DiNorscio (IQVIA) Dep.) at 95:8-100:18.

2021. Throughout 2021, the competition between Lasso and DeepIntent intensified as both firms responded with rapid innovation and price reductions. DeepIntent leadership quickly recognized that Lasso posed a serious competitive threat. ¹²¹ By April 2021, DeepIntent responded by introducing innovative new measurement capabilities. ¹²² But Lasso quickly responded with extremely aggressive pricing and its own new features, which raised alarm within DeepIntent.

¹²⁰ PX2571-01 (DeepIntent).

¹²¹ PX2507-01 (DeepIntent).

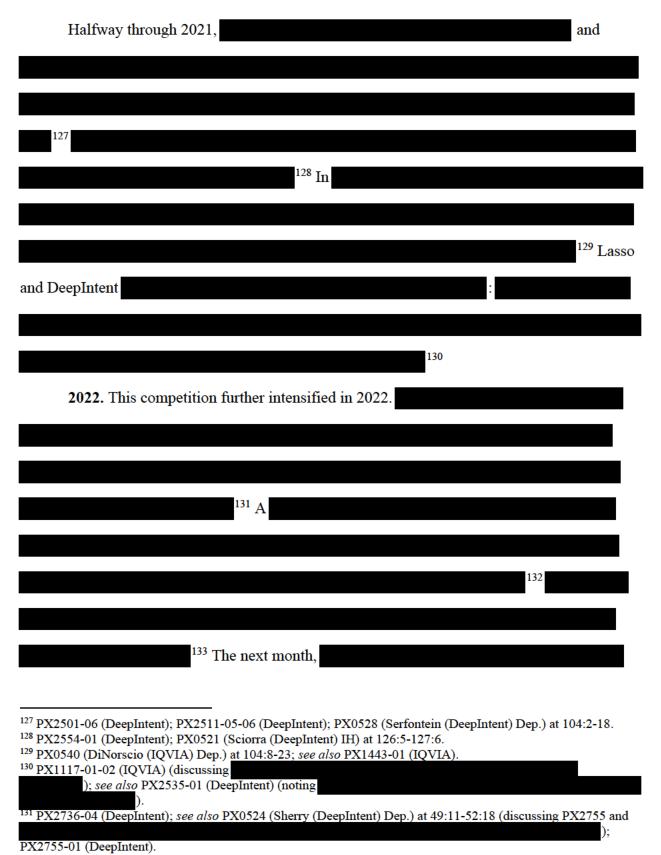
¹²² PX1063-02 (IQVIA).

¹²³ PX2798-01 (DeepIntent).

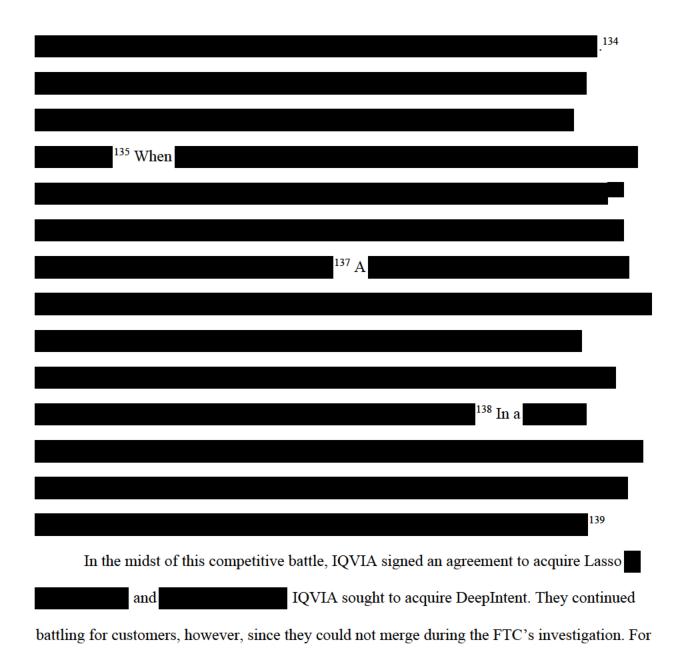
¹²⁴ PX2508-01 (DeepIntent).

¹²⁵ PX2512-01 (DeepIntent).

¹²⁶ PX2509-01 (DeepIntent).



PX2564-03-04 (DeepIntent); see also PX0521 (Sciorra (DeepIntent) IH) at 159:8-161:7 (discussing PX2564).
 PX2564-04 (DeepIntent); see also PX2573-01 (DeepIntent); PX2772-02-03 (DeepIntent).



); PX0535 (Mangano

¹³⁴ PX0526 (Sandler (DeepIntent) Dep.) at 72:24-73:15; see also PX2731-01-02 (DeepIntent).

¹³⁵ PX1433-03 (IQVIA); see also PX0538 (Field (IQVIA) Dep.) at 25:18-27:8.

