Question 2. The Visa/Plaid Merger

(*Rely only on the facts stated in this problem and your general knowledge. I have added some background and simplified the allegations without losing the essence of the claim.*)

You are an associate in Able & Baker LLP. Patty Hewes, a partner in the firm, has asked you to prepare a memorandum analyzing the possible merits of a complaint just filed by the Department of Justice alleging that the acquisition by the firm's client Visa, Inc. of Plaid Inc. would violate Section 7 of the Clayton Act.[1] In particular, Ms. Hewes would like you to identify possible ways to refute the elements of the DOJ's prima facie case as well as spot any other defenses Visa might raise. In each case, Ms. Hewes also would like you to identify the most important facts that would need to be developed to test whether the defense will be meritorious.

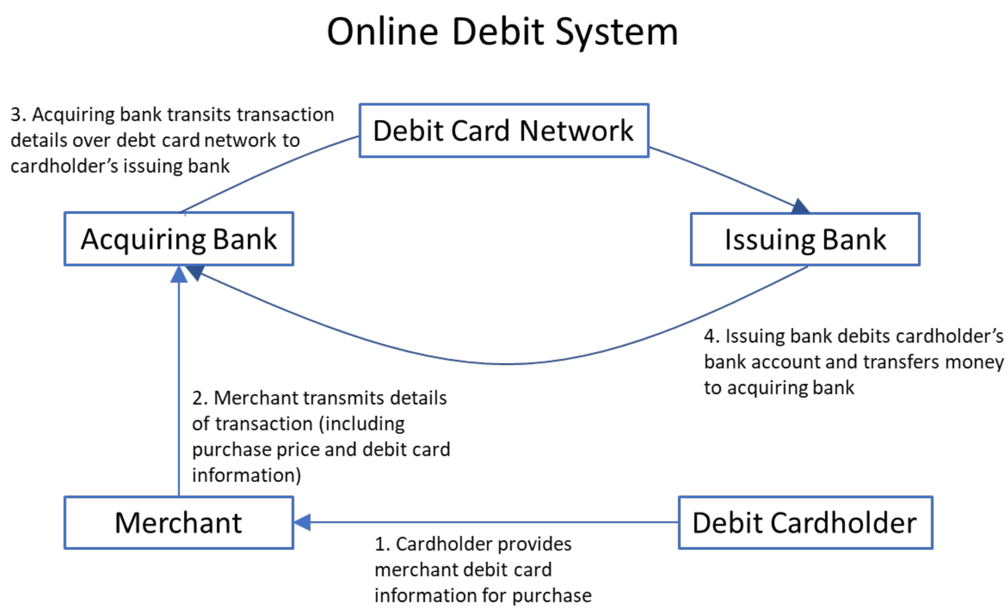
To help you get started, Ms. Hewes has asked another associate to summarize the background of the transaction and the factual allegations pertaining to each element of the DOJ's Section 7 claim. You may take the background facts as given and not in dispute, but Ms. Hewes reminds you that allegations in the complaint are just that—allegations. They are subject to refutation by evidence of contrary facts.

The background

Unlike a credit card, which actually extends credit by the card issuer to the cardholder, a debit card is a payment card that deducts money directly from a consumer's checking account to pay for a purchase. Debit cards, which are issued by the cardholder's bank, may be used to pay for consumer-to-business ("C2B") purchases just as a credit card. There are three types of debit card services in the United States: (1) *online debit cards*, which require an electronic authorization from the cardholder's bank of every transaction and the debits are reflected in the user's account immediately; (2) *offline debit cards*, which are authorized by the cardholder's signature, may be subject to a daily limit, and usually require one to three days to be reflected on users' account balance; and (3) *digital wallets*, such as PayPal, Apple Pay, or Google Pay, which require the consumer to deposit money in an account maintained by the service and which the services draw upon when paying the merchant. In the United States, online debit cards are by far the most popular.

Online debit cards require the merchant to use an online debit network that connects to the debit cardholder's bank to authorize, clear, and settle online debit transactions. Once the consumer's issuing bank authorizes the transaction, the debit network also guarantees the deposit of funds to the merchant's bank. Debit card networks do not issue cards directly to consumers or establish card-accepting services with merchants. Rather, debit card network typically contracts with the acquiring and issuing banks, which in turn contract respectively with merchants and consumers. Each issuing bank contracts with one debit card network to issue its debit cards, and debit card networks bid for these multiyear exclusive contracts.

[1] The complaint also alleges that the acquisition would constitute an act of unlawful monopolization under Section 2 of the Sherman Act. Another associate is analyzing that claim, so you should focus solely on the Section 7 claim.



Visa is a global payments company that operates the largest online debit network in the United States. Visa has a market share of online debit services of 70 percent by transaction volume. Bank of America, Wells Fargo, and most but not all Chase debit cards use the Visa online debit system. In 2019, Visa earned over $4 billion from its debit business, including approximately $2 billion from online debit.

MasterCard operates the second-largest online debit system, with a share of 25 percent by transaction volume. Citibank and Truist (SunTrust and BB&T), respectively the fourth and sixth largest banks in the country, use the MasterCard debit system.

Table 1
Largest U.S. Commercial Banks
(by domestic assets)

Rank	Bank	Domestic Assets (Mil $)	Share	Debit System
1	Bank of America	2,163,962	12.4%	Visa
2	JPMorgan Chase	2,057,019	11.7%	Visa*
3	Wells Fargo	1,760,451	10.1%	Visa
4	Citibank	985,494	5.6%	MC
5	U.S. Bank	525,256	3.0%	Visa
6	Truist	493,957	2.8%	MC
7	PNC	451,002	2.6%	Visa
8	TD Bank	383,967	2.2%	Visa
9	Capital One	363,706	2.1%	MC
10	Bank of New York	236,430	1.4%	MC
	U.S. total domestic	17,512		

* The Chase Freedom Flex operates on the MasterCard debit system
Source: Federal Reserve Statistical Release, Large Commercial Banks (June 30, 2020), https://www.federalreserve.gov/releases/lbr/current/default.htm

Debit card networks charge two types of fees to merchants: (1) *network fees* to process the transaction, and (2) *interchange fees* that the network pays to the issuing bank. Interchange fees paid to large commercial banks are regulated by federal statute;[2] network fees are not regulated. Part of the bidding by debit card networks to obtain contracts with commercial banks is the amount of the interchange fee the banks will receive for debit transactions using their cards.

There exist smaller debit networks (including Accel, Star, NYCE, and Pulse) that operate similarly to the Visa and MasterCard debit networks. These networks lack scale, which makes it difficult for them to bid to be the network for a commercial bank's debit card.

