MERGER ANTITRUST LAW

Unit 2: Sanford Health/Mid Dakota Clinic

Classes 3-5

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Sanford Health/Mid Dakota Clinic

[1] As much as I would like to included the district court's opinion, it opinion is long, not written in the common format for merger antitrust opinions, and it difficult to read. The other materials in this document, especially, the FTC's complaint and the answer, will provide what we need to this case study.

Other Materials

FTC Litigation

Defenses

Power buyers

Entry/expansion/repositioning

Efficiencies

The FTC Challenge

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

FTC and State Attorney General Challenge Physician Group Acquisition in North Dakota

Combination of Sanford Health and Mid Dakota Clinic would create physician group with at least 75 percent share of physician primary care and several other healthcare services

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FOR RELEASE

June 22, 2017

TAGS: Health Care | Hospitals and Clinics | Bureau of Competition | Competition | Merger | Horizontal

The Federal Trade Commission has authorized a federal court action to block Sanford Health's proposed acquisition of Mid Dakota Clinic, alleging that the deal would violate antitrust law by significantly reducing competition for adult primary care physician services, pediatric services, obstetrics and gynecology services, and general surgery physician services in the greater Bismarck and Mandan metropolitan area.

The FTC, jointly with the Office of the Attorney General of North Dakota, has filed a complaint in federal district court seeking a temporary restraining order and preliminary injunction to stop the deal and to maintain the status quo pending an administrative trial on the merits of the case.

According to the complaint, Sanford and Mid Dakota are each other's closest rivals in the four-county Bismarck-Mandan region of North Dakota, an area with a population of 125,000.

According to Tad Lipsky, Acting Director of the FTC's Bureau of Competition, "This merger is likely to reduce significantly the competitive options available to medical insurance providers, which in turn will lead to deteriorating terms for provision of medical care, including higher prices and lower quality. The parties currently compete to join commercial insurers' provider networks, stimulating each other to improve their technology, expand services, recruit high-quality physicians and provide patients with convenient and accessible physician and surgical services. The transaction would eliminate that competitive pressure."

The transaction would create a group of physicians with at least 75 to 85 percent share in the provision of adult primary care physician services, pediatric services, and obstetrics and gynecology services. It would be the only physician group offering general surgery physician services in the affected area, according to the complaint.

The possibility of future entry or expansion of services and facilities by other healthcare providers is unlikely to prevent the competitive harm caused by the acquisition.

Sanford Health is a healthcare system headquartered in Sioux Falls, South Dakota, which operates more than 40 hospitals and 250 clinics in nine U.S. states and several countries. It also sells health insurance in four states, including North Dakota. In the Bismarck-Mandan area, subsidiary Sanford Bismarck operates a 217-bed general acute care hospital and a network of primary care and specialty clinics, employing 160 physicians and 100 non-physician healthcare providers.

Mid Dakota provides primary care services, and specialty medical and surgical services primarily in Bismarck, North Dakota. Mid Dakota employs 61 physicians and 19 advanced practice practitioners and operates six clinics in Bismarck, as well as a Center for Women and an ambulatory surgery center.

The Commission voted 2-0 to issue the administrative complaint, and to authorize staff to seek a temporary restraining order and preliminary injunction in federal district court. The federal district court complaint has been filed in the U.S. District Court for the District of North Dakota. The administrative trial is scheduled to begin on November 28, 2017.

NOTE: The Commission files a complaint when it has "reason to believe" that the law has been or is being violated and it appears to the Commission that a proceeding is in the public interest. The authorization and filing of the court action and the administrative complaint does not constitute a determination that any law has been violated. A federal district court will assess requests for injunctive relief, subject to appellate review. The issuance of the administrative complaint marks the beginning of a proceeding in which the allegations will be tried in a formal hearing before an administrative law judge, subject to further review by the FTC and by federal appellate courts.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. Like the FTC on Facebook, follow us on Twitter, read our blogs and subscribe to press releases for the latest FTC news and resources.

PRESS RELEASE REFERENCE:
After Healthcare System Sanford Health Abandons Acquisition of North Dakota Healthcare Provider Mid Dakota Clinic, FTC Dismisses Case from Administrative Trial Process

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

FEDERAL TRADE COMMISSION and **STATE OF NORTH DAKOTA,** Plaintiffs, v. **SANFORD HEALTH,** **SANFORD BISMARCK,** and **MID DAKOTA CLINIC, P.C.**, Defendants.	No. 1:17-cv-00133-DLH-CSM **REDACTED PUBLIC VERSION**

COMPLAINT FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION PURSUANT TO
SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Plaintiffs, the Federal Trade Commission ("FTC" or "Commission") and the State of North Dakota, by their designated attorneys, petition the Court, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, for a temporary restraining order and preliminary injunction enjoining Defendant Sanford Health, Defendant Sanford Bismarck (together with Sanford Health, "Sanford"), and Defendant Mid Dakota Clinic, P.C. ("MDC"), including their agents, divisions, parents, subsidiaries, affiliates, partnerships, or joint ventures, from consummating an acquisition or consolidation. The proposed acquisition or consolidation is pursuant to a Term Sheet, dated

August 22, 2016, whereby Sanford plans to purchase MDC's assets through two separate transactions (herein referred to collectively as the "Transaction")—one in which Sanford will purchase the stock and clinic assets of MDC's professional corporation, and another in which Sanford will purchase the real estate and other assets owned by the Mid Dakota Medical Building Partnership that are leased by MDC. Absent this Court's action, Defendants will be free to complete the Transaction after 11:59 pm EST on June 26, 2017.

Plaintiffs require the aid of this Court to maintain the *status quo* and prevent interim harm to competition during the pendency of an administrative trial on the merits. The Commission has already initiated that administrative trial, pursuant to Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18, 21, and Section 5 of the FTC Act, 15 U.S.C. § 45, by filing an administrative complaint on June 21, 2017. Pursuant to FTC regulations, the administrative trial on the merits will begin five months from the date of that filing (i.e., on November 28, 2017). The administrative trial will determine the legality of the Transaction and will provide all parties a full opportunity to conduct discovery and present testimony and other evidence regarding the likely competitive effects of the Transaction.

I.

NATURE OF THE CASE

1. Sanford and MDC are the two largest providers of adult primary care physician services, pediatric services, obstetrics and gynecology services, and general surgery physician services in Bismarck and Mandan, North Dakota. The proposed Transaction would create by far the largest—and in one case, the only—group of physicians offering these services in Bismarck and Mandan.

2. The proposed Transaction will substantially lessen competition and cause significant harm to consumers. If Defendants consummate the Transaction, healthcare costs will rise, and the incentive to increase service offerings and improve the quality of healthcare will diminish.

3. Sanford and MDC are each other's closest competitor in the Bismarck-Mandan area. Sanford describes MDC as its "major competitor for primary care" and "main clinical competitor" in the Bismarck-Mandan area. MDC views Sanford as a significant competitor that threatens its market share in the Bismarck-Mandan area, describing it as "a demon to deal with competitively" and observing that "combining with them would put us in the dominant health care system for quite a while." Defendants also directly respond to one another by purchasing new equipment, updating technology, expanding services, recruiting high-quality physicians, and providing patients with convenient and accessible physician and surgical services.

4. The Transaction will substantially lessen competition in the markets for adult primary care physician services ("adult PCP services"), pediatric physician services ("pediatric services"), obstetrics and gynecology physician services ("OB/GYN services"), and general surgery physician services sold and provided to commercial payers and their insured members (together, the "relevant services"). The relevant geographic market in which to analyze the effects of the Transaction is an area no broader than the four-county Bismarck, ND Metropolitan Statistical Area (the "Bismarck-Mandan area").

5. Defendants are the two largest providers of the relevant services in the Bismarck-Mandan area. Post-Transaction, Defendants would control over 75% of the market for adult PCP services, over 80% of the market for pediatric services, over 85% of the market for OB/GYN services, and 100% of the market for general surgery physician services, by physician headcount,

in the Bismarck-Mandan area. The Transaction significantly increases concentration in already highly concentrated markets, making it presumptively unlawful under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines").

6. Today, Sanford and MDC compete for inclusion in commercial payers' provider networks. Without either of these physician groups, it would be very difficult for commercial payers to market a health plan provider network to employers with employees living in the Bismarck-Mandan area. Competition between Sanford and MDC results in lower prices, higher quality, and greater services offerings.

7. By eliminating competition between Sanford and MDC, the Transaction is likely to increase Defendants' bargaining leverage with commercial payers, and enhance Defendants' ability to negotiate more favorable reimbursement terms, including reimbursement rates (i.e., prices). Faced with higher rates and other less favorable terms, commercial payers will have to pass on those higher healthcare costs to employers and their employees in the form of increased premiums and, potentially, higher co-pays, deductibles, or other out-of-pocket expenses. The merged firm will also have a diminished incentive to expand services, acquire new technology, and improve quality and access for patients in the Bismarck-Mandan area.

8. Entry or expansion by other providers into the relevant services will not likely be timely or sufficient to offset the competitive harm that will likely result from the Transaction. It will take [redacted] for CHI St. Alexius Health ("CHI St. Alexius")—a vertically integrated healthcare provider in Bismarck and Mandan with only minimal service line overlap with MDC—to enter or reposition sufficient to offset the potential competitive harm from the Transaction. Smaller, independent physician groups cannot recruit and accommodate new physicians on a necessary scale to counteract or constrain post-Transaction price increases or

quality and service decreases, and new independent physicians or large healthcare organizations from outside the Bismarck-Mandan area are unlikely to enter *de novo*.

9. Defendants' speculative efficiency and quality-of-care claims are unsubstantiated, not merger-specific, and not cognizable. Even assuming Defendants' purported efficiencies were cognizable, they are far outweighed by the Transaction's potential harm and would not justify the Transaction.

10. A temporary restraining order enjoining the Transaction is necessary to preserve the *status quo* and allow the Court to grant full and effective relief after considering the Commission and Attorney General's application for a preliminary injunction. Preliminary injunctive relief restraining Defendants from proceeding with their Transaction is necessary to prevent interim harm to competition during the Commission's ongoing administrative proceeding. Absent preliminary relief, Defendants can close the Transaction and combine their operations, and the Commission and Attorney General's ability to fashion effective relief would be significantly impaired, or potentially precluded, if the Transaction were found to be unlawful after a full trial on the merits and any subsequent appeals.

II.

BACKGROUND

A.

Jurisdiction and Venue

11. This Court's jurisdiction arises under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b); Section 16 of the Clayton Act, 15 U.S.C. § 26; and 28 U.S.C. §§ 1331, 1337, and 1345. This is a civil action arising under Acts of Congress protecting trade and commerce against restraints and monopolies, and is brought by an agency of the United States authorized by an Act

of Congress to bring this action. Sanford and MDC, and their relevant operating entities and subsidiaries, are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

12. Sanford and MDC transact business in the District of North Dakota and are subject to personal jurisdiction therein. Venue therefore is proper in this district under 28 U.S.C. § 1391(b) and (c) and 15 U.S.C. § 53(b).

13. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

(b) Whenever the Commission has reason to believe –

> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public – the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . . .

14. In conjunction with the Commission, the State of North Dakota brings this action for a preliminary injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain Sanford and MDC from violating Section 7 of the Clayton Act, 15 U.S.C. § 18, pending the Commission's administrative proceeding. The State of North Dakota has the requisite standing to bring this action because the Transaction would cause antitrust injury in North

Dakota for adult PCP services, pediatric services, OB/GYN services, and general surgery physician services.

B.

The Parties

15. Plaintiff, the Commission, is an administrative agency of the United States government established, organized, and existing pursuant to the FTC Act, 15 U.S.C. §§ 41 *et seq.*, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, District of Columbia 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

16. Plaintiff, the State of North Dakota, is a sovereign state of the United States. This action is brought by and through its Attorney General, who is the chief law enforcement officer of the State, with the authority to bring this action on behalf of his state pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26; North Dakota Century Code §§ 32-06-02 and 51-15-07; and North Dakota Century Code §§ 51-08.1-07 and 51-08.1-08 of the Uniform State Antitrust Act. The Office of the Attorney General of the State of North Dakota has its principal offices at 600 East Boulevard Avenue, Bismarck, North Dakota 58505.

17. Defendant Sanford Bismarck is a North Dakota not-for-profit corporation and vertically integrated healthcare delivery system headquartered at 300 N. 7th Street, Bismarck, North Dakota 58501. Sanford Bismarck is a wholly-owned subsidiary of Defendant Sanford Health, a not-for-profit corporation. Together and with other controlled corporations, Sanford Bismarck and Sanford Health constitute and operate Sanford. In the cities of Bismarck and Mandan, North Dakota, Sanford operates Sanford Bismarck Medical Center, a 217-bed general

acute care hospital and Level II trauma center offering inpatient and outpatient services; eight clinics that provide primary care services; and a number of specialty clinics. Sanford employs approximately 160 primary care and specialist physicians who work in Bismarck or Mandan, including 36 adult PCPs, 4 pediatricians, 8 OB/GYNs, and 4 general surgeons. Sanford also employs approximately 100 advanced practice providers ("APPs"). Sanford is the largest private employer in the Bismarck-Mandan area and plans to recruit an additional [redacted] physicians over the next [redacted] years, including [redacted] to work in its clinic and facility locations in Bismarck and Mandan. Sanford Health, its Sanford Bismarck subsidiary, and other subsidiaries generated [redacted] in revenue for the fiscal year ending on June 30, 2016.