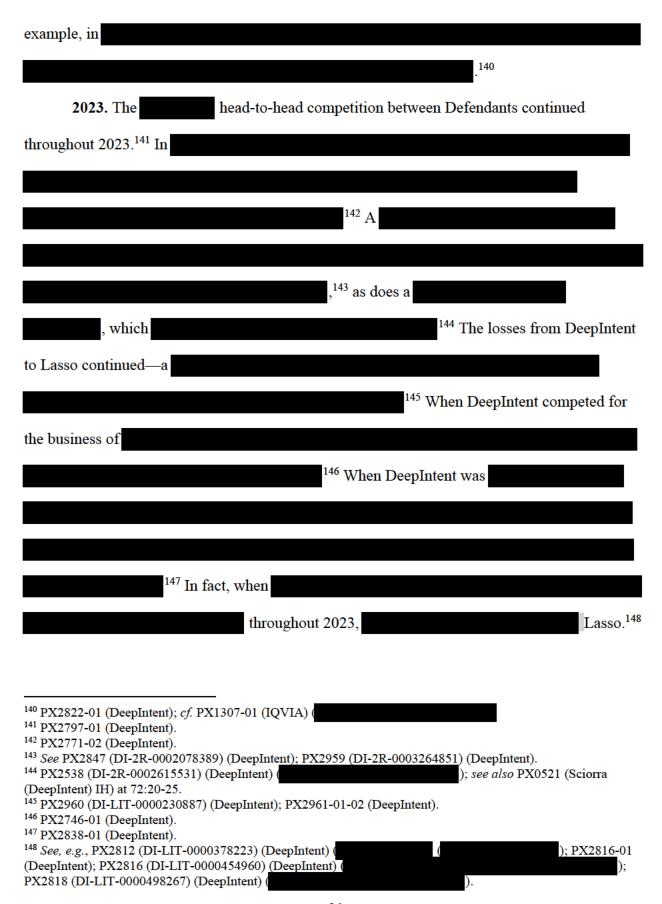
¹³⁶ PX1606-02 (IQVIA); PX0538 (Field (IQVIA) Dep.) at 44:20-45:22.

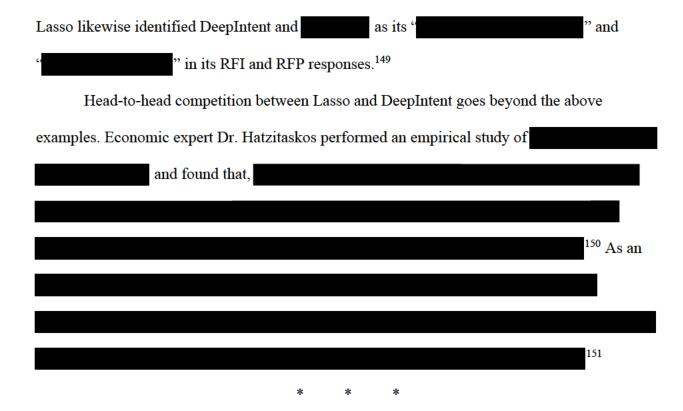
¹³⁷ PX2804-01 (DeepIntent); see also PX0526 (Sandler (DeepIntent) Dep.) at 78:11-16

⁽DeepIntent) Dep.) at 32:24-33:21; PX2557-01-05 (DeepIntent); PX2749-01-05 (DeepIntent); PX2876-01-05 (DeepIntent). See generally PX2731-01-02 (DeepIntent) (

¹³⁸ PX2578-01 (DeepIntent).

¹³⁹ PX2797-01 (DeepIntent).





The Court need not rely on the market shares-based analysis—the elimination of head-to-head competition is itself an independent basis to grant a preliminary injunction. ¹⁵² See United States v. Aetna Inc., 240 F. Supp. 3d at 43 (D.D.C. 2017) ("The government, however, has not rested on that presumption. Instead, it has introduced evidence tending to show that the merger would substantially lessen competition. 'Mergers that eliminate head-to-head competition between close competitors often result in a lessening of competition.'") (quoting FTC v. Staples,

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149 See, e.g., PX1612 (IQVIA-FTC-003038954) (IQVIA) (
"); PX1735 (IQVIA-FTC-000680528) (IQVIA) (
); PX1309 (IQVIA-FTC-000924555) (IQVIA) (
").

150 PX6500 (Hatzitaskos Report) ¶ 17, 154.

151 PX1743-01 (IQVIA).

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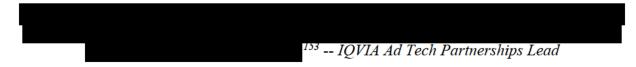
X6500 (Hatzitaskos Report) ¶ 15.

PX6500 (Hatzitaskos Report) ¶ 18.

PX0559 (
Dep.) at 198:15-23.
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190 F. Supp. 3d at 131 (D.D.C. 2016)); *Sysco* (collecting cases); *Mfrs. Hanover Tr.*, 240 F. Supp. at 955 ("[T]he elimination of substantial competition previously existing between the parties to this merger in the national market itself constitutes an unreasonable restraint of trade. . . violative of § 7 of the Clayton Act.").

2. The Proposed Acquisition is an Illegal Vertical Merger



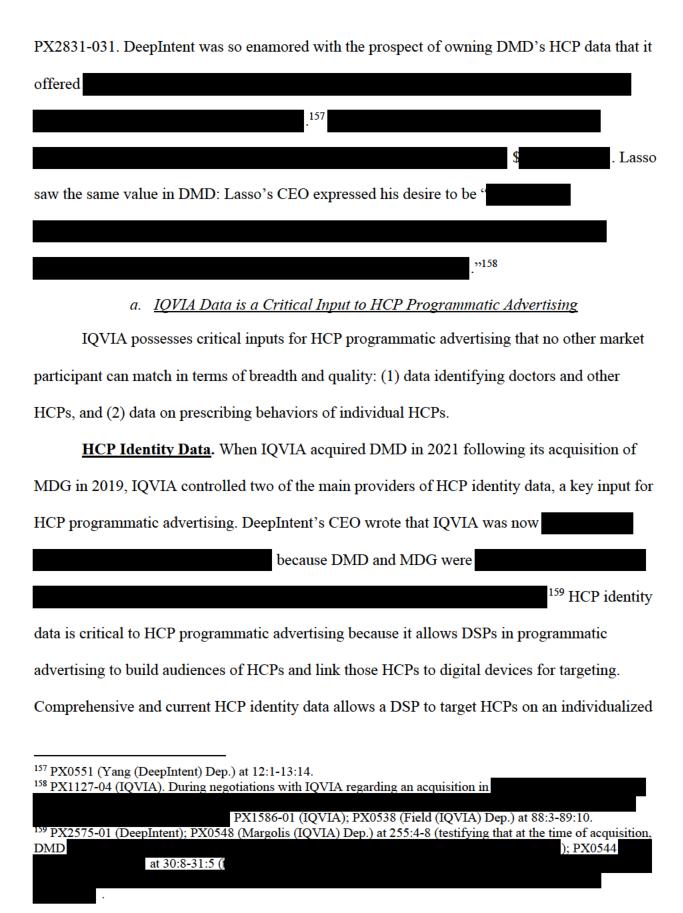
In addition to the loss of head-to-head competition between Lasso and DeepIntent, the proposed acquisition would increase IQVIA's incentive to use its control over the supply of key inputs for HCP programmatic advertising to disadvantage competitors of Lasso and DeepIntent. Having just acquired nearly of the market for HCP programmatic advertising, IQVIA stands to make more money if it favors Lasso and DeepIntent over rival DSPs. In this way, the ability and enhanced incentive of IQVIA to foreclose or otherwise disadvantage competitors post-acquisition creates a strong barrier to entry for companies aspiring to compete in the market for HCP programmatic advertising.