From a consumer's perspective, *offline debit cards* operate much like credit cards, but with much faster clearance times. Like credit cards, offline debit card transactions are signature-based, but unlike credit cards, the consumer's bank account is debited one or two days after the transaction. There are two offline debit card networks, one run by Visa (called "Visa Check Card") and the other by MasterCard ("MasterMoney"), which essentially piggyback off the card associations' credit card networks. Unlike online debit, offline debit cards do not allow the consumer to obtain cash back at the point of sale.

Digital wallets provide another means of paying merchants. Money can be deposited in the digital wallet prior to any transactions or an individual's bank account or credit card can be linked to the digital wallet to be drawn upon as needed. Digital wallets may be either device-based or internet-based. Device-based digital wallets, such as Apple Pay or Samsung Pay, use near field communication (NFC) technology to allow users to pay for purchases by waving their smartphone or other NFC-capable device near a contactless reader. Internet-based digital wallets, such as PayPal or Google Wallet, enable payments to participating merchants when a customer authorizes the service to make the payment.

An emerging payments competitor to the Visa and MasterCard debit networks are so-called "*direct debit*" or "*pay-by-bank*" debit. Pay-by-bank is a form of online debit that uses a consumer's online bank account credentials (i.e., a consumer's online banking username and password) to identify and verify the user, bank, and account number and balance. Using this authorization, pay-by-bank debit services can complete the transfer of funds to the merchant using the Automated Clearing House ("ACH"), a low-cost funds transfer facility run by the Federal Reserve and The Clearing House (owned by a consortium of banks). Delivery of ACH transfers can take several business days, but emerging "payment initiation services" ("PIS") can reliably signal a merchant that a payment has been initiated, thereby giving the merchant comfort to complete a transaction and release the goods or services to the consumer in real time.

Plaid, Inc. is a financial data aggregator. Founded in May 2013, Plaid provides the technology and software that enables financial technology ("fintech") applications to collect, with the consumer's permission, a consumer's financial data from her financial institutions. The Plaid platform allows companies to create financial services apps without having to build out a tool

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[2] Dodd–Frank Wall Street Reform and Consumer Protection Act § 1075. Pub. L. No. 111–203, § 1075, 124 Stat. 1376, 2068 (2010) ("Durbin amendment") (codified at 15 U.S.C. § 1693o-2). The Durbin amendment was intended to lower the cost to consumers of using debit cards. While the Durbin amendment did cut the interchange fee paid to large banks roughly in half, one study showed that the banks responded by reducing the availability of fee-free current accounts, more than doubling the minimum monthly holding required on fee-free current accounts, and doubling average monthly fees on (non-free) current accounts. *See* Todd J. Zywicki, Geoffrey A. Manne & Julian Morris, *Price Controls on Payment Card Interchange Fees: The US Experience* (George Mason Law & Economics Research Paper 14-18 (rev. Jan. 14, 2020)).

that connects apps to the app user's bank accounts, something Plaid's founders themselves lacked when they set out to build a fintech startup years ago. When a consumer signs up with a Plaid-supported fintech app and provides her bank log-in credentials, Plaid uses those credentials to access the consumer's financial institution and obtain the consumer's financial data, which it transmits back to the fintech app. The data Plaid retrieves ranges from basic identifying information, such as account and routing numbers, to detailed transaction history and close to real-time account balance information. This data allows fintech apps to offer personal financial management tools, manage bill payments or other expenses, and support loan underwriting. A fintech app also could use the Plaid-accessed data, again with the consumer's permission, to transfer the consumer's funds to a payee through the ACH network. Plaid has a compound annual growth rate of 100% in user accounts since 2015.[3] In 2019, Plaid doubled the number of fintech apps it supports, and it expanded beyond the U.S. to the U.K., Spain, France, and Ireland. Today, one in four people with a U.S. bank account have used Plaid to connect to more than 2,600 fintech developers across more than 11,000 financial institutions through apps such as PayPal's Venmo, Acorns, Betterment, Chime, and Transferwise. When a user sets up a Venmo account, for example, it is Plaid that enables the user to link their bank account to their Venmo account. Plaid has a network of more than 11,000 U.S. financial institutions and connects to over 200 million consumer bank accounts through its existing services.

On January 13, 2020, Visa agreed to buy Plaid for $5.3 billion. This is almost double the company's valuation of $2.65 billion in late 2018 when it raised its most recent round of financing. The Plaid transaction would be Visa's second-largest transaction and, at a purchase price of 50X revenues, is one of the highest price-revenue multiples in recent history for a private company. Plaid will continue to operate as a separate business unit run by the current CEO and co-founder, Zach Perret, who will report to Visa's Chief Product Officer.[4]

Visa says that its purpose in acquiring Plaid is two-fold. First, Plaid works with the vast majority of the largest fintech apps in the U.S. With the acquisition, Visa will get access to an important, ballooning base of customers to which it can sell additional payment services. In 2019, 75 percent of the world's internet-enabled consumers used a fintech application to initiate money movement versus 18 percent in 2015. Plaid has been a leader in enabling this connectivity at scale. Second, Visa has a global network that is unparalleled in financial technology, with millions of customers across 200 countries. That will make it much easier for Visa to take Plaid global.[5] Visa's CFO reported that he expects the acquisition will be accretive to revenue immediately.[6]

Notably, in the investor call and in the trade and newspaper reports at the time of announcement, no analyst or financial reporter raised the question of whether the deal presented an antitrust issue.

Gravamen of the DOJ complaint

The DOJ alleges that Visa's acquisition of Plaid likely substantially lessen competition in the online debit market in the United States by eliminating "nascent" competition between Visa and Plaid, resulting in higher prices and reduced service, quality, choice, and innovation than would

3 *See* Visa, Inc. Transcript: Investor Call 3-4 (Jan. 13, 2020).
4 Visa, Inc., Investor Presentation: Visa's Acquisition of Plaid (Jan. 13, 2020).
5 *See* Visa, Inc. Transcript: Investor Call 4 (Jan. 13, 2020).
6 *Id*. at 6.

be the case if the acquisition did not occur. According to the complaint, Visa's intense interest in eliminating Plaid as a future competitor is manifest in its agreement to pay an "extraordinarily" high purchase price. The complaint further alleged that the Visa CEO said that Visa needed to buy Plaid as an "insurance policy to protect our debit biz in the US." In making the case to buy Plaid to Visa's Board of Directors, Visa's senior leadership estimated a "potential downside risk of $300-500M in our US debit business" by 2024 should Plaid fall into the hands of a rival.

In essence, the DOJ complaint alleges that Visa is a dominant firm in online debit transactions, with debit cards operating on its network accounting for a 70% share of online debit transaction by transaction volume, and that MasterCard (with a 25% share) and smaller debit networks have been unsuccessful in materially reducing Visa's dominance. Moreover, because of its dominant share, merchants have no choice but to accept Visa-network debit cards. As the result of this dominance, Visa has been able to charge merchants supracompetitive network fees, which in turn are passed on to customers in the form of higher prices for the merchant's goods and services.