18. Sanford sells health insurance in four states, including North Dakota, under the operating name Sanford Health Plan. Sanford Health Plan has approximately [redacted] covered lives in North Dakota.

19. Defendant MDC is a for-profit, physician-owned professional corporation under North Dakota law that is headquartered at 401 N. 9th Street, Bismarck, North Dakota 58501. MDC is a multispecialty medical practice that employs 61 physicians who provide primary care and specialty practice medical services in Bismarck, including 23 adult PCPs, 6 pediatricians, 8 OB/GYNs, and 6 general surgeons. MDC also employs 19 APPs. Additionally, MDC operates six clinics, a Center for Women, and an ambulatory surgery center ("ASC") in Bismarck. MDC is the twelfth-largest private employer in Bismarck. For the fiscal year ending on December 31, 2015, MDC generated [redacted] in revenue.

20. MDC's 53 physician shareholders control Mid Dakota Medical Building Partnership, a partnership under North Dakota law that owns real estate and other assets, including two medical office buildings and a warehouse located in Bismarck. For the fiscal year

ending on December 31, 2015, Mid Dakota Medical Building Partnership generated over [redacted] in income for its physician shareholders.

21. MDC holds a non-transferable 25% interest in PrimeCare Health Group ("PrimeCare"), a physician-hospital organization that contracts with commercial payers on behalf of MDC's physicians. CHI St. Alexius holds the remaining 75% interest in PrimeCare.

C.

The Transaction and the Commission and Attorney General's Responses

22. In early 2015, MDC initiated discussions with Sanford regarding a potential affiliation. MDC also discussed a potential affiliation with CHI St. Alexius in 2015 and early 2016. In spring 2016, MDC's affiliation discussions with CHI St. Alexius terminated, and Defendants' affiliation discussions became exclusive. On August 22, 2016, Defendants signed a Term Sheet, according to which Sanford will purchase MDC's practice assets, including its clinics, ASC, laboratory, and diagnostic imaging equipment, as well as the real estate and other assets owned by the Mid Dakota Medical Building Partnership that are leased by MDC. Defendants have finalized a Stock Purchase Agreement for the sale of MDC's practice assets at [redacted], and a Real Estate and Asset Purchase Agreement for the sale of the Mid Dakota Medical Building Partnership assets at [redacted] The Transaction value includes [redacted] As part of the Transaction, [redacted] Pursuant to a timing

agreement entered into between Defendants and Commission staff, absent this Court's action, Defendants would be free to close the Transaction after 11:59 pm EST on June 26, 2017.

23. Following an investigation, the Commission, on June 21, 2017, and by a unanimous vote, found reason to believe that the Transaction would violate Section 7 of the Clayton Act by substantially lessening competition. That same day, the Commission initiated an administrative proceeding on the antitrust merits of the Transaction before an Administrative Law Judge, and a merits trial will begin on November 28, 2017. The administrative proceeding provides a forum for all parties to conduct discovery, followed by a merits trial with up to 210 hours of live testimony. The decision of the Administrative Law Judge is subject to appeal to the full Commission, which, in turn, is subject to judicial review by a United States Court of Appeals.

24. On June 21, 2017, the Commission also authorized its staff to pursue this federal court proceeding to obtain preliminary injunctive relief under Section 13(b) of the FTC Act. In doing so, the Commission has determined that it has reason to believe the Transaction would violate the Clayton Act and the FTC Act by substantially lessening competition.

25. Following an investigation, the Attorney General determined that he has a reasonable basis to believe that the Transaction would violate Section 7 of the Clayton Act and North Dakota Century Code § 51-08.1, the Uniform State Antitrust Act, by substantially lessening competition.

III.

THE RELEVANT SERVICE MARKETS

26. The Transaction threatens substantial harm to competition in four relevant service markets: (1) adult PCP services; (2) pediatric services; (3) OB/GYN services; and (4) general surgery physician services. The appropriate product market in which to analyze the Transaction is the set of services for which a hypothetical monopolist could profitably impose a small but significant and non-transitory increase in price ("SSNIP"). This group of services constitutes an appropriate market when payers would accept a SSNIP rather than market a network that omitted the services of the hypothetical monopolist.

A.

Adult PCP Services Market

27. The Transaction threatens substantial competitive harm in the market for adult PCP services sold and provided to commercial payers and their insured members. This market encompasses services provided to commercially insured patients age 18 and over by physicians who are board-certified in internal medicine, family medicine, and general practice. Adult PCP services typically include routine medical services in an outpatient or office setting, such as physical exams, basic medical procedures, treatments of common illnesses and injuries, and long-term management of chronic conditions such as diabetes and hypertension.

28. The adult PCP services market excludes obstetricians and gynecologists ("OB/GYNs") because for many health plan enrollees, including all males, services offered by OB/GYN physicians are not viable substitutes for adult PCP services. The market also excludes services provided by pediatricians because pediatricians typically only treat patients under age 18, and thus do not compete with PCPs that treat adults. A payer would accept a SSNIP rather

than market a network that omits adult PCP services even if that network also includes OB/GYN services and pediatric services.

B.

Pediatric Services Market

29. The Transaction also threatens substantial competitive harm in the market for pediatric physician services sold and provided to commercial payers and their insured members. This market includes primary care services provided by pediatricians to children under the age of 18. Pediatricians receive additional training to treat medical conditions affecting pediatric patients, and physicians trained for other specialties generally do not have this required expertise and thus do not compete with pediatricians. A payer would accept a SSNIP rather than market a network that omits pediatricians.

C.

OB/GYN Services Market

30. The Transaction also threatens substantial competitive harm in the market for OB/GYN physician services sold and provided to commercial payers and their insured female members. The market for OB/GYN services includes services provided by OB/GYN physicians related to women's reproductive health, pregnancy, and childbirth. The OB/GYN services market excludes physicians who lack additional training in these services because the services provided by other types of physicians are not viable substitutes for OB/GYN services. A payer would accept a SSNIP rather than market a network that omits OB/GYN services.

D.

General Surgery Physician Services Market

31. The Transaction also threatens substantial competitive harm in the market for general surgery physician services sold and provided to commercial payers and their insured members. The general surgery physician services market encompasses services offered by physicians who are board-certified exclusively in general surgery. General surgeons typically perform basic surgical procedures including abdominal surgeries, hernia repair surgeries, gallbladder surgeries, and appendectomies. Specialty surgeons who receive additional training and certification in particular types of procedures beyond the scope of general surgery training do not perform the same set of services as surgeons who are board-certified exclusively in general surgery, and therefore are excluded from the market. A payer would accept a SSNIP rather than market a network that omits general surgery physician services.

IV.

THE RELEVANT GEOGRAPHIC MARKET

32. The relevant geographic market in which to analyze the effects of the Transaction for each relevant service market is an area no larger than the four-county Bismarck, ND Metropolitan Statistical Area, which includes Burleigh, Morton, Oliver, and Sioux counties. The Bismarck-Mandan area covers a population of more than 125,000 people and includes the cities of Bismarck and Mandan, as well as rural areas and farming communities extending 40 to 50 miles outside of the two cities in every direction.

33. The appropriate geographic market in which to analyze the Transaction is the area where a hypothetical monopolist of the relevant services could profitably impose a SSNIP. If a

hypothetical monopolist could impose a SSNIP, the boundaries of that geographic area are an appropriate geographic market.

34. Bismarck-Mandan area residents strongly prefer to obtain the relevant services close to where they live. Indeed, it would be very difficult for a payer to market successfully to employers with employees living in the Bismarck-Mandan area a health plan that did not include PCPs, pediatricians, OB/GYNs, or general surgeons located within the Bismarck-Mandan area. A hypothetical monopolist that controlled all providers of any relevant service in the Bismarck-Mandan area could profitably impose a SSNIP on payers. The Bismarck-Mandan area is therefore a properly defined geographic market.

35. The Bismarck-Mandan area is the main area of competition between Sanford and MDC in each relevant service market. It also comprises the population center from where Defendants draw a significant portion of their patients. Approximately 95% of patients living in the Bismarck-Mandan area stay within the Bismarck-Mandan area for the relevant services. Quantitative and qualitative evidence, including Defendants' own executives and ordinary course documents, confirm that the Bismarck-Mandan area is the relevant geographic market in which to analyze the effects of the Transaction.

V.

MARKET STRUCTURE AND THE TRANSACTION'S PRESUMPTIVE ILLEGALITY

36. Sanford and MDC are the two largest providers of each of the relevant services in the Bismarck-Mandan area.

37. Under relevant case law and the Horizontal Merger Guidelines, the Transaction is presumptively unlawful in all four relevant service markets. Based on physician headcount in the Bismarck-Mandan area, post-Transaction, Defendants will control 77% of the adult PCP

services market, 83% of the pediatric services market, 88% of the OB/GYN services market, and 100% of the general surgery physician services market.

38. The courts and antitrust agencies commonly use the Herfindahl-Hirschman Index ("HHI") to measure market concentration. The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a market with an HHI that exceeds 2,500 points is considered highly concentrated. A merger or acquisition is presumed likely to create or enhance market power—and is presumptively illegal—when the post-acquisition HHI exceeds 2,500 points and the merger or acquisition increases the HHI by more than 200 points. Here, the market concentration levels far exceed these thresholds. As measured by physician headcount in the Bismarck-Mandan area, each of the relevant service markets is already highly concentrated today, and the Transaction further concentrates these markets. The following tables summarize the market shares and HHI figures for each relevant service market.

ADULT PCP SERVICES **Preliminary Market Shares by Physician Headcount for Providers Within Bismarck-Mandan Area**			
Provider	**Adult PCP Headcount**	**Market Share**	
		Pre-Transaction	**Post-Transaction**
Sanford Bismarck	**36**	**47%**	**77%**
Mid Dakota Clinic	**23**	**30%**	
CHI St. Alexius Health	6	8%	8%
UND Center for Family Medicine	6	8%	8%
Independent Doctors, P.C.	3	4%	4%
Baker Family Medicine	1	1%	1%
Glen Ullin Family Clinic	1	1%	1%
Jeffrey Smith, MD	1	1%	1%
HHI		**3,220**	**6,013**
Change in HHI		**2,793**	

PEDIATRIC SERVICES Preliminary Market Shares by Physician Headcount for Providers Within Bismarck-Mandan Area			
Provider	**Pediatrician Headcount**	**Market Share**	
		Pre-Transaction	**Post-Transaction**
Sanford Bismarck	**4**	**33%**	**83%**
Mid Dakota Clinic	**6**	**50%**	
Independent Doctors, P.C.	1	8%	8%
UND Center for Family Medicine	1	8%	8%
HHI		**3,750**	**7,083**
Change in HHI		**3,333**	

OB/GYN SERVICES Preliminary Market Shares by Physician Headcount for Providers Within Bismarck-Mandan Area				
Provider	**OB/GYN Headcount**		**Market Share**	
	Pre-Transaction	**Post-Transaction**	**Pre-Transaction**	**Post-Transaction**
Sanford Bismarck	**8**	**15**	**47%**	**88%**
Mid Dakota Clinic	**8**		**47%**	
UND Center for Family Medicine	1	1	6%	6%
CHI St. Alexius Health*	0	1	0%	6%
HHI			**4,464**	**7,855**
Change in HHI			**3,391**	

GENERAL SURGERY PHYSICIAN SERVICES Preliminary Market Shares by Physician Headcount for Providers Within Bismarck-Mandan Area			
Provider	**General Surgeon Headcount**	**Market Share**	
		Pre-Transaction	**Post-Transaction**
Sanford Bismarck	**4**	**40%**	**100%**
Mid Dakota Clinic	**6**	**60%**	
HHI		**5,200**	**10,000**
Change in HHI		**4,800**	

* CHI St. Alexius's post-Transaction headcount and market share consist of Dr. Jan Bury, a current MDC OB/GYN who is moving to CHI St. Alexius post-Transaction. She is counted as an MDC physician for purposes of calculating the pre-Transaction HHI, and counted as a CHI St. Alexius physician for purposes of calculating the post-Transaction HHI.

VI.

ANTICOMPETITIVE EFFECTS

A.

Competition Among Healthcare Providers Benefits Consumers

39. Competition between healthcare providers occurs in two distinct but related stages. First, providers compete for inclusion in commercial payers' health plan provider networks. Second, in-network providers compete to attract patients, including commercial payers' health plan members.