When a company acquires another company to which it provides a key input, it is referred to as a "vertical" merger. A vertical merger violates section 7 of the Clayton Act if it increases barriers to entry or substantially lessens competition by foreclosing or disadvantaging competitors of the downstream firm in the merger (i.e., DeepIntent) from access to a source of supply (i.e., IQVIA's data), or from access to supply on competitive terms. *See, e.g., Fruehauf,* 603 F.2d at 352; *Yankees Ent.*, 224 F. Supp. 2d at 673. Here, IQVIA describes itself as "and without IQVIA data,"

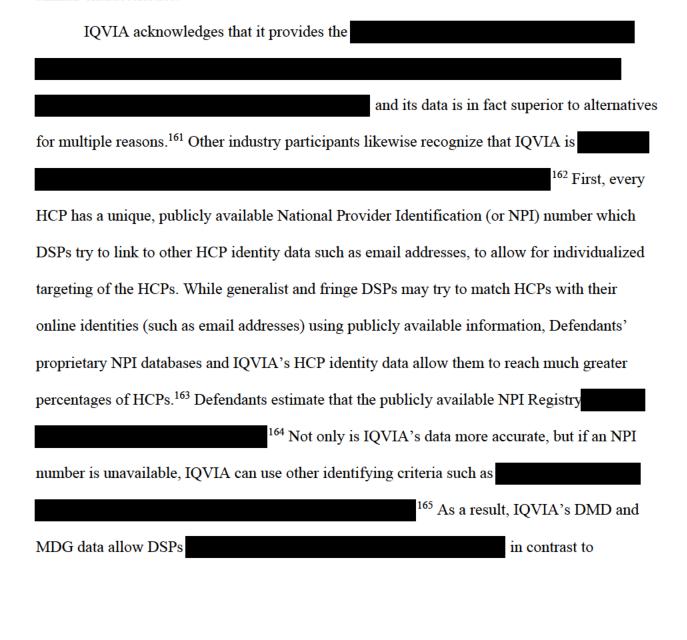
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¹⁵³ PX1032-01 (IQVIA).

¹⁵⁴ Due to IQVIA's data quality and ubiquity, customers would be unlikely to use a DSP that lacked access to IQVIA's data. 155 Therefore, under both the Brown Shoe and "ability and incentive" tests for vertical mergers, the proposed acquisition is illegal. Although the legal frameworks are applied below, the Court does not need to take the FTC's word for it and concluded that it would " . 156 The analysis, one slide of which appears below, illustrates how the consolidation would make competitors 154 PX1303-04 (IQVIA); see also PX0008-16 (IQVIA). 155 PX0500 () IH) at 63:17-65:4; PX0568 () Dep.) at 141:14-142:19, 152:1-IH) at 37:14-39:14; PX0570 (153:11; PX0502 () Dep.) at 141:15-146:12; PX0569 () Dep.) at 51:6-12 "); PX0576 (Dep.) at 145:15-146:8. 156 PX2576-17 (DeepIntent); see also PX2517-02 (DeepIntent) (



(1:1) basis as opposed to relying on "cohorts," meaning aggregate groupings of individuals with similar characteristics. 160



 ¹⁶⁰ PX0008-08 (IQVIA); see PX0540 (DiNorscio (IQVIA) Dep.) at 27:14-28:4; PX0568

 Dep.) at 125:8-126:9; PX0576 (Dep.) at 26:1-4.

 161 PX1169-01 (IQVIA); PX0548 (Margolis (IQVIA) Dep.) at 241:18-242:3); PX1750-05 (IQVIA).

 162 PX0571 (Dep.) at 127:2-19.

 163 PX0520 (Werther (DeepIntent) IH) at 74:15-19 (Craigmyle (DeepIntent) Dep.) at 62:17-63:9 (PX0549 (Colarossi (IQVIA) Dep.) at 52:12-54:4 (discussing); see also PX1626-01 (IQVIA); PX2860-05 (DeepIntent).

 164 PX1032-03 (IQVIA); PX1351-08 (IQVIA); PX0572 (Dep.) at 87:20-25, 76:22-25.

¹⁶⁵ PX2965-04 (DeepIntent).

alternatives, which provide substantially lower match rates. ¹⁶⁶ For that reason, the majority of HCP campaigns are based on the customer's use of IQVIA client list data. ¹⁶⁷ DSPs cannot obtain and target a customer's HCP client list based on IQVIA data without IQVIA's approval. ¹⁶⁸

Second, to compete effectively in the HCP programmatic advertising market, competitors must use "opted-in" data, or data from HCPs that have consented to be targeted. IGVIA describes its HCP identity data as

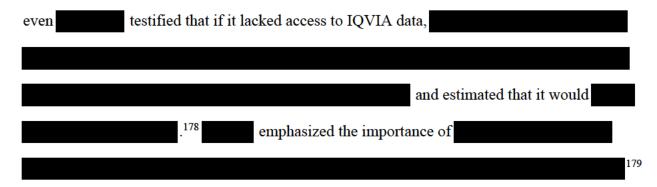
¹⁷¹ First-party user data also enables DSPs to