The complaint further alleges that Visa's dominance is protected by high barriers to entry and expansion, since new challengers would need millions of connections with customers to attract thousands of merchants and thousands of merchants to attract millions of customers.

Finally, the complaint alleges that Plaid is a highly innovative company that is "uniquely positioned to surmount these barriers and undermine Visa's monopoly in online debit services." Although the complaint acknowledges that Plaid does not compete today with Visa debit for C2B transactions, it has the customer base to permit fintech companies to develop apps that would compete directly with Visa debit. Moreover, the DOJ alleges that Plaid is developing a new pay-by-bank debit service by the end of 2021 that "would compete against Visa's online debit services." The complaint concludes that "[c]ompetition from Plaid likely would drive down prices for online debit transactions, chipping away at Visa's monopoly and resulting in substantial savings to merchants and consumers," and that Visa is acquiring Plaid in part to eliminate that competitive threat.

Relevant product market: Online debit transactions

This market includes traditional online debit services and emerging pay-by-bank debit services. It is defined by services that enable payments authorized online that are made from directly existing funds in a consumer's bank account to a merchant's bank account. Credit card payments are excluded from this market because they draw from a consumer's line of credit and not from the consumer's bank account and because many consumers do not qualify for a credit card and must pay from their bank account with a debit card. Credit cards also cost the merchant more on a given transaction than debit cards. ACH payments are excluded because the consumer must enter her bank account and routing information separately for each merchant and because it takes several business days to determine whether a payment is successful. Cash is excluded from the market because cash cannot be used for online payments.

Relevant geographic market: The United States

Both Visa and Plaid treat the United States as a distinct geographic market. Visa has separate rules governing merchant acceptance and separate uniform pricing for debit transactions in the United States, and federal law and regulations governing online debit transactions operate on a national level.

Likely anticompetitive effect: Higher prices and reduced innovation

Plaid's entry into online pay-by-bank debit services would increase competition and erode Visa's dominance by giving merchants and consumers cheaper, a more innovative alternative to Visa's online debit services and would likely result in lower prices and higher volumes of online debit transactions. Unlike MasterCard and other debit card network services that must compete with Visa for a bank's debit card contract, as a pay-by-bank service Plaid would compete with Visa debit for each transaction during the checkout process. To reduce losses to Plaid and defend its online debit volume, Visa would likely lower its prices.

Visa's acquisition of Plaid also would eliminate a disruptive and innovative competitor. In the absence of the acquisition, Plaid, on its own or in combination with a company other than Visa, "would continue to act as a disruptive competitor, developing and launching new, innovative solutions in competition with Visa." In particular, if Visa acquires Plaid, Visa would have an incentive to raise the price, degrade or delay, or terminate altogether Plaid's development of its pay-by-bank debit service.

Visa's response

> "Visa strongly disagrees with the Department of Justice (DOJ), whose attempt to block Visa's acquisition of Plaid is legally flawed and contradicted by the facts. This action reflects a lack of understanding of Plaid's business and the highly competitive payments landscape in which Visa operates. The combination of Visa and Plaid will deliver substantial benefits for consumers seeking access to a broader range of financial-related services, and Visa intends to defend the transaction vigorously.
>
> "As we explained to the DOJ, Plaid is not a payments company. Visa's business faces intense competition from a variety of players – but Plaid is not one of them. Plaid is a data network that enables individuals to connect their financial accounts to the apps and services they use to manage their financial lives, and its capabilities complement Visa's. Together, Visa and Plaid will deliver better digital experiences and more choice for consumers in managing their money and financial data. Visa is confident that this transaction is good for consumers and good for competition."[7]

Plaid declined to comment.

[7] Press Release, Visa Inc., Visa Statement on Planned Acquisition of Plaid (Nov. 5, 2020).

Merger Antitrust Law
Fall 2020

EXAM QUESTION #2: THE VISA/PLAID MERGER

INSTRUCTOR'S ANSWER

MEMORANDUM OF LAW VERSION

Note: This answer is much longer, more detailed, and more complete than anything I would expect for a writing assignment, much less a timed exam answer. I prepared this as a teaching tool to explain the law and the reasoning in detail rather than as a model exam answer.

You have asked me to prepare a memorandum analyzing the possible merits of a complaint just filed by the Department of Justice alleging that the acquisition by the firm's client Visa, Inc. of Plaid Inc. would violate Section 7 of the Clayton Act. In particular, you would like me to identify possible ways to refute the elements of the DOJ's prima facie case as well as identify other defenses Visa might raise. In each case, you have asked that identify the most important facts that would need to be developed to test whether the defense will be meritorious.

On January 13, 2020, Visa agreed to buy Plaid for $5.3 billion. Visa is a global payments company that operates the largest online debit network in the United States. Visa has a market share of online debit services of 70 percent by transaction volume. Plaid, Inc. is a financial data aggregator, founded in May 2013, that provides technology and software that enables financial technology ("fintech") applications to collect, with the consumer's permission, a consumer's financial data from her financial institutions.

The DOJ alleges that Visa's acquisition of Plaid likely will substantially lessen competition in the online debit market in the United States by eliminating "nascent" competition between Visa and Plaid and will result in higher prices and reduced service, quality, choice, and innovation than would be the case if the acquisition did not occur. In essence, the DOJ complaint alleges that Visa is a dominant firm in online debit transactions, with debit cards operating on its network accounting for a 70% share of online debit transactions by transaction volume, and that MasterCard (with a 25% share) and smaller debit networks have been unsuccessful in materially reducing Visa's dominance or market power. Moreover, because of Visa's dominant share, merchants have no choice but to accept Visa-network debit cards. As the result of this dominance, Visa has been able to charge merchants supracompetitive network fees, which in turn are passed on to customers in the form of higher prices for the merchant's goods and services. The complaint further alleges that high barriers to entry and expansion protect Visa's dominance since new challengers would need millions of connections with customers to attract thousands of merchants and thousands of merchants to attract millions of customers. Finally, the complaint alleges that Plaid is a highly innovative company that is "uniquely positioned to surmount these barriers and undermine Visa's monopoly in online debit services." Although the complaint acknowledges that Plaid does not compete today with Visa debit for consumer-to-business ("C2B") transactions, it has the customer base to permit fintech companies to develop apps that would compete directly with Visa debit. Moreover, the DOJ alleges that Plaid itself is developing a new pay-by-bank debit service by the end of 2021 that "would compete against

Visa's online debit services." The complaint concludes that "[c]ompetition from Plaid likely would drive down prices for online debit transactions, chipping away at Visa's monopoly and resulting in substantial savings to merchants and consumers," and that Visa is acquiring Plaid in part to eliminate that competitive threat.