40. In the first stage of provider competition, providers compete to be included in commercial payers' health plan provider networks. To become an in-network provider, a provider negotiates with a commercial payer and, if mutually agreeable terms can be reached, enters into a contract. The financial terms under which a provider is reimbursed for services rendered to a health plan's members are a central component of those negotiations, regardless of whether reimbursements are based on fee-for-service contracts, risk-based contracts, or other types of contracts.

41. In-network status benefits a provider by giving it preferential access to the health plan's members. Health plan members typically pay far less to access in-network providers than those out-of-network. Thus, all else being equal, an in-network provider will attract more patients from a particular health plan than an out-of-network one. This dynamic motivates providers to offer lower rates and other more favorable terms to commercial payers to win inclusion in their networks.

42. From the payers' perspective, having providers in-network is beneficial because it enables the payer to create a health plan provider network in a particular geographic area that is attractive to current and prospective members, typically local employers and their employees.

43. Under a fee-for-service payment model, a provider receives payment (i.e., reimbursement) for the services it provides to a commercial payer's health plan members. Such payment is typically on a per-service, per-diem, or discount-off-charges method. Under a full risk-based payment model, a provider is reimbursed a fixed payment for all services provided to a particular member. As a result, the provider has an incentive to reduce overall utilization of services by patients. Regardless of whether a contract's reimbursement method is based on fee-for-service terms, risk-based terms, or some combination of both, relative bargaining leverage plays a key role in negotiations between commercial payers and providers.

44. A critical determinant of the relative bargaining positions of a provider and a commercial payer during contract negotiations is whether other, nearby comparable providers are available to the commercial payer and its health plan members as alternatives in the event of a negotiating impasse. Alternative providers limit a provider's bargaining leverage and thus constrain its ability to obtain more favorable reimbursement terms from commercial payers. The more attractive these alternative providers are to a commercial payer's health plan members in a local area, the greater the constraint on that provider's bargaining leverage. Where there are few or no meaningful alternatives, a provider will have greater bargaining leverage to demand and obtain higher reimbursement rates and other more favorable reimbursement terms.

45. A merger between providers that are close substitutes in the eyes of commercial payers and their health plan members therefore tends to increase the merged entity's bargaining leverage. Such mergers lead to higher reimbursement rates by eliminating an available

alternative for commercial payers. This increase in leverage is greater when the merging providers are closer substitutes for (and competitors to) each other. This is true even where other factors, such as a payer's leverage as a result of having high market share, may impact the pre-merger bargaining dynamic. Preexisting leverage for the payer does not eliminate the concern about an increase in the post-merger bargaining leverage of the merged entity.

46. Changes in the reimbursement terms negotiated between a provider and a commercial payer, including increases in reimbursement rates, significantly impact the commercial payer's health plan members. "Self-insured" employers rely on a commercial payer for access to its health plan provider network and negotiated rates, but these employers pay the cost of their employees' healthcare claims directly and thus bear the full and immediate burden of any rate increase in the healthcare services used by their employees. Employees may bear some portion of the cost through premiums, co-pays, and deductibles. "Fully-insured" employers pay premiums to commercial payers—and employees pay premiums, co-pays, and deductibles—in exchange for the commercial payer assuming financial responsibility for paying provider costs generated by the employees' use of provider services. When provider rates increase, commercial payers pass on these increases to their fully-insured customers in the form of higher premiums, co-pays, and deductibles.

47. In the second stage of provider competition, providers compete to attract patients to their facilities. Because health plan members often face similar out-of-pocket costs for in-network providers, providers in the same network compete to attract patients on non-price features—that is, by offering better quality of care, amenities, convenience, and patient satisfaction than their competitors. Providers also compete on these non-price dimensions to attract patients covered by Medicare and Medicaid, and other patients without commercial

insurance. A merger of competing providers eliminates that non-price competition and reduces the merged entity's incentive to improve and maintain quality. Providers also compete on price terms in this second stage of competition in circumstances when patients pay the full cost of the procedure out of pocket, regardless of whether they are commercially insured.

B.

The Transaction Would Eliminate Beneficial Head-to-Head Competition and Increase Bargaining Leverage

48. Sanford and MDC are each other's closest competitor in the Bismarck-Mandan area for each of the relevant services. Sanford's ordinary course documents reflect the close competition between the Defendants. Sanford believes MDC is its "main clinical competitor" and "major competitor for primary care" in the Bismarck-Mandan area and identifies MDC as its only competitor for pediatric services in the Bismarck-Mandan area. Sanford also considers MDC's OB/GYN department to be Sanford's "top competitor" delivering babies in the Bismarck-Mandan area and describes MDC's general surgeons as Sanford's "primary competition in Bismarck" for bariatric procedures. Sanford's internal marketing and market research documents closely monitor MDC service offerings and routinely compare MDC's service offerings to its own, particularly in women's services and general surgery, in an effort to assess Sanford's "competitive advantage" over MDC.

49. Similarly, MDC considers Sanford to be a significant competitor and a threat to its market share in the relevant service markets. MDC expressed concern that Sanford "put a large target on [MDC's] finances and market share" and emphasized a need to "work on retaining the market share" in the face of Sanford "making some inroads into OB." Additionally, the results of a 2015 MDC strategy assessment conducted by MDC's marketing consulting focused on Sanford as MDC's closest clinical competitor in the Bismarck-Mandan area. MDC's

Chief Financial Officer observed that "Sanford is going to be a demon to deal with competitively. . . . Combining with them would put us in the dominant health care system for quite a while."

50. Defendants track and respond to each other's marketing campaigns and advertising spending, which neither Defendant does with respect to other providers. Sanford and MDC are also each other's closest competitor to recruit adult PCPs, pediatricians, OB/GYNs, and general surgeons, and are the two practices in the Bismarck-Mandan area that graduating residents and physicians in these service lines relocating to the Bismarck-Mandan area look to for employment. Because Sanford and MDC are close substitutes for each of the relevant services, the Transaction would eliminate significant head-to-head competition between the Defendants.

51. Diversion analysis, a standard economic tool that uses data on where patients receive healthcare services to determine the extent to which providers are substitutes, confirms that Sanford and MDC are close competitors. Preliminary diversion analysis shows that if all Sanford physicians providing adult PCP services were not available to Bismarck-Mandan area patients, approximately 77% of their patients would seek care at MDC. Correspondingly, if all MDC physicians providing adult PCP services were not available to Bismarck-Mandan area patients, approximately 82% of their patients would seek care at Sanford. In other words, each is by far the next-best alternative for patients of the other. Diversions for adult PCP services and other relevant services are shown in the table below:

Service	Diversion from Sanford to MDC	Diversion from MDC to Sanford
Adult PCP	77%	82%
Pediatric	90%	94%
OB/GYN	77%	70%
General Surgery	96%	98%

52. Offering provider coverage in the Bismarck-Mandan area is essential for a commercial payer to market a health plan provider network successfully to employers with employees in the Bismarck-Mandan area. At present, Sanford and MDC serve as the key providers of the relevant services for consumers living in the Bismarck-Mandan area, and either one can support a marketable health plan provider network. For example, Sanford offers its employees a group health plan that excludes MDC physicians as in-network providers, and MDC offers its employees a group health plan that excludes Sanford physicians as in-network providers. This substitutability leads to lower prices. When developing a provider network for the North Dakota Public Employees Retirement System ("NDPERS"), Sanford Health Plan [redacted] Commercial payers and employers do not view other providers in the Bismarck-Mandan area as adequate substitutes for Sanford or MDC. Consistent with that view, Bismarck-Mandan area residents strongly prefer that their health plan networks include at least one of the Defendants.

53. By combining the two largest providers of the relevant services in the Bismarck-Mandan area, the Transaction would increase Defendants' bargaining leverage in contract negotiations with commercial payers because employers in the Bismarck-Mandan area would have little, if any, interest in a health plan network that excluded the combined system. Defendants' increased bargaining leverage would enhance their ability to negotiate higher

reimbursement rates and more favorable reimbursement terms in payer contracts. Commercial payers would have little choice but to accept the reimbursement terms demanded by the merged system or exclude the merged system and risk having their network fail.

54. Today, when constructing provider networks for Bismarck-Mandan area employers, commercial payers treat Sanford and MDC (as part of PrimeCare) as substitutes—some include Sanford while excluding MDC and PrimeCare, and others exclude Sanford while including MDC and PrimeCare. If the merger is consummated, virtually every provider network marketed to consumers in the Bismarck-Mandan area will need to include the combined entity.

C.

The Transaction Would Eliminate Vital Quality and Service Competition

55. Competition drives providers to invest in quality initiatives and new technologies to differentiate themselves from competitors. Sanford and MDC compete with one another across various non-price dimensions, which has provided patients in the Bismarck-Mandan area with higher quality care and more extensive healthcare service offerings. Sanford and MDC have substantially invested in acquiring new technology, expanding their services and facilities, and improving patient access to compete against one another. The Transaction would eliminate this competition.

56. Sanford and MDC have invested in new technology to attract patients. In 2014, Sanford acquired 3D mammography technology, a state-of-the art technology that provides breast tissue imaging superior to the existing 2D technology. Sanford's capital expense and marketing documents explicitly noted the need to acquire the technology to compete with MDC. MDC subsequently acquired the same 3D mammography technology, and "put a million dollars into 3D [mammography technology] . . . [b]ecause [patients] were walking over to Sanford."

Since acquiring the technology, Defendants have continued to compete for 3D mammography patients along several dimensions, including price, access, and breast care services. Similarly, Sanford invested in a tower-free hysteroscopy system to transition certain gynecological procedures from an operating room to a clinical setting. Sanford made this investment to remain competitive with MDC, which offered these procedures in an office setting. Sanford also promotes its use of the da Vinci robotic surgery system for gynecological surgeries as a differentiator between Sanford and MDC's OB/GYN departments, and MDC acknowledged that Sanford's adoption of this technology attracted patients from MDC to Sanford. Ultimately, MDC encouraged CHI St. Alexius Medical Center, the only other acute care hospital in Bismarck apart from Sanford Bismarck Medical Center, to invest in the robot technology and two MDC OB/GYN physicians trained to use the robot in order to compete with Sanford's OB/GYNs.

57. Sanford and MDC have also improved patient access and convenience options in order to attract patients. Both Defendants operate walk-in clinics to provide patients with convenient options for acute care episodes and utilize the clinics as a way to attract and retain patients. MDC opened its Today Clinic specifically "to answer [Sanford]'s walk-ins; to increase [MDC's] market share and to provide [patient] access." Both Defendants post wait times on their respective websites as a transparent display of the convenience offered by their walk-in clinics. MDC has observed that "Sanford consistently promotes their SameDay [program]" and expressed a desire to promote its own program to attract patients. Similarly, both Defendants offer sports physicals for school-aged children in their walk-in clinics as a convenient and less expensive alternative to comprehensive child wellness/preventative exams. MDC specifically monitors Sanford's sports physical offerings when developing its own sports physical policy. In

June 2016, for example, MDC matched Sanford's price for sports physicals. To attract patients and gain a competitive edge over Sanford, MDC also offers services and amenities not available at Sanford, such as MDC's Center for Women, which provides women patients access to multiple services in one location, and a comprehensive breast program with the only breast fellowship-trained radiologist in North Dakota, who coordinates patient care with other specialists such as surgeons and oncologists.

58. Patients benefit from this direct competition in the quality of care and services offered to them by Defendants. Because the merged entity will control the majority of the relevant services in the Bismarck-Mandan area, it will face limited outside competition for patients seeking such services. Thus, the Transaction will dampen the merged firm's incentive to compete on quality of care and service offerings, to the detriment of all patients who use these providers, including commercially insured, Medicare, Medicaid, and self-pay patients. As one longtime MDC physician put it:

> competition is good and maybe no more important place than in health care, that it keeps us all striving to be better to make the best possible scenario for the patient and not settle for mediocre when that would be easier if you weren't competing with someone. . . . [W]hen you have competition it makes you step up and try to be better and provide excellent quality without just settling for average, which you can get away with when there is no one to compete with. . . . I don't feel like I want to drop to a mediocre standard of care, after working my whole life just to build a good reputation, I don't want to be just good enough. I want to be good and competitive. And I think that monopoly in health care is not a good thing.

VII.

ENTRY BARRIERS

59. Entry by new market participants into the relevant service markets in the Bismarck-Mandan area is unlikely to occur in a timely or sufficient manner to deter or counteract the likely anticompetitive effects of the Transaction. Repositioning or expansion by current

market participants is also unlikely to offset fully the Transaction's likely harm to competition for the relevant services in the Bismarck-Mandan area.

A.