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166 Compare PX2800-04 (DeepIntent)
                                                             ); and PX2919-10
                                                       ; and PX0540 (DiNorscio (IQVIA) Dep.) at 155:3-19
                                                                                      ) with PX0572
              at 41:2-6
                                  Dep.) at 69:3-22, 148:8-149:8; PX0534 (Craigmyle (DeepIntent) Dep.) at 101:22-
<sup>167</sup> PX0568
103:12; PX0576
                                    Dep.) at 145:15-146:8.
                              ; PX0533 (Fisher (IQVIA) Dep.) at 32:22-33:5; 37:3-12.
<sup>168</sup> PX4108-03-04
<sup>169</sup> See e.g., PX0500
                                             at 23:10-18, 45:17-46:10); PX0568
                                                                                                              at
123:16-124:15; PX0570
                                                     at 67:12-69:25
                                                   ; PX0555
                                                                                        at 33:18-20; PX0534
(Craigmyle (DeepIntent) Dep.) at 85:5-11, 85:22-86:7; PX0576
                                                                                         at 149:21-150:10.
<sup>170</sup> PX1032-01 (IQVIA); PX1584-02 (IQVIA); see also PX1170-05 (IQVIA); PX0539 (O'Brien (IQVIA) Dep.) at
49:17-50:8; PX0549 (Colarossi (IQVIA) Dep.) at 56:17-57:4.
<sup>171</sup> PX1032-01 (IQVIA); see also PX0548 (Margolis (IQVIA) Dep.) at 271:18-272:17 (
                                     ); PX0555
                                                                          at 33:18-24; PX0567
                              at 35:19-36:4; PX0574
                                                                                 at 106:16-107:3 (
                                                                         ); PX1355-01 (IQVIA)
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"future proof" their offering. The phasing out of third-party cookies by Google and other entities will make it more difficult to link HCPs with their digital identities without first-party data.¹⁷²

HCP Prescribing Data. HCP prescribing data is critical to HCP programmatic advertising campaigns because it facilitates audience building and measurement of campaign outcomes. ¹⁷³ HCP prescribing data allows DSPs or advertisers to identify HCPs based on actual prescribing behavior and then link the list of target NPI numbers to their online identities through HCP identity data for targeting during the advertising campaign. IQVIA's identity and prescribing data is commonly described as the "prescribing data is unmatched in depth and breadth. The While firms such as or provide prescription measurement data, (substituting projections for actual measurement) and, unlike IQVIA data, are not available in near-real-time. The Given these advantages of IQVIA's data over alternatives, it is unsurprising that nearly every would-be competitor has testified that they need IQVIA's data to compete effectively in HCP programmatic advertising going forward.

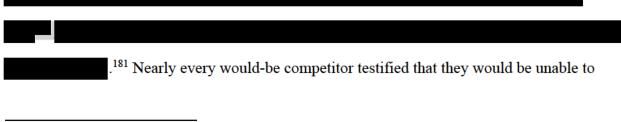
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172 PX0568
                                       at 124:16-126:9; PX0548
                                                                                         at 259:9-18; PX0008-
25 (IQVIA); PX0576
                                        Dep.) at 115:3-21; PX1236-09 (IQVIA).#
<sup>173</sup> See, e.g., PX0501
                                                  at 47:16-48:8; PX0514
                                                                                              at 20:7-21:22;
                                  at 100:11-101:20; PX0535 (Mangano (DeepIntent) Dep.) at 54:4-55:22; PX0576
PX0557
                   Dep.) at 133:7-135:16.
<sup>174</sup> See, e.g., PX4164-11 (DeepIntent); PX1739-02 (IQVIA); PX1740-03 (DeepIntent); PX1741-05 (IQVIA);
PX1170-05 (IQVIA); PX0531 (Klein (DeepIntent) Dep.) at 29:5-20; PX2788-03 (DeepIntent); PX0542
                     at 103:15-104:5.
<sup>175</sup> PX1131-03 (IQVIA)
                             Dep.) at 138:18-140:14; see, e.g., PX2800-02, -04 (DeepIntent); PX0552 (Resnick
<sup>176</sup> PX0576 (
(IQVIA) Dep.) at 270:22-272:18; PX0535 (Mangano (DeepIntent) Dep.) at 37:13-38:13; PX0548 (Margolis
(IQVIA) Dep.) at 145:20-146:15; PX0572 (
                                                                  at 94:3-11; PX0569
     at 82:10-83:2; PX0574
                                                       at 108:4-20
77 PX0501
                                        at 35:23-36:3; PX0565
                                                                                               at 259:3-
260:6);PX0502
                                          at 59:22-60:12; PX0570
                                                                                               at 141:15-144:20;
PX0561
                                   at 55:3-57:7; PX0542
                                                                                         at 103:15-105:21; see
also PX6020 ¶ 6 (
                               Decl.).
                                See PX1592-01 (IQVIA).
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b. Supreme Court Brown Shoe Framework

The Supreme Court set forth a multifactor analysis in *Brown Shoe* for determining whether a vertical merger may lessen competition. *Brown Shoe*, 370 U.S. at 321-22; *Fruehauf*, 603 F.2d at 353 (*Brown Shoe* factors should be assessed "as they exist for the particular merger in issue."). Here, multiple factors demonstrate the probable illegality of the proposed acquisition.

Share of the market foreclosure. In evaluating a vertical merger, "[i]f the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated" Brown Shoe, 370 U.S. at 328; see also United States v. Sybron Corp., 329 F. Supp. 919, 928-29 (E.D. Pa. 1971) (observing that even when "absolute foreclosure" would not be likely, "there are many more subtle avenues available").