There are a number of possible ways to refute the elements of the DOJ's prima facie Section 7 case as well as several other defenses to explore. To begin to frame the analysis, I should note that the transaction is not horizontal. As the complaint acknowledges, Visa and Plaid do not currently compete with one another for consumer-to-business ("C2B") transactions.[1] Plaid develops software for financial data aggregation; it does not currently offer any C2B transactions service. Nor is there any allegation that Plaid is a market participant because it is a "rapid entrant" that would very likely and quickly produce and sell a C2B transactions service in the event of a SSNIP without incurring significant sunk costs. Rather, the allegations sound in (1) the elimination of Plaid as an actual potential entrant into the online debit market, and (2) the vertical foreclosure of fintech companies that, in the absence of the acquisition, would use Plaid software to develop online debit services that would compete with Visa debit. The elimination of perceived potential competition and other theories of vertical harm are not alleged or implied by the complaint.[2]

I see ten avenues to explore to defeat the Section 7 claim:

The relevant market

1. The alleged relevant product market in which Visa participates is improperly defined and should either be limited to debit card transactions or expanded to include credit card transactions, if not also electronic payment services, cash, and checks.

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[1] **Note to students:** Some of you developed arguments that Visa and Plaid were not currently selling services in the same relevant market. There was no allegation in the complaint, however, that said that they are. Indeed, the hypothetical is explicit that "the complaint acknowledges that Plaid does not compete today with Visa debit for C2B transactions." Unless Plaid is a nonselling participant in the alleged relevant market, the transaction would not be horizontal and the *PNB* presumption would not be applicable nor need to be addressed. While not alleged in the complaint, the DOJ could argue that Plaid is a current participant in the alleged relevant market because of the new service the DOJ alleges will is developing, but for the DOJ to develop this as a horizontal case it would have to ascribe a future market share to Plaid. Given the burden on the DOJ of providing not only that Plaid, if it remained independent, would create a new pay-by-bank product but also of proving a future market share sufficiently high to yield a strong *PNB* presumption, it is probably better for the DOJ to try the case under an actual potential competition or vertical foreclosure theory and not challenge the transaction as a horizontal merger.

[2] **Note to students**: Be sure that you understand the procedural posture of the hypothetical in writing your answer. The hypothetical involved *allegations* in a complaint, not facts or even evidence. Just because a plaintiff alleges something is true (and has some evidence to support the allegation to avoid Rule 11 problems), the defendant can still attack the truth of the allegations with other evidence. Some of you analyzed the hypothetical as if the allegations were facts and did not look for ways to dispute any of the allegations. Moreover, the factual allegations in a complaint need only be sufficient to raise a plausible claim of a violation; they do not need to be complete. Some of you equated the absence of particular factual allegations as an absence of evidence and concluded that the DOJ could not discharge its burden of proof under *Baker Hughes*. But the DOJ is free to offer evidence of facts not alleged in but consistent with the complaint. What you needed to do was identify what evidence required to refute what the DOJ needed to show to win under a particular theory of the case. So, for example, it is not sufficient to say that the DOJ had only summarily alleged that Plaid would enter the relevant market by the end of 2021 and therefore conclude that the DOJ could not show that Plaid was an actual potential entrant. You needed to identify what evidence you should be seeking to show that Plaid was not in fact an actual potential entrant despite the DOJ's allegation that it was.

2. The relevant market is competitive today and will remain so postmerger.

The elimination of actual potential competition

3. Plaid is not an actual potential entrant into the online debit market.
4. Even if Plaid is an actual potential entrant, it is not unique: Other companies offer financial aggregation services similar to Plaid that they could use to enter the market or enable fintech companies to enter the market.
5. Even if Plaid is an actual potential entrant, its entry is too uncertain in timing, magnitude, and competitive effect to predicate an anticompetitive elimination of actual potential competition.

Vertical foreclosure

6. Visa has no incentive to foreclose rivals from using Plaid
7. Plaid is not unique or necessary to provide third-party fintech companies with the technology or connections to create a pay-by-bank service
8. It is speculative whether fintech companies would enter into pay-by-bank services using Plaid services even if Plaid remained independent.
9. If one or more fintech services would enter into pay-by-bank services using Plaid technology in the absence of the acquisition, their entry (individually or collectively) is too uncertain in timing, magnitude, and competitive effect to predicate an anticompetitive harm.

Efficiencies

10. The consumer benefits from the transaction outweigh any possible anticompetitive effect.

Given the nature of the services, I do not see any prospect for refuting the allegation that the relevant geographic market is the United States. Moreover, since the transaction is not horizontal, there is no role for the *Philadelphia National Bank* presumption and hence no need to address it.

Section 7 of the Clayton Act

Section 7 of the Clayton Act prohibits mergers and acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. By its terms, a Section 7 violation contains three essential elements: (1) a relevant product market ("line of commerce"), (2) a relevant geographic market ("section of the country"), and (3) a reasonably probable anticompetitive effect in the relevant market (that is, the combination of the relevant product market and the relevant geographic market). The plaintiff's failure to prove any of these essential elements requires dismissal of the claim.

The Relevant Market

1. Online debit is not the relevant product market

The complaint alleges that the relevant product market is online debit transactions, which the DOJ alleges include traditional online debit services and emerging pay-by-bank debit services. The complaint defines the market as services that enable payments authorized online that are made from directly existing funds in a consumer's bank account to a merchant's bank account. The complaint, however, excludes ACH payments on the grounds that the consumer must enter her bank account and routing information separately for each merchant and that it takes several business days to determine whether a payment is successful. This appears to qualify further what pay-by-bank services are in the relevant market since ACH payments made online otherwise fit the complaint's definition of an online debit transaction. Given the reasons for the ACH exclusion, the DOJ's definition more narrowly appears to be services that (a) enable payments authorized online that are made from directly existing funds in a consumer's bank account to a merchant's bank account, (b) do not require the entry of the purchaser's bank information for each merchant, and (c) quickly informs the merchant that payment has been made (which debit cards do not do) or—more likely what the DOJ means—guarantees payments upon authorization (which debit cards do). We should investigate what "pay-by-bank services" fit this definition and, to the extent they exist, how successful they have been, and what barriers exist that have impeded their expansion. It may be that the DOJ has defined a product that does not exist today, which, if true, should undermine the credibility of the DOJ's complaint somewhat. It also defines some of the attributes that a Plaid product or a Plaid-enable fintech product must have under the DOJ's theory.