Adult PCP and Pediatric Services Entry Will Not Be Timely or Sufficient

60. Existing adult PCP and pediatric practices in the Bismarck-Mandan area are unlikely to expand sufficiently and in a timely manner to offset the anticompetitive effects of the Transaction. The Bismarck-Mandan area's geographic location, including its cold climate and distance from larger metropolitan areas, makes it difficult for an existing competitor to attract and retain physicians, including adult PCPs and pediatricians, from outside of the area. Even if an existing competitor successfully recruited adult PCPs and pediatricians, it would be challenging for it to attract the substantial number of patients in the Bismarck-Mandan area needed to be a financially viable competitor. It would take [redacted] for CHI St. Alexius, the only remaining market participant positioned to enter or reposition in the Bismarck-Mandan area, to hire enough physicians, open adequate clinic space, and establish a presence in the area sufficient to replace the adult PCP and pediatric services offered by MDC. The other existing adult PCP and pediatric practices in the Bismarck-Mandan area lack the resources or ability to expand to the magnitude where they could counteract or constrain the anticompetitive effects of the Transaction.

61. New entry by independent physicians into the adult PCP or pediatric services markets in the Bismarck-Mandan area is also unlikely because of the significant financial challenges and risk involved in establishing an independent adult PCP or pediatric practice in the Bismarck-Mandan area, including renting or buying office space, renting or purchasing medical and office equipment, hiring administrative staff, investing in an electronic medical records

system, and purchasing malpractice insurance. A local labor shortage in the Bismarck-Mandan area makes starting an independent adult PCP or pediatric practice even more challenging. Moreover, new physicians finishing their residency programs often have substantial debt and lack the financial resources and experience to open an independent practice. After opening an office, it likely would take each adult PCP or pediatrician new to the Bismarck-Mandan area two years or longer to establish a patient base, and substantial time and money for a practice to become self-sustaining and a meaningful competitor, posing additional hurdles to new entrants.

B.

OB/GYN Services Entry Will Not Be Timely or Sufficient

62. New entry or expansion into the OB/GYN services market in the Bismarck-Mandan area will not be timely or sufficient to offset the Transaction's competitive harm. In addition to the financial and practical challenges that adult PCPs and pediatricians face in starting an independent practice, OB/GYNs need access to a hospital in order to provide the full scope of OB/GYN services, and must participate in or provide for call coverage for their patients in the hospital. A solo OB/GYN would have to be on call all the time, which, if even feasible, would likely lower the quality of care. To have a reasonable call rotation, a practice needs a minimum of four to five OB/GYNs. It would take [redacted] for CHI St. Alexius, the only remaining market participant positioned to enter or reposition in the Bismarck-Mandan area, to recruit five OB/GYNs to a new practice and open an OB/GYN clinic in the Bismarck-Mandan area, and up to another two years for each new OB/GYN to build a patient base.

C.

General Surgery Physician Services Entry Will Not Be Timely or Sufficient

63. Entry or expansion into the general surgery physician services market in the Bismarck-Mandan area is unlikely to be timely and sufficient to offset any competitive harm that results from the Transaction. Sanford and MDC employ the only general surgeons in the Bismarck-Mandan area. In addition to the challenges that adult PCPs, pediatricians, and OB/GYNs face starting a practice in the Bismarck-Mandan area, general surgeons need a source of patient referrals. An independent general surgeon in the Bismarck-Mandan area would be unlikely to receive referrals because PCPs and other physicians are likely to refer patients to affiliated general surgeons. As with OB/GYNs, call requirements for general surgeons make it unlikely that a general surgeon would operate a solo practice and difficult for a hospital or physician group to recruit a single general surgeon to start a general surgery group. A general surgery physician practice needs a minimum of four to five general surgeons to provide call coverage, and it would take [redacted] for CHI St. Alexius, the only remaining market participant positioned to enter or reposition in the Bismarck-Mandan area, to recruit a practice of five general surgeons.

VIII.

EFFICIENCIES

64. Defendants' claimed efficiencies do not outweigh the Transaction's likely harm to competition. The purported benefits would not enhance competition for the relevant services and fall far short of the cognizable efficiencies needed to outweigh the Transaction's likely significant harm to competition in the Bismarck-Mandan area.

65. Defendants have projected several categories of cost savings that will result from the Transaction, but many of these estimated cost savings are unsubstantiated and reflect speculative assumptions. Even if the claimed efficiencies were substantiated and achievable, many are not merger-specific. MDC could achieve many of the claimed cost savings by affiliating with a suitable and interested alternative partner far less harmful to competition. In any event, Defendants' projected cost savings are not nearly of the magnitude necessary to justify the Transaction in light of its potential to harm competition.

66. Defendants' other efficiency claims, including those relating to quality improvements, are speculative and unsubstantiated. The claimed quality efficiencies are also not merger-specific because they could be accomplished absent the Transaction. Sanford and MDC already are high-quality providers and have presented no evidence demonstrating how the Transaction will improve the quality of care either Defendant provides. In fact, Sanford already has engaged in efforts to achieve some of these purported quality improvements independent of the Transaction, such as recruiting and retaining specialists and subspecialists as well as launching or expanding service lines.

IX.

LIKELIHOOD OF SUCCESS ON THE MERITS, BALANCE OF EQUITIES, AND NEED FOR RELIEF

67. In deciding whether to grant relief, the Court must balance the likelihood of the Commission's ultimate success on the merits against the public equities, using a sliding scale. The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public's interest in effective enforcement of the antitrust laws.

68. The Commission has reason to believe that the Transaction would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. In particular, the Commission is likely to succeed in demonstrating, among other things, that:

a. The Transaction would have anticompetitive effects in the adult PCP services, pediatric services, OB/GYN services, and general surgery physician services markets in the Bismarck-Mandan area;

b. Substantial and effective entry or expansion into the relevant service and geographic markets is difficult and would not be timely, likely, or sufficient to offset the anticompetitive effects of the Transaction; and

c. Any efficiencies that Defendants may assert as resulting from the Transaction are speculative, not merger-specific, and are, in any event, insufficient as a matter of law to justify the Transaction.

69. Preliminary relief is warranted and necessary. The Commission voted unanimously to issue an administrative complaint. Should the Commission rule, after the full administrative trial, that the Transaction is unlawful, reestablishing the *status quo ante* of competition would be difficult, if not impossible, without preliminary injunctive relief from this Court. The integration of Sanford and MDC's operations, including the elimination or transfer of service lines, the implementation of higher prices, and potential staff reductions, would substantially impair any attempt to restore competition to pre-Transaction levels.

70. Moreover, in the absence of relief from this Court, substantial harm to competition could occur immediately, including an increase in the costs that employers and their employees in the Bismarck-Mandan area incur for their healthcare and a reduction in the quality of healthcare administered. Because any potential pro-competitive benefits of the Transaction do

not outweigh the significant interim harm to competition and consumers, and should still be available pending the outcome of the administrative trial, the public equities weigh strongly in favor of Plaintiffs' request for preliminary injunctive relief.

71. Accordingly, the equitable relief requested here is in the public interest.

WHEREFORE, the Commission and the State of North Dakota respectfully request that the Court:

a. Temporarily restrain and preliminarily enjoin Defendants from taking any further steps to consummate the Transaction, or any other acquisition of stock, assets, or other interests of one another, either directly or indirectly;

b. Retain jurisdiction and maintain the *status quo* until the administrative proceeding that the Commission has initiated concludes;

c. Award costs of this action to Plaintiffs, including attorneys' fees to the State of North Dakota; and

d. Award such other and further relief as the Court may determine is appropriate, just, and proper.

Dated: June 22, 2017

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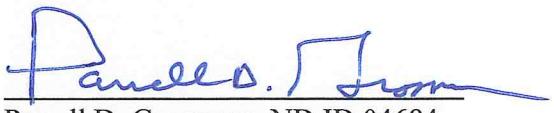
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of June, 2017, I served the foregoing on the following counsel via electronic mail:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

FEDERAL TRADE COMMISSION **and** **STATE OF NORTH DAKOTA,** **Plaintiffs,** **v.** **SANFORD HEALTH,** **SANFORD BISMARCK,** **and** **MID-DAKOTA CLINIC, P.C.,** **Defendants.**	**Case No. 1:17-cv-00133-DLH-CSM**

DEFENDANTS SANFORD HEALTH AND SANFORD BISMARCK'S ANSWER TO COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendants Sanford Health and Sanford Bismarck[1] ("Sanford"), by and through its undersigned counsel, answers the Complaint ("Complaint") of Plaintiffs the Federal Trade Commission ("FTC" or "Commission") and State of North Dakota ("Plaintiffs"). Unless specifically admitted, Sanford denies each of the allegations of Plaintiffs' Complaint.

[1] While the Complaint purports to be directed to Sanford Health as well as Sanford Bismarck, as explained in Paragraph 17 of this Answer, there is no relevant company with the name of Sanford Health. Sanford Bismarck is a subsidiary of Sanford, not Sanford Health.

This complaint reflects a fundamental misunderstanding of the past, present and future delivery of, and payment for, health care in central and western North Dakota. It elevates flawed theory over facts and conjures purported anticompetitive effects from the challenged Sanford-Mid Dakota Clinic transaction (the "Transaction") that cannot be reconciled with market realities in North Dakota. It ignores, *inter alia*, Sanford's history in expanding access to health care in North Dakota, the myriad benefits that this combination will deliver to the community, the bargaining leverage- and business policies and practices of the dominant commercial payer, Blue Cross Blue Shield, and the adverse effects on the local patient population if Mid Dakota Clinic ("MDC") is impeded from choosing the course that will best preserve its ability to deliver quality care.

1. In response to the allegations contained in paragraph 1 of the Complaint, Sanford admits the first sentence and states that the second sentence contains vague and ambiguous characterizations such as "by far the largest" to which no response is required. To the extent a response is required, Sanford denies the second sentence.

2. In response to the allegations contained in paragraph 2 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations and legal conclusions, such as "substantially lessen" and "significant harm," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 2.

3. In response to the allegations contained in paragraph 3 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as "closest competitor," "major competitor" "significant competitor," and "directly respond to one another by," to which no response is required. Sanford avers that Paragraph 3's selective quotation of unidentified written material or communications, offered without context, is misleading as

framed. Sanford competes with a large number and variety of health care providers in North Dakota. To the extent a response is required, Sanford denies the allegations in paragraph 3, except admits that Sanford has purchased new equipment, updated technology, expanded services, recruited high quality physicians, and provided patients with convenient and accessible health care services in North Dakota.

4. In response to the allegations contained in paragraph 4 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations and legal conclusions to which no response is required such as "will substantially lessen competition" and "relevant geographic market." To the extent a response is required, Sanford denies the allegations in paragraph 4.

5. In response to the allegations contained in paragraph 5 of the Complaint, Sanford admits the first sentence of paragraph 5. Sanford states that the remaining allegations contain vague and ambiguous characterizations and legal conclusions, such as the terms "control," "significantly increases concentration," "highly concentrated," and "presumptively unlawful," to which no response is required. To the extent a response is required, Sanford denies the allegations in the second and third sentences of paragraph 5.

6. In response to the allegations contained in paragraph 6 of the Complaint, Sanford states that allegations contain vague and ambiguous characterizations, such as the terms "compete for inclusion," "very difficult," and "competition between Sanford and MDC results in . . ." to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 6.

7. In response to the allegations contained in paragraph 7 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as the terms

"likely to increase," "enhance," "less favorable terms," and "diminished incentive," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 7.

8. In response to the allegations contained in paragraph 8 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations and legal conclusions, such as the terms "will not likely be timely," "sufficient," "offset," "reposition," "counteract," and "constrain," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 8.

9. In response to the allegations contained in paragraph 9 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as the terms "speculative efficiency and quality-of-care claims," "cognizable," "far outweighed," "potential harm," and "would not justify," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 9, except that Sanford admits that Sanford has identified (and in certain instances quantified) an array of cost-saving efficiencies and quality-of-care improvements that will result from the Transaction.

10. In response to the allegations contained in paragraph 10 of the Complaint, Sanford states that the allegations are legal conclusions to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 10.

11. In response to the allegations contained in paragraph 11 of the Complaint, Sanford states that the allegations are legal conclusions to which no response is required.

12. In response to the allegations contained in paragraph 12 of the Complaint, Sanford states that the allegations are legal conclusions to which no response is required.

13. In response to the allegations contained in paragraph 13 of the Complaint, Sanford states that the allegations are legal conclusions to which no response is required.

14. In response to the allegations contained in paragraph 14, Sanford states that the allegations are legal conclusions to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 14.

15. In response to the allegations contained in paragraph 15 of the Complaint, Sanford states that the allegations are legal conclusions to which no response is required.

16. In response to the allegations contained in paragraph 16 of the Complaint, Sanford states that the allegations are legal conclusions to which no response is required.

17. In response to the allegations contained in paragraph 17 of the complaint, Sanford admits the first sentence of paragraph 17. Sanford denies the second and third sentences. Sanford Bismarck is an affiliate but not a subsidiary of Sanford Health. Sanford admits the fourth sentence of paragraph 17. Sanford denies the fifth and sixth sentences of paragraph 17. Sanford admits the seventh sentence. Sanford denies the eighth sentence.