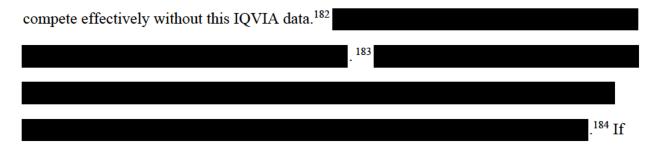
at 63:17-65:4; PX0568 at 141:14-142:19, 152:1-153:11.

¹⁷⁹ PX0563 (Dep.) at 73:19-75:11; see also supra n.28.

See PX0519 (Whiting (IQVIA) IH) at 71:21-72:1; PX2957-02 (PMI); PX0535 (Mangano (DeepIntent) Dep.) at 54:18-55:3; PX2958-09 (PMI); PX0568 (DeepIntent) Dep.) at 69:3-22, 138:12-140:10, 148:21-149:8, 152:1-153:11; PX0538 (Field (IQVIA) Dep.) at 92:4-20.

Dep.) at 152:13-53:5; PX0542 (Dep.) at 104:20-105:21; PX0561 (Dep.) at 35:1-10, 57:14-61:5) PX0565 (Dep.) at 259:3-260:6; see also PX0010 ¶ 5 (Dep.) a

^{.&}quot;). Even among those DSPs who



IQVIA were to withhold access to its data, it could foreclose a substantial share of the market.

Nature and economic purpose of the transaction. As discussed supra § II.C, the proposed acquisition is merely IQVIA's latest step in its

185 The purpose of acquiring DeepIntent along with Lasso is clear:

186

Degree of market power possessed by the merged firm. The Second Circuit in Fruehauf identified the degree of market power that would be possessed by the merged enterprise, and the number and strength of competing suppliers and purchasers, as factors that influence the analysis of a vertical merger. 603 F.2d at 353. At the downstream level, IQVIA already acquired Lasso and now seeks to acquire one of the other two remaining large players,

This raises the risk that the market for HCP programmatic advertising would

"cease to be competitive." See Fruehauf, 603 F.2d at 353.

purchase data from multiple providers,); PX6008 ¶ 6 IH) at 35:23-36:3; PX0542 (⁸² PX0501 (Dep.) at 104:20-Dep.) at 259:3-260:6); PX0502 (105:21; PX0565 (IH) at 59:22-Dep.) at 139:20-44:20; PX0568 (60:12; PX0570 Dep) at 141:14-142:19, 152:1-153:11, 157:15-159:21; PX0561 Dep.) at 156:1-20; 183 PX0500 () IH) at 63:17-65:4; PX0568 () Dep.) at 141:14-142:19, 152:1-153:11. 184 PX2525 (DeepIntent) (); see also PX6500-166-67 (Hatzitaskos Report) ¶ 367c. ¹⁸⁵ PX1377-01 (IQVIA). 186 PX1026-01 (IQVIA).

Entry barriers. The presence of entry barriers weighs in favor of blocking a vertical merger. Fruehauf, 605 F.2d at 353 (including capital costs and scale economies among the barriers to be considered); U.S. Steel Corp. v. U.S., 426 F.2d 592, 605 (6th Cir. 1970) (barriers can include "possible reliance on suppliers from a vertically integrated firm with whom [entrants are] also competing"); see also Ford Motor Co. v. United States, 405 U.S. 562 at 568-71 (1972). Substantial entry barriers already exist in the HCP programmatic advertising market, see infra § III.A.3.a, and nearly every would-be competitor testified that they need IQVIA's data to compete in HCP programmatic advertising, see supra § III.A.2.a. Even combining just IQVIA's DMD data with DeepIntent would (per DeepIntent's CEO)

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c. Ability and Incentive to Disadvantage DeepIntent's Rivals

Some courts have considered whether the combined firm will have an ability and incentive to disadvantage rivals as a result of the merger, a framework which "interrelate[s] closely" with the *Brown Shoe* factors, as the latter "provide direct insight into the ability and incentive of the merged firm to harm rivals." *In re Illumina, Inc.*, No. 9401, 2023 WL 2823393, at *33 (F.T.C. Mar. 31, 2023); *see also AT&T*, 310 F. Supp. 3d at 250-52.

i. <u>IQVIA's Ability to Harm DeepIntent's Rivals</u>

All three primary competitors in HCP programmatic advertising rely on IQVIA's HCP identity data and/or HCP prescribing data, as do all meaningful rivals, and the rivals have all testified that substantial business would be at risk if IQVIA foreclosed or disadvantaged their access to IQVIA's data. 188 IQVIA already has a mechanism in place to foreclose or disadvantage

¹⁸⁷ PX2579-03 (DeepIntent); see also PX1252-06 (IQVIA).

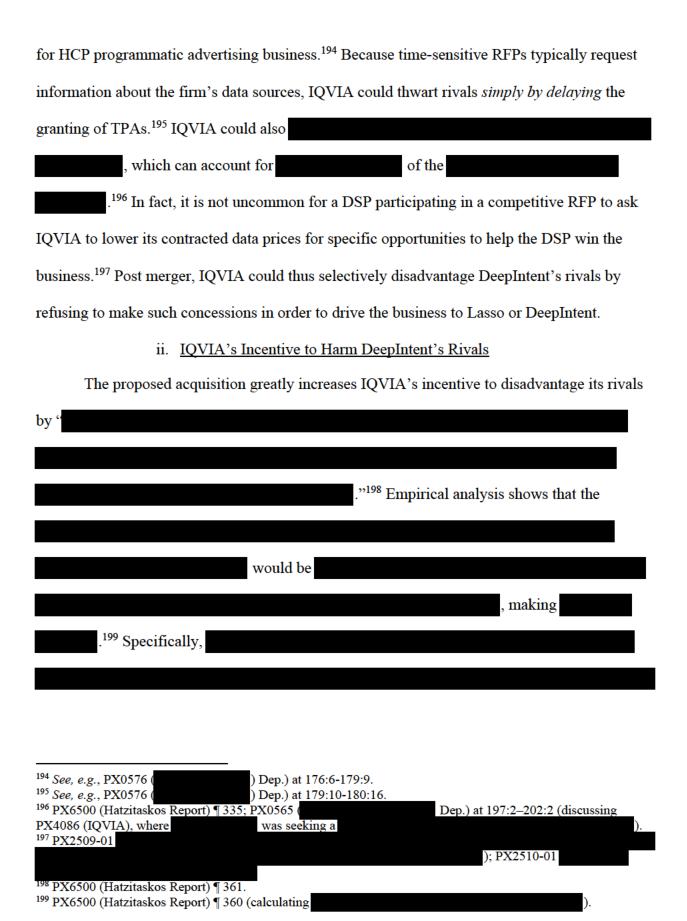
¹⁸⁸ See supra § III.A.2.a.