The idea behind the DOJ's complaint appears to be that merchants or customers would shift materially from debit cards in general (and Visa network debit cards in particular) to Plaid if Plaid remained independent and allowed to develop its own pay-by-bank service or to third-party fintech companies that would develop their own pay-by-bank service using Plaid technology. This raises two related questions about market definition: Are debit cards sufficiently unique that the relevant market in which Visa participates should be limited to traditional debit card services? Alternatively, if the relevant market includes pay-by-bank debit services, should it be expanded to include at least credit cards, if not also electronic payment services, cash, and checks?[3]

The law. Pleading and proof of a relevant market are required for every alleged Section 7 violation. A plaintiff's failure to prove a relevant product market requires the Section 7 claim to be dismissed.

There are two complementary legal approaches to product market definition: (1) the *Brown Shoe* "outer boundaries" and "practical indicia" criteria, and (2) the hypothetical monopolist test.

Under *Brown Shoe*, the "outer boundaries" of the relevant 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 Co. v. United States*, 370 U.S. 294, 325 (1962). Moreover, "within this broad market, well-defined submarkets may exist which, in themselves, constitute

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[3] Another consumer of Visa's debit card services are banks that contract with Visa to provide network support for the debit cards the bank issues to its account holders. There is nothing in the complaint that suggests that the DOJ is alleging that banks will switch to Plaid or a Plaid-enabled fintech pay-by-bank service to displace the bank's debit cards, although that is at least theoretically conceivable. I will not address this possibility in this memorandum.

product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id*. (internal citations and footnotes omitted). The original purpose of the *Brown Shoe* "practical indicia" was to enable the finding of relevant (sub)markets within larger markets defined by the "outer boundaries" test. Modern courts, however, do not view submarkets as any different from markets and regard the *Brown Shoe* "practical indicia" as factors probative of reasonable interchangeability of use and high cross-elasticity of demand.

The "hypothetical monopolist test," which was introduced by the Merger Guidelines in 1982 and now adopted in one form or another by the courts, deems a product grouping ("candidate market") as a relevant market if a hypothetical monopolist of all products in the candidate market could profitably raise the prices of all products uniformly by a small but significant nontransitory price ("SSNIP"), usually taken to be 5% for one year. Under the 2010 Merger Guidelines, the relevant market need not be the smallest market that satisfies the hypothetical monopolist test. Most recent courts that have addressed the issue have adopted this principle.[4]

Application. Both *Brown Shoe* and the Merger Guidelines look to measures of demand-side substitutability—whether cross-elasticity of demand, diversion ratios, or reasonable interchangeability of use—as the defining characteristic of a relevant market. Products within a relevant market exhibit significant demand-side substitutability with each other and much less substitutability with products outside of the market. The DOJ's alleged market requires debit card services and pay-by-bank services to exhibit high substitutability with one another and much less substitutability with other payment services, such as credit card services, electronic payment services, cash, and checks.[5]

But from the perspective of both merchants and purchasers, it is not apparent that debit card services and pay-by-bank services exhibit a high degree of substitutability with one another.

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[4] **Note to students:** In your boilerplate, be sure that it is either neutral as to the identifies of the merging parties or that you customize your answer to name the parties at hand. References to parties in other deals (e.g., MGC and Bell) undermine the credibility of the answer. I should note that this is a problem in practice as well when attorneys reuse previously written material. Best to learn this lesson now and not when the partner—or even worse, the client—catches the error.

[5] **Note to students**: You may be interested to know that the 2020 Diary of Consumer Payment Choice study by the Cash Product Office of the Federal Reserve Board from the following share of payment instrument usage for 2019:

Instrument	Share
Cash	26%
Checks	6%
Credit	23%
Debit	28%
Prepaid	3%
Electronic	11%
Other	3%

Laura Kim, Raynil Kumar & Shaun O'Brien, Fed. Res. Bank of San Francisco, Cash Payment Office, Findings from the 2020 Diary of Consumer Payment Choice (July 2020), https://www.frbsf.org/cash/files/2020-findings-from-the-diary-of-consumer-payment-choice-july2020.pdf. There is no reason why you should know this for the exam.

Indeed, the *Brown Shoe* "practical indicia" suggests that debit card services should be isolated in their own relevant market. Although this would need confirmation, I suspect that the industry and the public recognize debit card services as a separate economic entity, and traditional debit cards have peculiar characteristics and uses, distinct prices (interchange and network fees), and specialized vendors (the commercial banks) apart from other payment products generally and pay-by-bank products in particular. Conversely, I suspect that the industry and the public recognize pay-by-bank products as a separate economic entity, and pay-by-bank products have peculiar characteristics and uses, distinct prices, and specialized vendors apart from other payment products generally and debit card services in particular.

Moreover, if prices of debit card services to merchants were to increase by a small but significant nontransitory amount (a "SSNIP"), I suspect that few if any merchants would switch to a pay-by-bank service as a partial or complete replacement for debit card transactions. Indeed, I have encountered few merchants that ask customers to use a different payment method unless the merchant does not take the customer's preferred payment method. For example, some merchants do not take American Express and so ask customers to use another payment mechanism, but I have only rarely experienced a merchant who takes American Express ask a customer to use another payment mechanism. I suspect that merchants believe that the loss of customer goodwill would outweigh any savings resulting from asking customers to switch to a different payment mechanism. This suggests a very low cross-elasticity in demand by merchants between debit card services and other payment services. A quantification of cross-elasticity of demand by merchants between debit card services and pay-by-bank and other payment services, including perhaps through a survey, should be explored as we prepare the defense. In the absence of good quantitative evidence, we should explore the possibility of a merchant survey to examine substitutability. Finally, we should retain an industry expert for an opinion on the substitutability of other payment services for debit card transactions.

Purchasers, on the other hand, do not pay for the use of their debit cards. Unless banks (or merchants) were to begin to impose fees for the use of a debit card, a purchaser who prefers this method of payment has no reason to switch. We should explore whether banks or merchants are considering imposing fees or other impediments on the use of debit cards.

If, however, traditional debit cards and pay-by-bank services are in the same market, then at least credit cards and perhaps other payment mechanisms should be included in the market as well. While the complaint defines the relevant product market as services that enable payments authorized online that are made directly from existing funds in a consumer's bank account to a merchant's bank account, it is not apparent that this feature factors meaningfully into the choice by merchants or purchasers as to which payment instrument they will use.

Merchants should not care whether the money for payment is withdrawn directly from the purchaser's bank account as long as the merchant is guaranteed payment. If so, merchants should prefer that customers substitute credit cards, which guarantee payment, rather than today's pay-by-bank instruments, which do not guarantee payment, if the purchaser chooses not to use a debit card. Moreover, almost all merchants are already equipped to accept credit cards as well as debit cards, whereas accepting pay-by-bank payments would require the merchant to install an additional acceptance system. Merchant willingness to accept pay-by-bank services should be part of the cross-elasticity studies and industry expert analysis.