18. In response to the allegations contained in paragraph 18 of the Complaint, Sanford denies the first sentence of paragraph 18, except that Sanford admits that Sanford Health Plan and its subsidiaries sell health insurance in four states, including North Dakota. Sanford admits the second sentence in paragraph 18.

19. In response to the allegations contained in paragraph 19 of the Complaint, Sanford admits the first sentence and admits that the second sentence correctly states the number of MDC's employed physicians, the number of physicians in specified specialties, and the number of APPs, without regard to locum physicians or independent contractor part-time physicians and APPs. Sanford admits the remaining allegations in paragraph 19, except Sanford

lacks knowledge sufficient to form a belief as to the truth of the assertion that "MDC is the twelfth-largest private employer in Bismarck."

20. In response to the allegations contained in paragraph 20 of the Complaint, Sanford admits the first sentence and denies the second sentence in paragraph 20.

21. In response to the allegations contained in paragraph 21 of the Complaint, Sanford states that the first sentence is a legal conclusion to which no response is required. To the extent a response is required, Sanford lacks knowledge sufficient to form a belief as to the truth of the first sentence. Sanford admits the second sentence in paragraph 21.

22. In response to the allegations contained in paragraph 22 of the Complaint, Sanford admits the first through fourth sentences. Sanford denies the fifth sentence, except Sanford admits that Defendants have entered into a Stock Purchase Agreement for the purchase of MDC stock and certain associated assets for the first figure specified in the fifth sentence and a Real Estate and Asset Purchase Agreement for the sale of the Mid Dakota Medical Building Partnership assets for the amount specified in the fifth sentence. Sanford admits the sixth sentence, except that Sanford denies the words ", as well as the establishment of" which should be replaced with "coupled with" to make the assertion accurate. Sanford admits the seventh sentence.

23. In response to the allegations contained in paragraph 23 of the Complaint, Sanford states that the first sentence is a legal conclusion to which no response is required. To the extent a response is required, Sanford denies the first sentence. The second and third sentences are characterizations as to how the administrative proceeding will proceed to which no response is required. The fourth sentence is a legal conclusion to which no response is required.

24. In response to the allegations contained in paragraph 24 of the Complaint, Sanford states paragraph 24 contains legal conclusions to which no response is required. To the extent a response is required, Sanford denies the second sentence of paragraph 24.

25. In response to the allegations contained in paragraph 25 of the Complaint, Sanford states that paragraph 25 is a legal conclusion to which no response is required. To the extent a response is required, Sanford denies paragraph 25.

26. In response to the allegations contained in paragraph 26 of the Complaint, Sanford states that the first sentence contains vague, speculative, and ambiguous characterizations and legal conclusions, such as the terms "threatens," "substantial harm to competition," "hypothetical monopolist," and "small but significant and non-transitory increase in price," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 26 of the complaint.

27. In response to the allegations contained in paragraph 27 of the Complaint, Sanford states that the first sentence contains legal conclusions and vague and ambiguous characterizations, such as the terms "threatens," "substantial," and "competitive harm," to which no response is required. To the extent a response is required, Sanford denies the first sentence. The second sentence is a legal conclusion to which no response is required. To the extent a response is required, Sanford denies the second sentence. Sanford admits the third sentence.

28. In response to the allegations contained in paragraph 28 of the Complaint, Sanford states that the allegations in this paragraph are legal conclusions, and contain vague, speculative, and ambiguous characterizations, including "A payer would accept a SSNIP rather than market a network," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 28.

29. In response to the allegations contained in paragraph 29 of the Complaint, Sanford states that the allegations are legal conclusions that contain vague, speculative, and ambiguous characterizations, such as "threatens," "substantial competitive harm," "generally," and "A payer would accept a SSNIP rather than market a network," to which no response is required. To the extent a response is required, Sanford admits that pediatricians receive additional training to treat medical conditions affecting pediatric patients and denies the remaining allegations in paragraph 29.

30. In response to the allegations contained in paragraph 30 of the Complaint, Sanford states that the paragraph contains legal conclusions and vague, speculative, and ambiguous characterizations, such as "threatens substantial competitive harm," and "A payer would accept a SSNIP rather than market a network rather than market a network that omits OB/GYN services," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 30.

31. In response to the allegations contained in paragraph 31 of the Complaint, Sanford states that the paragraph contains legal conclusions, and vague and ambiguous characterizations, such as the terms "threatens substantial competitive harm," "typically," "do not perform the same set of services," and "A payer would accept a SSNIP rather than market a network that omits general surgery physician services," to which no response is required. To the extent a response is required, Sanford admits that general surgeons perform basic surgical procedures including abdominal surgeries, hernia repair surgeries, gallbladder surgeries, and appendectomies but otherwise denies the allegations in paragraph 31.

32. In response to the allegations contained in paragraph 32 of the Complaint, Sanford states that the first sentence is a legal conclusion to which no response is required. To

the extent a response is required, Sanford denies the first sentence. Sanford admits the second sentence.

33. In response to the allegations contained in paragraph 33 of the Complaint, Sanford states that the allegations in paragraph 33 are legal conclusions to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 33.

34. In response to the allegations contained in paragraph 34 of the Complaint, Sanford states that the paragraph contains vague and ambiguous characterizations to which no response is required including "strongly prefer," "very difficult," and "controlled." The third and fourth sentences also are legal conclusions to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 34.

35. In response to the allegations contained in paragraph 35 of the Complaint, Sanford states that the first sentence is a vague legal conclusion to which no response is required. To the extent a response is required, Sanford denies the first sentence, except that Sanford admits that it competes with a large number and variety of health care providers in North Dakota. In response to the second sentence, Sanford admits that a number of its patients reside in the Bismarck/Mandan area. The third sentence contains vague characterizations to which no response is required. To the extent a response is required, Sanford lacks knowledge sufficient to form a belief as to the truth of the third sentence. The fourth sentence is a vague and speculative characterization and legal conclusion to which no response is required. Sanford avers that references to unidentified "evidence," "confirm," and "ordinary-course documents," offered without context, are misleading as framed. To the extent a response is required, Sanford denies the fourth sentence.

36. In response to the allegations contained in paragraph 36 of the Complaint, Sanford admits the allegations.

37. In response to the allegations contained in paragraph 37 of the Complaint, Sanford states that the allegations contained in paragraph 37 contain vague and ambiguous legal conclusions and characterizations to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 37.

38. Sanford states that the allegations in the first four sentences of paragraph 38 are legal conclusions to which no response is required. Sanford further states that the remaining sentences of the paragraph and accompanying table contain legal conclusions and vague and ambiguous characterizations to which no response is required. To the extent a response is required, Sanford denies the remaining sentences of the paragraph.

39. In response to the allegations contained in paragraph 39 of the Complaint, Sanford states that the allegations contained in paragraph 39 of the complaint contain vague and ambiguous characterizations to which no response is required, including "providers," "occur in two distinct but related stages," "compete for inclusion," and "compete to attract patients." To the extent a response is required, Sanford lacks knowledge sufficient to form a belief as to the truth of the allegations in paragraph 39. Sanford also states (with respect to paragraph 39 and, more generally, elsewhere in the complaint where payer-provider relationships are discussed) that any analysis of the impact of the Sanford-Mid Dakota Clinic transaction must account for policies and practices of, and the leverage exerted by, commercial payers in North Dakota and the actual dynamics of provider-commercial payer business relationships.

40. In response to the allegations contained in paragraph 40 of the complaint, Sanford states that the allegations contained in paragraph 40 of the complaint contain vague and

ambiguous characterizations, such as "first stage of provider competition," "providers compete to be included," "central component," and "based on," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 40. Sanford also states (with respect to paragraph 40 and, more generally, elsewhere in the complaint where payer-provider relationships are discussed) that any analysis of the impact of the Sanford-Mid Dakota Clinic transaction must account for the policies and practices of, and leverage exerted by, commercial payers in North Dakota and the actual dynamics of provider-commercial payer business relationships.

41. In response to the allegations contained in paragraph 41 of the Complaint, Sanford states that the allegations contain vague, speculative, and ambiguous characterizations, such as "a provider," "preferential access," "typically," "all else being equal," "dynamic," and "attract more patients," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 41.

42. In response to the allegation contained in paragraph 42 of the Complaint, Sanford states that the allegation contains vague and ambiguous characterizations, such as "the payers' perspective," "attractive," and "typically," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 42.

43. In response to the allegations contained in paragraph 43 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as "a provider," "the provider," "typically," "Under a full risk-based payment model," and "plays a key role," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 43, except that Sanford admits that bargaining leverage of payers plays a key role in negotiations between payers and providers.

44. In response to the allegations contained in paragraph 44 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as "critical determinant," "comparable," "alternatives," "leverage," "more favorable," "constrain" and "constraint," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 44.

45. In response to the allegations contained in paragraph 45 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as "between providers that are close substitutes," "therefore tends to increase the merged entity's bargaining leverage," "more attractive," "leads to higher reimbursement rates," and "available alternative," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 45. Sanford further avers that there is no legal or economic basis for the assertion that the preexisting leverage of a payer cannot eliminate a concern about the alleged bargaining leverage of the merged entity.

46. In response to the allegations contained in paragraph 46 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as "a provider and a commercial payer," "significantly impact," and "may bear some portion of the cost," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 46.

47. In response to the allegations contained in paragraph 47 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as "second stage of provider competition," "providers compete to attract," "non-price dimensions," and "reduces the merged entity's incentive to compete," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 47.

48. In response to the allegations contained in paragraph 48 of the Complaint, Sanford states that the allegations contain vague, argumentative, and ambiguous characterizations, such as "closest competitor for each of the relevant services," "Sanford's ordinary course documents reflect," "close competition," "Sanford believes," "Sanford also considers," and "documents closely monitor," to which no response is required. Sanford avers that the paragraph's selective quotation of unidentified written material or communications, offered without context, is misleading as framed. To the extent a response is required, Sanford denies the allegations in paragraph 48.

49. In response to the allegations contained in paragraph 49 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as "MDC considers," "MDC expressed concern," "focused on Sanford as MDC's closest clinical competitor," to which no response is required. Sanford avers that the paragraph's selective quotation of unidentified written material or communications, offered without context, is misleading as framed. To the extent a response is required, Sanford denies the allegations in paragraph 49.

50. In response to the allegations contained in paragraph 50 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as "track and respond to," "closest competitor to recruit," and "significant head-to-head competition," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 50.

51. In response to the allegations contained in paragraph 51 of the Complaint, Sanford states that the allegations contain vague, ambiguous and speculative characterizations, such as "close competitors," "substitutes," "next-best alternative," "Diversions for adult PCP

services" to which no response is required. To the extent a response is required, Sanford lacks knowledge sufficient to form a belief as to the truth of the allegations in paragraph 51.

52. In response to the allegations contained in paragraph 52 of the Complaint, Sanford states that the first two sentences contain vague and ambiguous characterizations to which no response is required, including "Offering provider coverage in the Bismarck-Mandan area is essential," "key providers of the relevant services," and "either one can support." To the extent a response is required, Sanford denies the second sentence. With respect to the third sentence, Sanford admits that it "offers its employees a group health plan that excludes MDC physicians as in-network providers, and MDC offers its employees a group health plan that excludes Sanford physicians as in-network providers," but denies that this provides an example of the prior allegations in paragraph 52 as the words "For example" are apparently meant to suggest. The fourth sentence is a vague and ambiguous characterization to which no response is required. To the extent a response is required, Sanford denies the fourth sentence. The fifth and sixth sentences contain vague and ambiguous characterizations to which no response is required. To the extent a response is required, Sanford denies the fifth and sixth sentences. The seventh and eighth sentences contain vague and ambiguous characterization to which no response is required, including "Commercial payers and employers do not view," "Consistent with that view," and "strongly prefer." To the extent a response is required, Sanford lacks knowledge sufficient to form a belief as to the truth of these sentences.

53. In response to the allegations contained in paragraph 53 of the Complaint, Sanford states that paragraph 53 contains vague, ambiguous and speculative characterizations, such as "interest," "increase bargaining leverage in negotiations with commercial payers,"

"enhance their ability to negotiate," and "more favorable," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 53.

54. In response to the allegations contained in paragraph 54 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as "commercial payers treat Sanford and MDC (as part of PrimeCare) as substitutes," "virtually every," "need to include," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 54.

55. In response to the allegations contained in paragraph 55 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations such as "Competition drives providers," "compete with one another across various non-price dimensions," "which has provided patients," "to compete against one another," and "improving patient access," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 55, except that Sanford admits that Sanford has substantially invested in acquiring new technology, expanding services and facilities, and improving patient access to health care in North Dakota.