even those competitors who do not purchase HCP data directly from IQVIA. A pharmaceutical customer will often want to use IQVIA data that the customer has already licensed—and may have used to generate an initial list of target HCPs—to perform HCP programmatic advertising. ¹⁸⁹ In these situations, the DSP must seek a license from IQVIA pursuant to its Third-Party Access ("TPA") program in order to use the customer's IQVIA data to help run the HCP programmatic advertising campaign. ¹⁹⁰

¹⁹¹ As one internal IQVIA discussion revealed,

IQVIA need not engage in total foreclosure—i.e., completely deny access to its data—in order to effectively disadvantage rivals. ¹⁹³ See Yankees Ent., 224 F. Supp. 2d at 673; Sybron Corp., 329 F. Supp. at 928-29. For example, given that TPAs may be granted on a case-by-case basis, IQVIA could use its preexisting TPA approval process to selectively deny TPAs to competitors on specific opportunities where DeepIntent or Lasso is a front-runner (or incumbent)

¹⁸⁹ PX0568 (Dep.) at 148:21-149:8; PX0522 (Escalante (IQVIA) IH) at 117:5-118:3; see also PX0505 (Paquette (DeepIntent) IH) at 107:1-109:4. 190 See, e.g., PX5042-01 (IQVIA, Third-Party Access Program, https://www.iqvia.com/about-us/third-party-access-Dep.) at 104:19-105:21; PX0533 (Fisher (IQVIA) Dep.) at 85:1-9 program); PX0542 ((acknowledging that . Additionally, PX0533 (Fisher (IQVIA) Dep.) at 111:5-115:17; see also PX4108-03 (¹⁹¹ PX1379-01 (IQVIA) (); PX0533 (Fisher (IQVIA) Dep.) at 134:1-21. ¹⁹² PX1295-01 (IQVIA); see also PX1344-02 (IQVIA) ; PX1736 (IQVIA)); PX0515 () IH) at 53:23-55:10); PX0576 (Dep.) at 176:6-180:16; PX0573 (Dep.) at 25:22–26:3 193 As an illustration, Dr. Hatzitaskos's report finds that the merged firm . For example, See PX6500 (Hatzitaskos Report) § 4.3.4.



.²⁰⁰ Those figures are consistent with IQVIA's stated strategy of "
" of the market through the proposed acquisition.²⁰¹

3. Defendants Cannot Rebut the Strong *Prima Facie* Case

Having established multiple *prima facie* bases for the illegality of the proposed acquisition, "[t]he burden of producing evidence to rebut [the *prima facie* case] then shifts to the defendant." *Baker Hughes*, 908 F.2d at 982. To meet their burden, Defendants must demonstrate that expansion of existing firms or entry by new firms will be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects" of the proposed acquisition. *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019) (citing *Horizontal Merger Guidelines* § 9). Although Defendants' burden, the FTC briefly addresses these defenses below—the evidence is overwhelming that neither entry nor efficiencies can offset the massive competitive harm.²⁰²

a. Entry and Expansion

i. Significant Barriers to Entry and Expansion

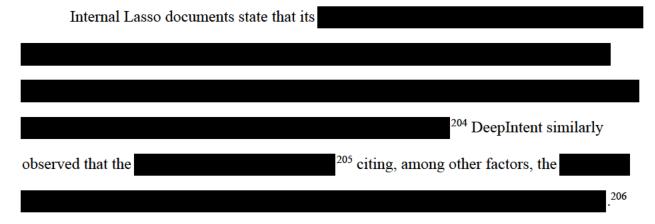
IQVIA is willing to spend to acquire both Lasso and DeepIntent and gain control of HCP programmatic advertising market. If entry or expansion were likely to threaten this market share, this investment makes little sense. But Defendants recognize that substantial barriers make successful entry into the HCP programmatic advertising market difficult, and that fact underlies IQVIA's rationale for the acquisitions.²⁰³

²⁰⁰ PX6500 (Hatzitaskos Report) ¶ 349.

²⁰¹ PX1377-01 (IQVIA).

²⁰² Defendants also attempt to distract from the merits by tossing together a grab-bag of constitutional challenges as affirmative defenses. *See* Def. IQVIA's Answer at 18–20 (¶¶10–15), Affirmative Defenses Nos. 10–15, ECF No. 58; Def. PMI's Answer at 28–29 (¶¶ 10–14), Affirmative Defenses Nos. 10–14, ECF No. 72. As detailed in Plaintiff's Motion to Strike, ECF No. 147, the Court need not today decide these constitutional issues, which are irrelevant to the narrow inquiry under Section 13(b) of whether to grant preliminary relief.

²⁰³ See, e.g., PX2581-24 (PMI); PX1128-12 (IQVIA).