As for purchasers, if for some reason they want to use something other than their debit card, I suspect that the most likely substitute is a credit card. I suspect that purchasers value merchant acceptance, low or no fees, convenience, and rewards in their choice of payment instruments. If so, then debit cardholders will likely find credit cards (wide merchant acceptance, low fees, convenience, and rewards) a better substitute to pay-by-bank instruments (low merchant acceptance, not convenient to use, no rewards). This may not be true for all purchasers—especially those who do not want or cannot qualify for a credit card—but these may be inframarginal rather than marginal customers. We need to investigate why purchasers use debit cards, the alternative payment mechanisms available for them to use, and the payment mechanisms they consider to be the closest substitutes to traditional debit cards.

Finally, to the extent that—contrary to my suspicion—payments must be made directly from existing funds in a consumer's bank account into the merchant's bank account, then checks are technically the closest substitutes to pay-by-bank services today. Pay-by-bank instruments are essentially electronic checks: rather than use a written document, the purchaser instructs its bank electronically to pay the merchant a certain amount of money. Like written checks, payment is not guaranteed at the time the electronic "check" is written but instead must wait for processing through the ACH. We should confirm this.[6,7]

2. The relevant market is competitive today and will remain so postmerger

Visa's acquisition of Plaid can violate Section 7 only if the effect of the acquisition "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. A common defense is to argue that the relevant market is competitive today and that the forces that make the market competitive premerger will ensure that the market remains competitive postmerger. We should certainly explore this argument, but it may be a difficult one to sustain. If the market is limited to debit card services or includes all online debit transactions as alleged by the DOJ, given Visa's high market share of around 70%, together with MasterCard's share of around 25%. Given the highly concentrated nature of the market, it is likely that the court will presume that the market is operating noncompetitively premerger. Even if the market were expanded to include credit card services, Visa and MasterCard again account for the bulk of these services. The resulting concentration in the broader market is likely .to be high enough for a court to presume that the market is operating noncompetitively premerger. Still, we should at least

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[6] One problem with including checks in the relevant market with debit card services is that debit card services are a two-sided platform, while check services may be deemed to be a one-sided platform. In *Amex*, the Supreme Court held in a nonprice vertical restraints case involving restrictions imposed by Amex on merchants accepting American Express cards that "[o]nly other two-sided platforms can compete with a two-sided platform for transactions." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018). In *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 137 (D. Del. 2020), *vacated*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020), the district court applied this rule to reject, as a matter of law, the inclusion of a one-sided service in the same relevant market as a two-sided service. Debit cards, by an easy analogy with credit cards, are a two-sided platform. If checks are found to be a one-sided service and the *Sabre* reasoning applies, then checks would be excluded from the relevant market containing debit card services.

[7] **Note to students:** Some of you sought to challenge the DOJ's relevant product market on the grounds that Visa and Plaid did not offer services that compete with one another. By itself, that is not sufficient. A relevant product market in which the anticompetitive effect allegedly will occur is required in all Section 7 claims, including those against potential competition and vertical transactions (where the merging parties do not compete against each other).

explore with the economists whether there is an argument that the relevant market—even as defined by the DOJ in the complaint—is competitive today and will remain so postmerger.

The Elimination of Potential Competition

The complaint does not allege that Plaid is currently a provider of online debit transactions. Rather, it only alleges that Plaid, in the absence of its acquisition by Visa, would develop a new pay-by-bank debit service by the end of 2021 that "would compete against Visa's online debit services." The theory of competitive harm here is that the acquisition would eliminate actual potential competition. The idea is that, in the absence of the acquisition, the potential entrant would have entered the market and its entry would improve the competitive performance of the marketplace.

Although the Supreme Court has reserved judgment on the elimination of actual potential competition, see *United States v. Marine Bancorporation, Inc*., 418 U.S. 602, 625, 639 (1974); *United States v. Falstaff Brewing Corp*., 410 U.S. 526, 537-38 (1973), lower courts, the FTC, and the 1984 DOJ Merger Guidelines recognize the elimination of actual potential competition as a viable theory of anticompetitive harm under Section 7. In addition to the acquired firm having decided to enter the market, the lower courts have created five additional requirements on an acquisition for it to give rise to the requisite anticompetitive effect for eliminating potential competition:

1. The relevant market must be operating noncompetitively prior to the acquisition. If the market is operating competitively, new entry cannot improve the market's competitive performance.
2. The putative actual potential entrant must be uniquely positioned to enter the market.
3. The putative potential entrant must have an "available feasible" means of entering the market.
4. But for the acquisition, the putative potential entrant would have entered the market "in the near future."
5. Assuming entry occurred, it must materially improve the competitive performance of the market.

Here, challenges to Plaid's decision to enter, uniqueness, timeliness, and competitive effect all are fruitful avenues of defense to pursue.

3. Even assuming that the relevant market is online debit transactions as the DOJ alleges, Plaid is not an actual potential entrant into this market

One requirement of the actual potential competition theory is that actual entry must occur "in the near future." There is no modern case law on when entry is sufficiently imminent, but if the firm has decided to enter the market and is currently executing plans to do so, that appears to be sufficient to satisfy the "near future¨ requirement regardless of when entry would actually occur. (This explains the prescription drug cases, where the firm is in Phase 3 clinical trials but actual entry remains some years away.)

Here, we should investigate whether Plaid has decided to enter the market. The complaint summarily alleges that Plaid will enter the market with a new pay-by-bank service by the end of 2021 but contains no detail about what decisions have been made, the contours of the product design, the state of development of the new product, what funds have been expended on development so far, what funds are committed to the product's future development, the product's anticipated release date, and Plaid's expectations for the product's penetration into the market. We should investigate what decisions have been made regarding the alleged new product to determine whether Plaid, in fact, is sufficiently committed to the project for it to be deemed an actual potential entrant.

Moreover, given the exclusion of online ACH services from the DOJ's relevant market, to qualify as an actual potential entrant into that market the Plaid product must have the following attributes: (a) enables payments authorized online that are made from directly existing funds in a consumer's bank account to a merchant's bank account; (b) does not require the entry of the purchaser's bank information for each merchant, and (c) quickly informs the merchant that payment has been made or guarantees payments upon authorization. If Plaid is considering creating a pay-by-bank service, we should investigate whether the product will have these qualifying attributes.

We should also explore the possibility that any claim Plaid might have made to create a new pay-by-bank service was simply a ruse to induce Visa to pay a higher acquisition price and did not reflect a serious effort to create such a service.[8]

4. Plaid is not uniquely situated to enter into an online debit transaction service

For courts to recognize the elimination of a firm as an actual potential entrant as anticompetitive, the potential entrant must be one of only a few firms equally capable of entering the market. In its 1984 Merger Guidelines, the DOJ stated:

> The Department is unlikely to challenge a potential competition merger if the entry advantage ascribed to the acquiring firm (or another advantage of comparable importance) is also possessed by three or more other firms. Other things being equal, the Department is increasingly likely to challenge a merger as the number of other similarly situated firms decreases below three and as the extent of the entry advantage over nonadvantaged firms increases.