56. In response to the allegations contained in paragraph 56 of the Complaint, Sanford states that the words "to attract patients" are a vague and ambiguous characterization to which no response is required. To the extent a response is required, Sanford denies the sentence, except Sanford admits that it has invested in new technology. Sanford states that the second sentence contains vague and ambiguous characterizations, such as "state-of-the-art technology" and "superior to." To the extent a response is required, Sanford admits that it acquired 3D mammography technology, and lacks knowledge sufficient to form a belief as to the truth of the remaining allegations in the sentence. The third sentence is a vague and ambiguous

characterization to which no response is required. To the extent a response is required, Sanford denies the third sentence. With respect to the fourth sentence, Sanford admits that MDC acquired 3D mammography technology but states that the remainder of the sentence consists of vague and ambiguous characterizations to which no response is required. To the extent a response is required, Sanford denies the remainder of the sentence. The allegations in the fifth through ninth sentences contain vague and ambiguous characterizations to which no response is required. To the extent a response is required, Sanford denies the fifth through ninth sentences except Sanford admits that it invested in a tower-free hysteroscopy system to offer certain gynecological procedures in a clinical setting. Sanford further avers that the paragraph's selective quotation of unidentified written material or communications, offered without context, is misleading as framed.

57. In response to allegations contained in the first sentence of paragraph 57 of the Complaint, Sanford states that the first sentence is a vague and ambiguous characterization to which no response is required. To the extent a response is required, Sanford denies the sentence except that Sanford and MDC have "improved patient access and convenience options." In response to the second sentence, Sanford admits that Sanford and MDC "operate walk-in clinics." The remainder of the sentence is a vague and ambiguous characterization to which no response is required. To the extent a response is required, Sanford denies the remainder of the sentence. The third sentence is a vague and ambiguous characterization to which no response is required. To the extent a response is required, Sanford denies the sentence. In response to the fourth sentence, Sanford admits that Sanford and MDC "post wait times on their respective websites," but states that the remainder of the sentence is a vague and ambiguous characterization to which no response is required. To the extent a response is required, Sanford denies the remainder of

the sentence. The fifth through eighth sentences contain vague and ambiguous characterizations to which no response is required. To the extent a response is required, Sanford denies the sentences. The ninth sentence is a vague and ambiguous characterization to which no response is required as to the introductory phrase "To attract patients and gain a competitive edge over Sanford, MDC also offers services and amenities not available at Sanford." To the extent a response is required, Sanford denies the ninth sentence. Sanford further avers that the paragraph's selective quotation of unidentified written material or communications, offered without context, is misleading as framed.

58. In response to the allegations contained in paragraph 58 of the Complaint, Sanford states that the allegations contain vague and ambiguous characterizations, such as "this direct competition in the quality of care and services," "control," "limited outside competition," "dampen the merged firm's incentive to compete," "competition is," and "not settle for mediocre when that would be easier," and "you can get away with," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 58, except that Sanford lacks knowledge as to what the physician quoted in the paragraph "feel[s]," "want[s]," and "think[s]" as stated in the quoted language. Sanford further avers that the paragraph's selective quotation of unidentified written material or communications, offered without context, is misleading as framed.

59. In response to the allegations contained in paragraph 59 of the Complaint, Sanford states that paragraph 59 contains vague, ambiguous and speculative characterizations, such as "unlikely to occur in a timely or sufficient manner," "likely anticompetitive effects," and "unlikely to offset fully." To the extent a response is required, Sanford denies the allegations in paragraph 59.

60. In response to the allegations contained in paragraph 60 of the Complaint, Sanford states that the allegations contain vague, ambiguous and speculative characterizations and legal conclusions, such as "unlikely to expand sufficiently," "makes it difficult," "timely," "it would be challenging," "substantial," "establish a presence," and "anticompetitive effects of the Transaction" to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 60.

61. In response to the allegations contained in paragraph 61 of the Complaint, Sanford states that the allegations contain vague, ambiguous and speculative characterizations, such as "significant," "establishing," "often have," "challenging," "substantial," "likely would take," and "meaningful," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 61.

62. In response to the allegations contained in paragraph 62 of the Complaint, Sanford states that the allegations contain vague, ambiguous and speculative characterizations and legal conclusions, such as "offset the Transaction's competitive harm," "timely," "sufficient," "practical," "would likely lower," and "reasonable," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 62.

63. In response to the allegations contained in paragraph 63 of the Complaint, Sanford states that the allegations contain vague, ambiguous and speculative characterizations, such as "timely," "sufficient," "offset any competitive harm," "unlikely," and "difficult," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 63.

64. In response to the allegations contained in paragraph 64 of the Complaint, Sanford states that the allegations contain legal conclusions to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 64.

65. In response to the allegations contained in paragraph 65 of the Complaint, Sanford admits that Defendants have projected several categories of cost savings that will result from the Transaction—but denies the remaining allegations of the first sentence. Sanford further states that the second sentence contains vague and ambiguous characterizations, such as "many," to which no response is required. To the extent a response is required, Sanford denies the second sentence. Sanford further states that the third sentence contains vague and ambiguous characterizations to which no response is required, such as "suitable and interested alternative partner far less harmful to competition." To the extent a response is required, Sanford denies the third sentence. The allegation contained in the last sentence of paragraph 65 contains a vague legal conclusion to which no response is required. To the extent a response is required, Sanford denies the fourth sentence.

66. In response to the allegations contained in paragraph 66 of the Complaint, Sanford states that allegations contain vague and ambiguous characterizations, such as "other efficiency claims," "speculative and unsubstantiated," "could be accomplished absent the Transaction," "high-quality," and "these purported quality improvements," to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 66, except that Sanford admits that Sanford and MDC are high-quality providers of health care services and that it has identified (and in certain instances quantified) an array of quality improvements that will result from the Transaction.

67. In response to the allegations contained in paragraph 67 of the Complaint, Sanford states that the allegation contains legal conclusions to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 67.

68. In response to the allegation contained in paragraph 68 of the Complaint, Sanford states that the allegations contain legal conclusions to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 68.

69. In response to the allegations contained in paragraph 69, Sanford states that the allegations contain legal conclusions to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 69.

70. In response to the allegations contained in paragraph 70 of the Complaint, Sanford states that the allegations contain legal conclusions to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 70.

71. In response to the allegations contained in paragraph 71 of the Complaint, Sanford states that the allegations contain legal conclusions to which no response is required. To the extent a response is required, Sanford denies the allegations in paragraph 71 and further denies that Plaintiffs are entitled to any relief whatsoever.

DEFENSES

Sanford hereby reserves the right to present additional defenses as this matter proceeds, particularly with respect to those defenses presently unknown to Sanford. Sanford hereby asserts the following defenses, without assuming any burden of proof on any issue or relieving the Plaintiffs of their burden to establish each element of its alleged claims.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Complaint fails to comply with Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), because the issuance of the Complaint and the contemplated relief are not in the public interest.

THIRD DEFENSE

The proposed Transaction is not an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

FOURTH DEFENSE

The proposed Transaction will not substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act as amended, 15 U.S.C. § 18.

FIFTH DEFENSE

The merger between MDC and Sanford will result in substantial merger-specific efficiencies that far outweigh any alleged anticompetitive effects and, as a result of will benefit consumers.

SIXTH DEFENSE

The alleged market definitions fail as a matter of law.

SEVENTH DEFENSE

New entry and expansion by competitors can be timely, likely, and sufficient, such that it will ensure that there will be no harm to competition, or consumer welfare.

EIGHTH DEFENSE

The dominant commercial payer is a “powerful buyer” and has the ability to ensure that it is not compelled to accept reimbursement rates and policies that could be anticompetitive.

WHEREFORE, Sanford prays for judgment as follows:

1. That Plaintiffs take nothing by way of their Complaint;

2. That the Complaint, and each and every purported claim for relief therein, be dismissed with prejudice.

3. That Sanford be awarded its costs of suit incurred herein, including attorneys' fees and expenses; and

4. For such other and further relief as the Court deems just and proper.

Dated: July 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 5, 2017, I electronically filed the foregoing document on all parties via the Court's electronic filing system, which will automatically send e-mail notification of such filing to all attorneys of record in this action.

/s/ Ronald H. McLean
Ronald H. McLean

The Preliminary Injunction Proceeding

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

FEDERAL TRADE COMMISSION and **STATE OF NORTH DAKOTA,** Plaintiffs, v. **SANFORD HEALTH,** **SANFORD BISMARCK,** and **MID DAKOTA CLINIC, P.C.**, Defendants.	No. 1:17-cv-00133-DLH-CSM

STIPULATION FOR TEMPORARY RESTRAINING ORDER

WHEREAS, Plaintiff, the Federal Trade Commission (the "Commission"), along with the State of North Dakota (together with the Commission, "Plaintiffs"), filed a Complaint in this matter on June 22, 2017, seeking, among other relief, a temporary restraining order and preliminary injunction enjoining Defendants Sanford Health, Sanford Bismarck (together with Sanford Health, "Sanford"), and Mid Dakota Clinic, P.C. ("MDC," and together with Sanford, "Defendants") from consummating a proposed transaction pursuant to a Term Sheet dated August 22, 2016, whereby Sanford plans to purchase MDC's assets (herein referred to as the "Transaction"); and

WHEREAS, absent this Stipulation, Defendants Sanford and MDC would be free to consummate the Transaction after 11:59 pm eastern time on June 26, 2017; and

WHEREAS, Plaintiffs and Defendants have agreed that Defendants will not consummate the Transaction, or otherwise effect a combination of Sanford and MDC, until after 11:59 pm eastern time on the fifth business day after the Court rules on Plaintiffs' anticipated motion for a preliminary injunction, pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED AMONG THE PARTIES:

1. Sanford and MDC shall not consummate the Transaction, or otherwise effect a combination of Sanford and MDC, until after 11:59 pm eastern time on the fifth business day after the Court rules on Plaintiffs' motion for a preliminary injunction, pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26; and
2. In connection with the immediately above paragraph, Sanford and MDC shall take any and all necessary steps to prevent any of their officers, directors, agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures from consummating, directly or indirectly, any such affiliation, or otherwise effecting any combination between Sanford and MDC; and
3. In computing any period specified in this Stipulation, the day of the act, event, or default that triggers the period shall be excluded. The term "business day" as used in this Stipulation refers to any day that is not a Saturday, Sunday, or federal holiday.

4. Except as stipulated herein, the Defendants reserve all rights and defenses with respect to the proposed Transaction.

Dated: June 22, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of June, 2017, I served the foregoing on the following counsel via electronic mail:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Federal Trade Commission, and State of North Dakota, Plaintiffs, vs. Sanford Health, Sanford Bismarck, and Mid Dakota Clinic, P.C., Defendants.	)	**ORDER ADOPTING STIPULATION FOR TEMPORARY RESTRAINING ORDER** Case No. 1:17-cv-133

On June 22, 2017, the Plaintiffs filed a complaint and stipulation for entry of a temporary restraining order. See Docket No. 3 and 4. The Plaintiffs seek to prohibit the Defendants from consummating a proposed transaction pursuant to an agreement dated August 22, 2016, whereby Sanford Health and Sanford Bismarck (collectively "Sanford") plan to purchase Mid Dakota Clinic, P.C.'s ("MDC") assets (herein referred to as the "Transaction"). The Court **ADOPTS** the stipulation (Docket No. 4) in its entirety and **ORDERS** that Sanford and MDC are **TEMPORARILY RESTRAINED** and **ENJOINED** as follows:

1) Sanford and MDC shall not consummate the Transaction, or otherwise effect a combination of Sanford and MDC, until after 11:59 pm eastern time on the fifth business day after the Court rules on the Plaintiffs' motion for a preliminary injunction, pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26; and

2) In connection with the above paragraph, Sanford and MDC shall take any

and all necessary steps to prevent any of their officers, directors, agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures from consummating, directly or indirectly, any such affiliation, or otherwise effecting any combination between Sanford and MDC; and

3) In computing any period specified in this Stipulation, the day of the act, event, or default that triggers the period shall be excluded. The term "business day" as used in this Stipulation refers to any day that is not a Saturday, Sunday, or federal holiday.

4) Except as stipulated, the Defendants reserve all rights and defenses with respect to the proposed Transaction.

IT IS SO ORDERED.

Dated this 22nd day of June, 2017.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court

A NOTE ON TEMPORARY RESTRAINING ORDERS

A temporary restraining order (TRO) is the most urgent form of injunctive relief, designed to address situations so time-sensitive that immediate court intervention is necessary to preserve the status quo and prevent the risk of immediate irreparable harm before the court can hold a hearing on a motion for a preliminary injunction. Rule 65 of the Federal Rules of Civil Procedure governs the entry of TROs as well as injunctions generally. A court may enter a TRO either without notice or with notice to the adverse party. When notice is given, the TRO may be either contested by the opposing party or entered by stipulation of the parties.