Of course, the preeminent entry barrier which will be created by the proposed acquisition is the need for any entrants to access the data of a competitor: IQVIA. *See supra* § III.A.2.a (discussing importance of IQVIA data to HCP programmatic advertising). DeepIntent reasoned that the combination of IQVIA's DMD data with DeepIntent

²⁰⁷ And it is not remotely plausible for an entrant to develop its own alternative to IQVIA's data: IQVIA's unrivaled healthcare data collection "would be difficult and costly for another party to replicate," according to the company's annual report, ²⁰⁸ and IQVIA estimated that

The history of failed entry into the HCP programmatic advertising market confirms the high barriers and shows why Defendants' claims regarding entry amount to no more than

Dep.) at 138:18-144:5.

 $^{^{204}\,}PX1128\text{-}12$ (IQVIA); see also PX1584-03 (IQVIA).

²⁰⁵ PX2504-18 (DeepIntent).

²⁰⁶ PX2581-24 (DeepIntent).

²⁰⁷ PX2696-17 (DeepIntent); see also PX2580-08 (DeepIntent)

²⁰⁸ PX1137-05 (IQVIA 2022 10-K).

²⁰⁹ PX1129-03 (IQVIA) (emphasis added); see also PX1583-01 (IQVIA)

); PX1715-01 (IQVIA) (

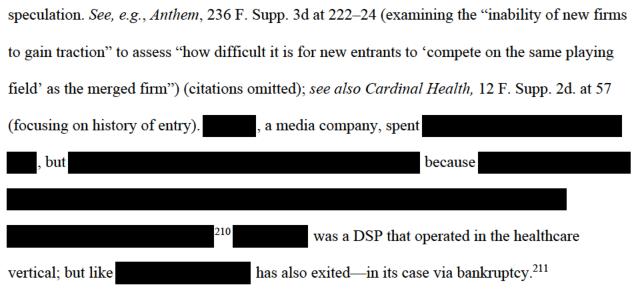
PX0548 (Margolis (IQVIA) Dep.) at 248:4–20.

testified that it has spent and that

may cost

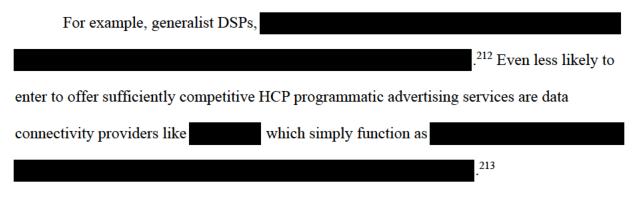
See PX0515 (

) IH) at 21:10–22:12; PX0576



ii. Market Participants Confirm Neither Entry Nor Expansion Will Be Timely, Likely, and Sufficient

Testimony and documents—including from the very firms whom Defendants speculate may enter—confirm that these firms lack the plans and/or capabilities to enter and/or expand in a sufficient and timely manner to offset the significant competitive harm which will result from the proposed acquisition. Aside from Lasso, DeepIntent, and _______, other current market participants, including "generalist" DSPs, are unlikely to enter or expand in a timely and sufficient manner to counteract the competitive harm from the proposed acquisition.

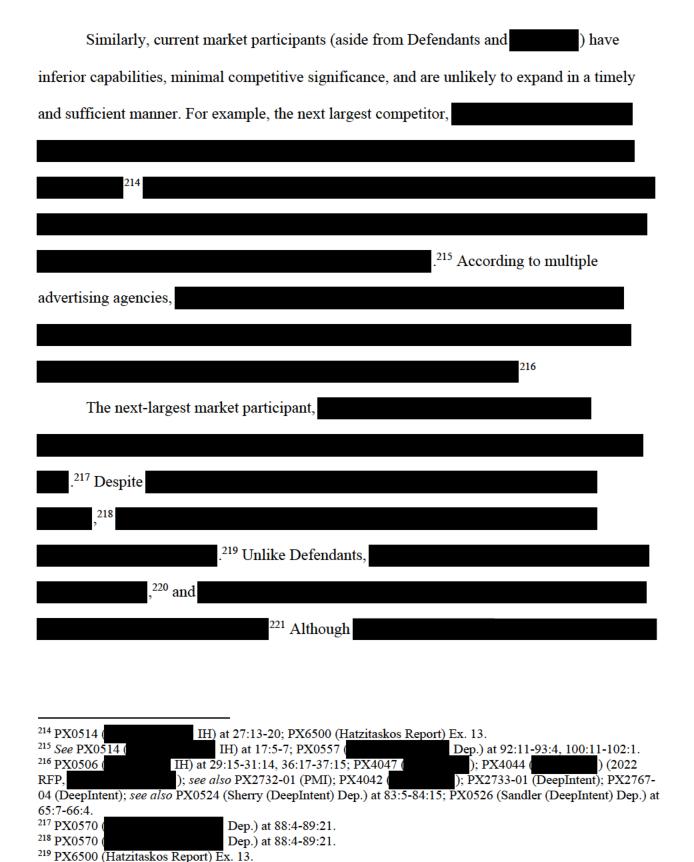


²¹⁰ PX0511 (IH) at 44:13–45:12.