U.S. Dep't of Justice, Merger Guidelines § 4.133 (rev. 1984). Although the FTC did not join the DOJ in either the 1982 guidelines or its 1984 revision, the uniqueness requirement—including the three-firm threshold—is consistent with the earlier case law and is likely to be followed today. The idea is that if other firms are similarly situated to the acquired firm as an actual potential entrant, then the acquisition will not reduce likely future competition because—if entry is profitable—another firm will enter the market in place of the target firm.

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8 **Note to students:** Some of you argued that Visa and Plaid were not currently in the same relevant market. *See supra* note 1. As I noted earlier, the DOJ did not allege that Visa and Plaid currently are in the same market. The DOJ did allege, however, that Plaid would enter the alleged online debt transactions market by the end of 2021. In Point 3, I suggest that Visa explore an argument that even if Plaid did create a pay-by-bank service it would not be in the DOJ's relevant market because it would lack one or more of the defining characteristics of the DOJ's market. One argument that probably will not work is that Visa's product is a two-sided platform and Plaid's pay-by-bank product is one-sided, and hence under *Amex* the two cannot compete with one another as a matter of law. If Plaid develops a product of the type the DOJ alleges, it will almost surely be deemed to be a two-sided platform.

Here, Plaid is a financial data aggregator. We should explore what other financial data aggregators exist that also have an ability to create a pay-by-bank service similar to the one the DOJ alleges Plaid would create in the absence of the acquisition. If there are more than three, as I suspect is the case, then we have the beginnings of a challenge to the uniqueness requirement.

Moreover, Plaid's technology—which is simply software—should be relatively easy for good programmers to emulate. The DOJ does not allege any unique or intellectual property-protected attributes to Plaid's software that other financial data aggregators do not or cannot emulate. We should investigate to confirm that this is the case. If there is ease of entry into Plaid's technology, this should also negate the uniqueness requirement.

The DOJ is likely to argue that Plaid is uniquely situated to enter into a pay-by-bank service because of the large number of Plaid's connections to user accounts and fintech companies. We should investigate the number of connections other financial aggregators have. Even if Plaid has a uniquely large number of connections, we can argue that the ability to grow into pay-by-bank services will depend on the service's attractiveness to merchants and purchasers. If a third-party financial data aggregator or fintech company were to create an equally attractive product, it should be able to grow at the same pace.

5. Even if Plaid is an actual potential entrant, its entry is too uncertain in timing, magnitude, and competitive effect to predicate an anticompetitive elimination of actual potential competition

Even if Plaid is an actual potential entrant, its entry is too uncertain in timing, magnitude, and competitive effect to predicate an anticompetitive elimination of actual potential competition Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect of the transaction "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. This requirement has two implications that are important here.
First, the Supreme Court has interpreted the "may be" language to require that there is a "reasonable probability, appear[ing] at the time of suit" that the putative anticompetitive effect will occur in the relevant market. *United States v. du Pont & Co.*, 353 U.S. 586, 589 (1957); *accord Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962) (holding that the government must show a "reasonable probability that the merger will substantially lessen competition"). While the government need not prove anticompetitive effects with "certainty," *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001), "proof of a mere possibility of a prohibited restraint or tendency to monopoly will not establish the statutory requirement that the effect of an acquisition 'may be' such restraint or tendency." *du Pont*, 353 U.S. at 598; *accord FTC v. Consol. Foods Corp.*, 380 U.S. 592, 598 (1965).

Second, the threat must be to lessen competition *substantially*. 15 U.S.C. § 18. If the likely effect on competition is only minor, the anticompetitive effect requirement is not satisfied. In considering the effect of the entry of an actual potential entrant, the court must consider the minimum scale of entry required for a new entrant to have a material procompetitive effect, and how quickly, if at all, the putative actual potential entrant likely would achieve this scale. More generally, the standards courts use in determining whether an entry defense exists should be equally applicable in determining whether entry would have a substantial (procompetitive) effect on competition under the actual potential competition theory of anticompetitive harm.

Taken together, Section 7 requires that Plaid not only have a reasonable probability of entering into a pay-by-bank service in the near future, but also that this entry—if it were to occur—must have a reasonable probability of substantially increasing competition in the relevant market.

Here, the complaint is silent on both the likelihood and magnitude of the DOJ-predicted procompetitive effect of Plaid's entry. But the complaint indicates that even substantial firms in the market–notably MasterCard—have been unable to take significant share away from Visa. This suggests that there are barriers to expansion in the market even for firms with a virtually identical product to Visa. The DOJ's complaint posits that a new firm that has not previously participated in the space, with a new product based on technology that has yet to be widely accepted by either merchants or purchasers, will be able to penetrate the market significantly and predictably.

In Point 1 above, I addressed whether merchants and purchasers would find pay-by-bank products sufficiently substitutable to be in the same relevant market as debit card transactions. The same information we gather there should also be probative of the ability of Plaid to penetrate the market if it were to create a product. We should investigate how much share Plaid would have to gain to improve competition in the relevant market substantially and how quickly Plaid will be able to gain this share.

Finally, even if Plaid were able to take a substantial share from Visa within a short time after Plaid's entry, it is not clear that a reduction in Visa's share would lead to a reduction in the fees Visa charges. The DOJ's complaint alleges that, because of Visa's dominance, "merchants have no choice but to accept Visa-network debit cards." The complaint then alleges that Visa's dominance—in other words, its "must have" quality—enables Visa "to charge merchants supracompetitive network fees, which in turn are passed on to customers in the form of higher prices for the merchant's goods and services." I suspect, however, that the number of merchants that accept MasterCard debit cards is equal to those who accept Visa debit cards. This suggests that MasterCard debit cards have a similar "dominance" and "must have" quality to Visa debit cards even though MasterCard has only a 25% share. We should investigate the extent to which MasterCard, with its much lower share, still has the power to charge debit card fees equivalent to those of Visa. If so, then there is a good argument that the entry of Plaid into the market would not cause a reduction in Visa's fees as the DOJ's theory of harm posits.

Vertical Foreclosure

The elimination of actual potential competition posits that Plaid itself will enter the relevant market. The complaint also contains a second theory of anticompetitive harm: that Plaid possesses a unique product that will enable third-party fintech companies in the future to enter the relevant market and that, after the acquisition, Visa will foreclose or impede these third-party fintech firms from entering by either refusing to license the Plaid technology or by significantly increasing the license fees.