The government routinely seeks a blocking TRO when challenging an unconsummated merger. The government typically files its complaint in federal district court only a few days before the expiration of the HSR Act waiting period or any negotiated timing agreement. Without a TRO blocking consummation, the merging parties would be free to close the transaction and integrate their assets, converting the litigation into a significantly more complex postclosing divestiture action often less effective in remedying competitive problems than prospective relief. In effect, a TRO functions as a judicially imposed extension of the HSR waiting period: it preserves the premerger status quo and prevents irreparable competitive harm while the court considers whether to grant preliminary injunctive relief. For the reasons explained below, the merging parties almost always stipulate to the entry of a blocking TRO rather than contest it.

Rule 65(b)(2) limits the entry of a TRO obtained without notice to the adverse party to 14 calendar days, with an extension of one additional 14-day period for good cause.[1] While the rule is silent on the maximum duration of a temporary restraining order entered with notice, courts generally apply these same time limits.[2] If a TRO lasts longer than 28 days, it will continue to operate, but courts will construe it to be a

1 Fed. R. Civ. P. 65(b)(2).

2 *See, e.g.*, H-D Michigan, LLC v. Hellenic Duty Free Shops S.A., 694 F.3d 827, 844 (7th Cir. 2012) ("In our view, the language of Rule 65(b)(2) and the great weight of authority support the view that 28 days is the outer limit for a TRO without the consent of the enjoined party, regardless of whether the TRO was issued with or without notice."); Nutrasweet Co. v. Vit-Mar Enterprises, Inc., 112 F.3d 689, 692 (3d Cir. 1997); Pan Am. World Airways, Inc. v. Flight Engineers' Int'l Ass'n, 306 F.2d 840, 842-44 (2d Cir. 1962) (holding that the Rule 65(d)(2) limitations also apply to TROs with notice); 11A CHARLES A. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 2953 (3d ed. 2024).

preliminary injunction.[3] A TRO entered by stipulation of the parties can be of any duration that the parties set without becoming a preliminary injunction.[4]

Rule 65(d)(1) requires that every TRO or injunction:

(1) state the reasons why it was issued,

(2) state its terms specifically, and

(3) describe in reasonable detail the act or acts restrained or required.[5]

Rule 65(d)(2) provides that a TRO or injunction directly binds the parties to the action, their officers, agents, servants, employees, and attorneys who have been personally served with the order or who otherwise have actual notice of it.[6] Moreover, consistent with historical equity law, Rule 65(d)(2) also provides that the order is binding on "other persons who are in active concert or participation" with a directly bound person, provided that these third parties had actual notice of the order, whether or not they have been personally served.[7]

The traditional equity standard when a TRO is contested is the same four-factor test that governs preliminary injunctions: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of relief, (3) that the balance of equities favors the movant, and (4) that the injunction serves the public interest.[8] The Federal Trade Commission Act articulates a different standard for Section 13(b) cases.[9] It

[3] *See, e.g.*, Sampson v. Murray, 415 U.S. 61, 86 (1974) (holding that a temporary restraining order continued beyond the time permissible under Rule 65 must be treated as a preliminary injunction); *H-D Michigan*, 694 F.3d at 844; *Nutrasweet*, 112 F.3d at 692; Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd., 496 F.3d 769, 771 (7th Cir. 2007).

[4] Fed. R. Civ. P. 65(b)(2) (providing that a TRO's duration may be extended if the adverse party consents to a longer term); *see* FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1082 (D.C. Cir. 1981) (duration limits inapplicable when parties consent).

[5] Fed. R. Civ. P. 65(d)(1).

[6] *Id*. 65(d)(2)(A)-(B).

[7] *Id*. 65(d)(2)(C). This rule is a direct descendant of early English chancery doctrine. English courts initially held that an injunction could bind only the parties to the suit, along with their privies and agents, but not strangers to the proceeding. *See* Iveson v. Harris, 7 Ves. 251, 82 Eng. Rep. 102 (Ch. 1802). By the end of the nineteenth century, however, courts recognized that an injunction binding only parties and their agents were inadequate because an enjoined party could evade an order by acting through others. As a consequence, courts expanded the reach of an injunction to forbid not only the named defendant but also his "assignees, aiders, and abettors" from disobeying the injunction. *See* Seaward v. Paterson, [1897] 1 Ch. 545, 555. The U.S. Supreme Court adopted this principle in *Ex parte* Lennon, 166 U.S. 548 (1897), holding that a nonparty employee of a railroad company could be bound by an injunction if he had actual notice of it. *Id*. at 554-55. (Although the Court did not expressly state that the employee acted in concert with his enjoined employer, that premise is implicit in the holding and reflects the ordinary operation of the employer-employee relationship.) The principle was formally codified in 1938 with the adoption of the Federal Rules of Civil Procedure. See RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, 308 U.S. 645, 745 (1940) (Rule 65(d)) (adopted Dec. 20, 1937; effective Sept. 16, 1938); *see also* Fed. R. Civ. P. 70(d) advisory committee's report to 1937 proposed rules (substantially adopting 28 U.S.C. § 383; later renumbered as Rule 65(d)). The principle remains embedded in the current version of Rule 65.

[8] *See* Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008).

[9] FTC Act § 13(b)(2). 15 U.S.C.§ 53(b)(2).

provides that the court may grant a TRO "[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."[10] In practice, however, the two standards converge, and the courts will enter a TRO whenever the government adequately alleges a Section 7 violation and shows that the merging parties would close the transaction immediately in the absence of a blocking TRO.[11] The idea is that a contested TRO can only have a short duration and therefore cannot materially harm the merging parties even if the acquisition is lawful, while the closing of an illegal transaction would significantly harm the public interest.[12]

In contrast to contested TROs, stipulated TROs are entered by agreement of the parties and approved by the court, making them the norm in merger antitrust cases. When parties stipulate to a TRO, they bypass the traditional four-factor analysis since there is no adversarial dispute over whether the injunctive relief should issue. Instead, the focus shifts to negotiating the terms and scope of the restraining order. Stipulated TROs typically prohibit the merging parties from consummating their transaction pending resolution of the government's challenge while allowing the parties to continue operating their businesses and taking steps to prepare for closing (such as obtaining regulatory approvals) that do not involve actual consummation. As noted above, the duration of a stipulated TRO is limited only to what the parties can agree in their stipulation. In merger antitrust cases, the parties almost always stipulate to a TRO to remain in effect until the district court renders its final decision, plus some additional

[10] *Id*. The same standard applies to preliminary injunctions in Section 13(b) cases. *Id*.

[11] Courts have repeatedly recognized a presumption of irreparable harm when the government seeks preliminary injunctive relief under a state authorizing injunctive relief. *See, e.g.*, United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) ("[O]nce the Government demonstrates a reasonable probability that § 7 has been violated, irreparable harm to the public should be presumed."); United States v. Trib. Publ'g Co., No. CV1601822ABPJWX, 2016 WL 2989488, at *5 (C.D. Cal. Mar. 18, 2016). Separately, courts have repeatedly held that Congress removed the requirement to show irreparable harm an Section 13(b) action. *See, e.g.*, FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1082 (D.C. Cir. 1981) ("The case law Congress codified removes irreparable damage as an essential element of the preliminary injunction proponent's case and permits the judge to presume from a likelihood of success showing that the public interest will be served by interim relief."); *accord* FTC v. Consumer Def., LLC, 926 F.3d 1208, 1212-14 (9th Cir. 2019); FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 337 (3d Cir. 2016); Univ. Health, 938 F.2d at 1217-18; FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988); FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1159 (9th Cir. 1984) (per curiam); FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 410 (S.D.N.Y. 2024).

[12] When the plaintiff seeks a TRO without notice (ex parte), Rule 65(b)(1) imposes two additional requirements: (1) the motion must be supported by an affidavit or verified complaint clearly showing that immediate and irreparable injury will occur before the opposing party can be heard, and (2) the movant's attorney must certify in writing what efforts were made to provide notice and why notice should not be required. Fed. R. Civ. P. 65(b)(1). In merger antitrust cases, it is difficult to imagine a situation in which the government could satisfy Rule 65(b)(1)'s requirement that the movant's attorney certify why notice should not be required, and therefore the DOJ and FTC rarely, if ever, seek TROs on an ex parte basis.

time (usually five days) for post-trial motions, including a motion to stay the transaction pending appeal.[13]

The merging parties almost always stipulate to a TRO rather than contest it. First, it is extremely difficult to defeat a government motion for a blocking TRO in a merger antitrust case. The government's filings typically establish a strong prima facie Section 7 violation, satisfying the "likelihood of success" prong and triggering a presumption of irreparable public harm. A contested TRO, moreover, is strictly limited in duration, so the private harm to the parties of delay in closing their transaction is minimal. As a result, the four *Winter* factors align squarely in the government's favor. Second, contesting a TRO they are almost certain to lose can squander the judge's goodwill, which the merging parties need to maximize throughout the litigation. Third, stipulation lets counsel negotiate the order's scope and timing instead of accepting terms drafted by the court after an adversarial hearing. Finally, a stipulated TRO is entered quickly, allowing the litigation to move immediately to case management and discovery. For these reasons, experienced merger antitrust lawyers regard stipulation as the better course: it avoids a losing battle, preserves judicial goodwill, allows negotiation of favorable terms, and enables the litigation to progress immediately.

Rule 65(c) generally requires a movant to post "security in an amount the court considers proper," but it expressly exempts "the United States, its officers, and its agencies."[14] Accordingly, the FTC or DOJ is not required to post a bond when it seeks a TRO or preliminary injunction in merger litigation. Courts extend similar leniency to state and local governments: although the rule does not automatically exempt them, many courts waive the bond or set only a nominal amount when a State sues to protect the public interest.[15] Even in purely private litigation, district judges retain discretion to dispense with a bond or to fix a token bond—sometimes as little as one dollar—where the defendant faces no meaningful risk of damages if the injunction is later dissolved.[16]

TROs generally are not immediately appealable. TROs are interlocutory orders not qualifying for appellate review as final orders under 28 U.S.C. § 1291. Moreover,

[13] *See, e.g.*, Stipulated Temporary Restraining Order, FTC v. Tapestry, Inc., No. 1:24-cv-03109 (S.D.N.Y. so ordered Apr. 24, 2024) (the later of (1) Section 13(b) preliminary injunction decision plus five business days, or (2) the date set by the court); Stipulated Temporary Restraining Order, FTC v. Kroger Co., No. 3:24-cv-00347 (D. Or. so ordered July 16, 2024) (same); Stipulated Temporary Restraining Order, FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER (S.D.N.Y. so ordered July 21, 2023) (the earlier of 11:59 p.m. Eastern Time on (1) November 22, 2023, or (2) the Section 13(b) preliminary injunction decision plus three business days); Stipulated Temporary Restraining Order, FTC v. Hackensack Meridian Health, Inc., No. 2:20-cv-18140-JMV-JBC (D.N.J. so ordered Dec. 4, 2020) (the later of (1) Section 13(b) preliminary injunction decision plus five business days, or (2) the date set by the court).

[14] Fed. R. Civ. P. 65(c).

[15] *See, e.g.*, Temple Univ. v. White, 941 F.2d 201, 219-20 (3d Cir. 1991) (district court may waive bond for state plaintiff enforcing public interest).

[16] *See, e.g.*, Doctor's Assocs., Inc. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996) (finding that the district court did not abuse its discretion in dispensing with the a when defendants did not show they will likely suffer harm absent the posting of a bond); *accord* Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999) (same).

courts do not consider TROs to be "injunctions" immediately appealable under 28 U.S.C. § 1292(a)(1). The Supreme Court explained the scope of Section 1292(a)(1) in *Carson v. American Brands, Inc.*:[17]

> Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly to ensure that appeal as of right under § 1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of "permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.[18]

Because TROs are brief, temporary measures designed to preserve the status quo pending a fuller hearing rather than providing the substantial relief that the interlocutory appeal statute contemplates, they do not generally satisfy the *Carson* test.[19] However, courts recognize a narrow exception when the TRO functions as a de facto preliminary injunction, either because it exceeds Rule 65(b)'s time limits (as discussed above) or because it otherwise satisfies the *Carson* test for "serious, perhaps irreparable, consequences" that can only be challenged through immediate appeal.[20]

[17] 450 U.S. 79 (1981).

[18] *Id*. at 84 (quoting Red-Striped Flag Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955).

[19] *See, e.g.*, Calvary Chapel v. Mills, 915 F.3d 15, 19 (1st Cir. 2019) (explaining that TROs are "usually brief, temporary, and designed to preserve the status quo pending fuller proceedings"); Nutrasweet Co. v. Vit-Mar Enters., Inc., 112 F.3d 689, 692 (3d Cir. 1997) ("The rationale for distinguishing between a temporary restraining order and a preliminary injunction is that temporary restraining orders are of short duration and terminate with a ruling on the preliminary injunction, making an immediate appeal unnecessary to protect the rights of the parties.").