211 See PX4170 ().

212 PX0009 ¶¶ 3–5 (Decl.); PX0010 ¶¶ 2–4 (Decl.); PX0007 ¶¶ 6–7 (Dep.) at 96:21–97:4; id. at 91:15–92:3.

213 PX0571 Dep.) at 123:6-14; id. at 152:23-154:5.



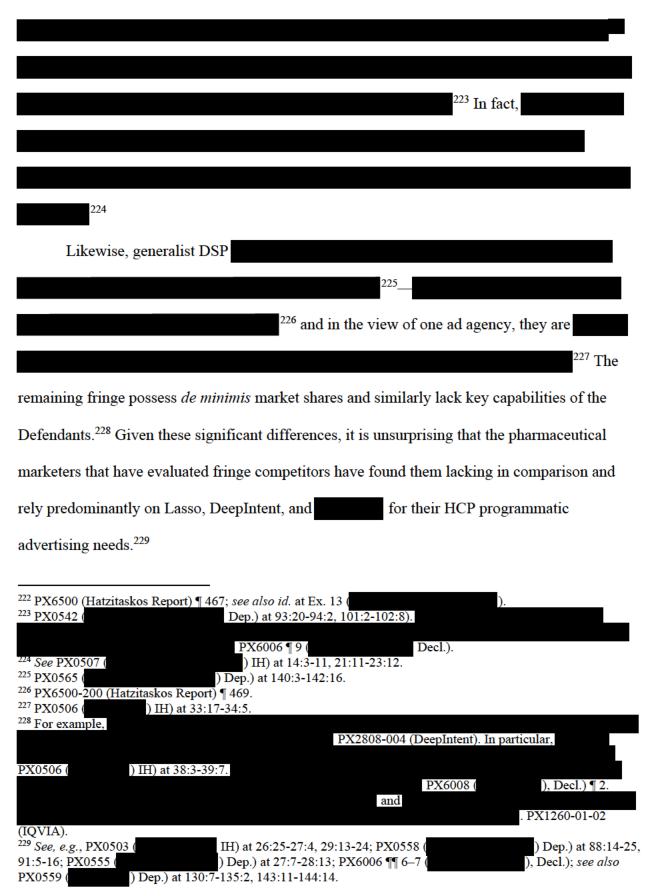
⁴⁷

Dep.) at 109:6-10.

IH) at 35:10-13; PX0570 (

²²⁰ PX0502 (

²²¹ PX1431-003 (IQVIA).



b. Efficiencies

Defendants offer a blanket assertion that the proposed acquisition "will result in substantial efficiencies," but no court has held that efficiencies claims could immunize an otherwise anticompetitive merger. See Penn State Hershey Med. Ctr., 838 F.3d at 347-48; FTC v. Advoc. Health Care, 2017 WL 1022015, at *12 (N.D. Ill. Mar. 16, 2017) (explaining that an efficiencies "defense has never been sanctioned by the Supreme Court"). Even assuming the efficiencies defense is cognizable under the Clayton Act, Defendants fall far short of demonstrating that their asserted efficiency claims are "verif[iable] by reasonable means the likelihood and magnitude of each asserted efficiency," H&R Block, 833 F. Supp. 2d 36 at 89, as Defendants' executives have admitted that their efficiency claims amount to little more than speculation. 231

B. THE EQUITIES FAVOR A PRELIMINARY INJUNCTION

Although the second step in determining whether to grant preliminary relief involves consideration of the equities, *Lancaster*, 434 F. Supp. at 1096, "[n]o court has denied relief to the FTC in a [Section] 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits." *FTC v. ProMedica Health Sys., Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at *60 (N.D. Ohio Mar. 29, 2011). "The equities to be weighed are not, however, the usual equities of private litigation" but public equities. *FTC. v. Food Town Stores, Inc.*, 539 F.2d 1339, 1343 (4th Cir. 1976); *see also FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 75-76 (D.D.C. 2009) (citing

²³⁰ Def. IQVIA's Answer at 18 (¶ 6), Affirmative Defense No. 6, ECF No. 58; Def. PMI's Answer at 27 (¶ 6), Affirmative Defense No. 6, ECF No. 72.

²³¹ PX0548 (Margolis (IQVIA) Dep.) at 48:14-50:19, 51:18-52:6, 60:11-61:24, 69:14-70:9, 88:13-90:8, 116:10-15; PX0525 (Sachs (IQVIA) Dep.) at 25:15-22); PX0530 (Lin (IQVIA) Dep.) at 170:3-8; PX0510 (Rice (IQVIA) Dep.) at 101:22-102:1 ().

FTC v. Whole Foods Mkt. Inc., 548 F.3d at 1028, 1041 (D.C. Cir. 2008)) ("Only 'public equities' that benefit consumers can override the FTC's showing of serious questions on the merits.").

The paramount public equity favoring injunctive relief is the "public interest in effective enforcement of the antitrust laws," *Heinz*, 246 F.3d at 726, as congressional concern for antitrust enforcement was the genesis of Section 13(b). *Whole Foods*, 548 F.3d at 1035 (*citing Heinz*, 246 F.3d at 726). Allowing this merger to close before the administrative proceeding is completed would cause immediate harm. IQVIA would be free to "scramble the eggs" by integrating DeepIntent, accessing all of DeepIntent's sensitive trade secrets and business information, laying off employees, and approaching customers as a unified dominant provider. Any harm that customers suffer in the interim would be irreversible. The inherent difficulties of divesting integrated assets after a merger has been consummated also weigh in favor of injunctive relief. *Whole Foods*, 548 F.3d at 1034; *accord FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n.5 (1966). Without preliminary relief, "[i]f the acquisition is allowed to proceed but is later found to be violative of the antitrust laws, divestiture will be required. At best, divestiture is a slow, cumbersome, difficult, disruptive and complex remedy." *Lancaster*, 434 F. Supp. at 1096.

In contrast, Defendants can claim only private harm from delaying consummation of the merger. But a "risk that the transaction will not occur at all," by itself, is a private consideration that cannot alone defeat the preliminary injunction." *Whole Foods*, 548 F.3d at 1041 (citing *Heinz*, 246 F.3d at 726). To protect interim competition and preserve the Commission's ability to order effective relief, the equities strongly favor preliminary relief.

IV. CONCLUSION

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

Dated: October 25, 2023 Respectfully submitted,

/s/ Jennifer Fleury

Jennifer Fleury Jordan Andrew Stephanie Bovee Habin Chung Lisa DeMarchi Sleigh Yan Gao Cory Gordon Christopher Lamar Wade Lippard Jessica Moy Christina Perez Michelle Seo Varnitha Siva Anjelica Sarmiento Jay Tymkovich Lily Verbeck

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 25, 2023, I electronically filed a true and correct copy of the foregoing document using the United States District Court for the Southern District of New York CM/ECF System.

I FURTHER CERTIFY that I served the foregoing document on the following counsel via FTP:

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