The DOJ's complaint does not allege that third-party fintech firms have used Plaid services to create pay-by-bank services currently in the DOJ's alleged market. Consequently, this is not a traditional vertical foreclosure theory, but rather a hybrid where the alleged vertically foreclosed firms are actual potential entrants into the relevant market. For this theory to apply here, Visa must have the incentive to foreclosure rivals from using Plaid technology, Plaid's technology must be unique, one or more third-party fintech firms must be reasonably likely to enter the relevant market using the Plaid technology in the near future in the absence of the acquisition, and there must be a reasonable probability that this entry (individually or collectively) would produce a substantial procompetitive effect in the relevant market. As a result, we can use much the same approach to vertical foreclosure as we did for the DOJ's actual potential competition theory:

6. Visa has no incentive to foreclose rivals from using Plaid

The DOJ's vertical foreclosure theory requires Visa to have the incentive to foreclose rivals from using Plaid either by refusing to license Plaid technology to them or by charging materially higher prices for licenses than Plaid would have charged in the absence of Visa's acquisition. Visa's incentive to foreclosure rivals depends on whether Visa can recoup more profits from the diversion of customers from rivals than it would lose in foregone license fees to rivals that Visa could have earned in the absence of foreclosure. To perform this calculation, we need to estimate the license fee Plaid would charge in the absence of the transaction and its resulting margin and then determine the profit-maximizing license fee Visa would charge in light of any profits it might make on the recapture of the customers of rivals if it charged a higher license fee than Plaid would have charged as an independent company. If there is significant recapture of customers by Visa, then Visa is likely to charge a higher price than Plaid would in the absence of the transaction. We should retain an economist to make these estimates and analyze the likely difference, if any, between the price Plaid would charge in the absence of the transaction and the price Visa would charge with the transaction.

7. Plaid is not unique or necessary to provide third-party fintech companies with the technology or connections to create a pay-by-bank service

Other companies offer financial aggregation services similar to Plaid that they could use to enter the market or enable fintech companies to enter the market. We should investigate alternative suppliers of financial aggregation services that fintech companies could use to create a pay-by-bank service and the strengths and weaknesses of these other services compared to Plaid for this purpose.

8. It is speculative whether fintech companies would enter into pay-by-bank services using Plaid even if Plaid remained independent

Even if Plaid is unique, there can be no vertical foreclosure unless one or more third-party fintech companies would have used Plaid to create a pay-by-bank service. We should investigate whether any such companies are currently planning to create a pay-by-bank service using Plaid. Note that Plaid's financial aggregation services have been available for license for several years. We also should investigate whether any fintech company has attempted to create a pay-by-bank service using Plaid to date and, if so, what has been its success and what problems it has encountered. Also, just as the DOJ would press the parties to identify with particularity new entrants if the parties raised an entry defense, we should press the DOJ to identify each fintech company it believes would enter the relevant market with a Plaid-enabled pay-by-bank service in the absence of the transaction. For each such firm, we should press the DOJ to prove the attributes of each firm's new pay-by-bank service, the time of entry into the market, the market share the product will obtain in the first two to five years after entry, and how much, if at all, this entry will result in lower Visa debit card fees or other competitive benefits.

9. If one or more fintech services would enter into pay-by-bank services using Plaid technology in the absence of the acquisition, their entry (individually or collectively) is too uncertain in timing, magnitude, and competitive effect to predicate an anticompetitive harm

As noted in Point 5 above, even if Plaid were a uniquely suitable service and one or more firms would create pay-by-bank services using Plaid in the absence of the transaction, it still remains for the DOJ to show a reasonable probability that this entry—either individually or collectively—would substantially competition in the relevant market. As in Point 5, we should investigate the minimum scale of entry necessary for this entry to improve competition in the market materially and the likely time it would take for entry of this scale to occur in light of barriers to merchant and purchaser acceptance.

Efficiencies

The Horizontal Merger Guidelines recognize an efficiency defense when the efficiencies will negate the anticompetitive effect shown in the proof of the prima facie case. Courts have been more cautious in recognizing the validity of the principle of an efficiencies defense because of statements in earlier Supreme Court cases (*Brown Shoe* and *Procter & Gamble*) that efficiencies will not save an anticompetitive merger. However, most courts have been willing to assume, at least for the purposes of analysis, that the efficiencies defense described in the Horizontal Merger Guidelines is a cognizable defense, although no court has yet to find on the facts that the elements of an efficiency defense were satisfied. As with the entry defense, an efficiency defense is a *negative* defense: the efficiencies must negate the anticompetitive effect the merger otherwise would have. Moreover, to be cognizable, courts and the merger guidelines require the efficiencies to be merger specific and verifiable in addition to being sufficient to overcome the otherwise anticompetitive effect of the merger.

10. The consumer benefits from the transaction outweigh any possible anticompetitive effect

Here, Visa should develop its arguments and supporting evidence that Visa's acquisition of Plaid will enable the combined company to create better services for merchants and customers faster. These expected benefits should be developed in detail and verified by one or more independent consultants. Visa should argue that these benefits will outweigh any anticompetitive effect reasonably likely to occur due to the acquisition.

Regardless of the benefits, however, it is likely that efficiencies will fail as a defense to a prima facie case. No case to date has found for the defendants on an efficiency defense after the plaintiff has proved a prima facie case. Technically, I suspect that with sufficient investment of time and resources, Visa could develop software that emulates Plaid and, if so, any efficiencies resulting from the transaction would not be merger specific even if verifiable.

That said, it is still important to develop the efficiencies story in detail to the extent supportable. Even if an efficiencies defense is not technically available, an efficiencies story will provide a competing explanation to the DOJ's anticompetitive theory of why Visa is acquiring Plaid (and paying the very high price for it). Moreover, large and verifiable efficiencies from the transaction are likely to motivate a judge to find for Visa, especially as the likelihood, timing, and magnitude of the alleged harms become smaller or more speculative.

More particularly, we should investigate whether output in the relevant market is likely to be greater with the acquisition than it would be without the acquisition. Visa's submits that it will create new and better products faster by acquiring Plaid than it would in the absence of the acquisition. A well-accepted measure of competition and consumer welfare—especially when there are product improvements accompanied by price increases—is to look at the aggregate output in the relevant market: the greater the output, the more competitively performing the market. Here, Visa claims that it will be using Plaid to create new or better services that will increase consumer demand. If some or all of these services are in the relevant market and would generate new demand for online debit transactions, then the acquisition would be procompetitive if this increased demand would be greater than any increase in demand for online debit transactions that would result from any independent pay-by-bank service Plaid might create in the absence of the acquisition. Given the likelihood of significant barriers to merchant and consumer acceptance of a new Plaid pay-by-bank service and nearly ubiquitous merchant and consumer acceptance of Visa debit transaction services, a postacquisition Visa may well be able to increase usage more than an independent Plaid.