[20] *See, e.g.*, Dep't of Educ. v. California, 145 S. Ct. 966, 968 (2025) (finding "carries many of the hallmarks of a preliminary injunction); Hope v. Warden York County Prison (Hope II), 972 F.3d 310 (3d Cir. 2020) (finding TRO appealable as a preliminary injunction because it (1) disturbed the status quo by ordering affirmative relief, (2) exceeded Rule 65(b)'s typical duration without moving to a preliminary injunction hearing, (3) exposed respondents to "serious and potentially irreversible consequences," and (4) effectively foreclosed immediate interlocutory review short of appeal); Adams v. Vance, 570 F.2d 950, 953 (D.C. Cir. 1978) (holding that the TRO was appealable as a preliminary injunction because it "did not merely preserve the status quo pending further proceedings, but commanded an unprecedented action irreversibly altering the delicate diplomatic balance in the environmental arena."); *see also* Woratzeck v. Arizona Bd. of Executive Clemency, 117 F.3d 400, 402 (9th Cir. 1997) (per curiam) (holding that the denial of a TRO a staying the movant's execution may be appealed because the denial implies denial of all relief, transforming it into a de facto final judgment).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Federal Trade Commission, and State of North Dakota, Plaintiffs, vs. Sanford Health, Sanford Bismarck, and Mid Dakota Clinic, P.C., Defendants.	)	**ORDER OF RECUSAL** Case No. 1:17-cv-133

Pursuant to 28 U.S.C. § 455(a), the undersigned recuses himself from hearing or determining any further proceeding in this case. The telephone conference set for June 27, 2017, is cancelled.

IT IS SO ORDERED.

Dated this 26th day of June, 2017.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court

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/s/ Charles S. Miller, Jr.
Charles S. Miller, Jr., Magistrate Judge
United States District Court

A NOTE ON JUDICIAL RECUSAL IN FEDERAL COURTS

The impartiality of the federal judiciary is essential to the rule of law and public confidence in judicial decision making. In the federal courts, this principle is guarded primarily by two statutes. Section 455 of Title 28 imposes a continuing, self-executing duty on "any justice, judge, or magistrate judge of the United States" to step aside whenever her "impartiality might reasonably be questioned."[1] Section 144, by contrast, empowers parties in the district courts to seek reassignment when a sworn affidavit establishes personal bias or prejudice.[2] Section 455 applies to all federal judges, including Supreme Court justices. Section 144, by contrast, applies only to district judges and provides a narrow, party-initiated disqualification procedure.

Although the two provisions overlap in purpose, they differ sharply in scope, procedure, and practical effect, differences that take on special urgency in merger antitrust litigation, which necessarily proceeds on a highly compressed timetable.

Self-recusal under Section § 455

Section 455(a) provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[3] By its terms, the section applies to every tier of the federal judiciary, from magistrate judges to the Supreme Court.

Section 455(a) sets out the operative appearance-of-impropriety standard: a judge *must* disqualify herself in any proceeding in which a reasonable observer, informed by all the relevant facts, would harbor doubts about her neutrality. The statute does not require actual bias; the appearance of bias is enough. The Supreme Court affirmed this approach in *Liljeberg v. Health Services Acquisition Corp.*,[4] where a federal judge unknowingly presided over a declaratory judgment action regarding ownership of a hospital corporation while simultaneously serving as a trustee on Loyola University's board. Loyola stood to benefit financially from the outcome because it was negotiating to sell land to one of the parties for the hospital site. The Court held that recusal was required even though the judge was unaware of Loyola's interest during trial because "the appearance of partiality" alone undermined public trust and a reasonable observer would question the judge's impartiality."[5]

Section 455(b) enumerates five categories of mandatory, non-waivable disqualification:

- Personal bias or prejudicial knowledge of disputed evidentiary facts[6]

1 28 U.S.C. § 455.
2 *Id.* § 144.
3 *Id.* § 455(a).
4 486 U.S. 847 (1988).
5 *Id.* at 860.
6 28 U.S.C. § 455(b)(1)).

- Prior involvement as a lawyer or material witness in the matter[7]
- Current employment of the judge or a close family member by a party during the proceeding[8]
- Financial interests, however small, in the subject matter or in a party[9]
- Close familial relationships with parties, lawyers, or material witnesses[10]

For example, a district judge who holds $12,000 in shares of a regional hospital chain must recuse herself from a challenge to that chain's proposed acquisition of another local hospital, even if the stake represents a tiny fraction of the judge's overall portfolio or the market capitalization of the issuer. Likewise, a district judge whose spouse is a senior engineer at one of the merging semiconductor firms must step aside from the case, regardless of how small the spouse's equity-compensation stake may be. While parties may, after full on-the-record disclosure, waive an appearance-based conflict under § 455(a), subsection (e) forbids waiver of the concrete interests listed in subsection (b).

Section 455(e) permits waiver of disqualification, but only for conflicts under Section 455(a) not covered under Section 455(b). Conflicts under Section 455(b) are not waivable.[11] Section 455(b) conflicts are considered too concrete and direct threats to judicial neutrality to permit a conflicted judge to proceed even with party consent. When permitted, a waiver can be effective only if preceded by a full disclosure on the record of the basis for disqualification.[12] This provision allows parties to proceed with a judge despite a marginal appearance concern.

Section 455 imposes a continuing obligation on judges to monitor for conflicts requiring self-disqualification.[13] Judges are expected to conduct initial conflict checks upon case assignment and to monitor for emerging conflicts throughout the proceeding. As in *Sanford Health*, most recusals occur shortly after case assignment when judges review party names, counsel, and case descriptions against their financial holdings and personal relationships. When a disqualifying fact surfaces late—for example, after an evidentiary hearing in a Section 7 challenge—the recusal obligation is undiminished. Still, the practical fallout can be severe: a successor judge must master an unfamiliar record under tight statutory deadlines. Under these circumstances, the parties will likely grant a waiver if no actual bias appears and the conflict is waivable.

Party-initiated disqualification under Section 144

Unlike Section 455, which is self-executing and applies to every level of the federal judiciary, Section 144 applies only to district judges. It gives litigants an affirmative, statutory procedure for seeking a judge's removal. Section 144 provides that a party

7 *Id.* § 455(b)(2).

8 *Id.* § 455(b)(3).

9 *Id.* § 455(b)(4).

10 *Id.* § 455(b)(5).

11 *Id.* § 455(e) ("No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).").

12 *Id.*

13 *See Liljeberg*, 486 U.S. at 860-61.

may disqualify a judge by filing a "sufficient affidavit" showing that the judge "has a personal bias or prejudice either against him or in favor of any adverse party." Judicial rulings or conduct during proceedings generally do not constitute grounds for disqualification unless they reveal a personal bias stemming from an extrajudicial source.[14] If the affidavit is legally sufficient, the judge must recuse, and the case is reassigned to another judge using the district's usual assignment procedure.[15]

In practice, a Section 144 disqualification is usually initiated by a motion to recuse accompanied by the required affidavit. To be sufficient under the statute, the affidavit must (1) be filed promptly, ordinarily at the first opportunity after the facts giving rise to bias become known; (2) be sworn to by the moving party (and not just by counsel[16]); and (3) lay out specific, concrete facts that, if true, would convince a reasonable person of extrajudicial bias or prejudice.[17] The motion also must be accompanied by counsel's certificate that the motion is made in good faith.[18] The challenged judge herself initially determines the legal sufficiency of the affidavit, evaluating whether the allegations would convince a reasonable person that extrajudicial bias exists.[19] In determining whether the affidavit sets forth a legally sufficient basis for disqualification, the court must accept the factual allegations as true, even if the judge knows them to be false.[20] The affidavit must set forth factual allegations rather than bare conclusions, and while the affiant may rely on information and belief rather than personal knowledge, mere speculation is insufficient.[21] If the affidavit meets that standard, recusal and reassignment follow automatically; if it does not, the judge remains on the case.

[14] *See* United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) ("The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."); *see also* Liteky v. United States, 510 U.S. 540, 544-45 (1994) (discussing "extrajudicial source" doctrine).

[15] 28 U.S.C. § 144; *see* Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co., 380 F.2d 570, 576 (D.C. Cir. 1967) ("The disqualification statute, 28 U.S.C. § 144, is mandatory and automatic, requiring only a timely and sufficient affidavit alleging personal bias or prejudice of the judge.").

[16] *See* Sataki v. Broad. Bd. of Governors, 733 F. Supp. 2d 54, 59-60 (D.D.C. 2010) (collecting cases).

[17] 28 U.S.C. § 144.

[18] *Id*.

[19] *See, e.g.*, United States v. Haldeman, 559 F.2d 31, 131 (D.C. Cir. 1976) ("It is well settled that the involved judge has the prerogative, if indeed not the duty, of passing on the legal sufficiency of a Section 144 challenge.").

[20] *See, e.g.*, SEC v. Loving Spirit Found., 392 F.3d 486, 496 (D.C. Cir. 2004); United States v. Bray, 546 F.2d 851, 857 (10th Cir. 1976). Because the court must accept the allegations in the affidavit as true, counsel's certificate of good faith is "key to the integrity of the recusal process." Strange v. Islamic Republic of Iran, 46 F. Supp. 3d 78, 81 (D.D.C. 2014).

[21] *See, e.g.*, United States v. Hanrahan, 248 F. Supp. 471, 474 (D.D.C. 1965) ("The identifying facts of time, place, persons, occasion and circumstances must be set forth, with at least that degree of particularity one would expect to find in a bill of particulars.") (internal citations omitted).

Interestingly, some cases rightly suggest that a judge faced with a Section 144 motion has a duty to consider whether she should recuse herself under Section 455.[22] If the judge decides that recusal is not required under Section 455, she may decide the Section 144 motion herself or refer it to another judge for a sufficiency ruling.[23]

There is no immediate appellate review of a challenged judge's interlocutory decision on a Section 144 motion to recuse as a matter of right. To obtain immediate appeal review, the movant has two narrowly circumscribed avenues: (1) persuading the district court to certify the order for interlocutory appeal under 28 U.S.C. § 1292(b) and convincing the court of appeals to accept that appeal or (2) securing the extraordinary writ of mandamus, The decision is also reviewable on appeal from the final judgment. All three avenues apply an abuse-of-discretion standard and proceed on the assumption that the affidavit's allegations are true, so reversal on the denial of a motion to recuse requires showing that a reasonable observer, apprised of those facts, would doubt the judge's impartiality.

Because Section 1292(b) certification is discretionary, mandamus requires a "clear and indisputable" error, and the merits frequently subsume final-judgment appeals, successful challenges remain exceedingly rare. In practice, Section 144 is a residual remedy for truly egregious cases of personal animus or misconduct. Courts are correspondingly wary of strategic, last-minute recusal motions—particularly those filed after unfavorable rulings—so disqualification is seldom ordered absent compelling, well-documented extrajudicial prejudice.[24]

[22] *See* United States v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980) (holding that a Section 144 motion "should also prompt the judge to whom the motion is directed to determine independently whether all the circumstances call for recusal under the self-enforcing provisions of section 455(a)).

[23] *See* United States v. Grinnell Corp., 384 U.S. 563, 582 & n.12 (1966) (noting referral of the Section 144 motion to another judge).

[24] The only merger case I can find involving the appellate review of a Section 144 motion to disqualify is United States v. Grinnell Corp., 384 U.S. 563, 582-83 (1966). The government charged that Grinnell and its subsidiaries had willfully acquired and maintained monopoly power in the central-station fire- and burglar-alarm services market, chiefly through serial acquisitions and exclusionary practices ,in violation of Section 2 of the Sherman Act. Prior to trial, the defendants filed a Section 144 motion to disqualify District Judge Charles Wyzanski as "personally biased and prejudiced" based on comments Wyzanski made in a pretrial conference suggesting Grinnell was likely to lose at trial based on the documents he had seen. Judge Wyzanski referred the question of his disqualification to Chief Judge Woodbury of the Court of Appeals for the First Circuit, who after hearing oral argument held that no case of bias and prejudice had been made out. After a final judgment was entered in favor of the government, Grinnell appealed under the Expediting Act directly to the Supreme Court on a variety of issues, including the denial of the motion to disqualify. The Supreme Court affirmed the denial, holding that Section 144 requires the alleged bias *"*stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case*." Id*. at 583. Because Judge Wyzanski's critical comments were drawn solely from the record materials the parties had urged him to study, the Court found no disqualifying bias and affirmed the judgment (while remanding for broader relief).

The Codes of Conduct

Beyond Sections 455 and 144, lower-court federal judges are bound by the Judicial Conference's Code of Conduct for United States Judges.[25] Since November 13, 2023, the nine Supreme Court Justices have followed their own parallel Code of Conduct for Justices of the Supreme Court of the United States.[26]

The Judicial Conference Code, first adopted in 1973 and last comprehensively revised in March 2019, is enforceable through the 28 U.S.C. §§ 351–364 misconduct process administered by chief circuit judges. Canon 2 instructs every judge to "avoid impropriety and the appearance of impropriety," thereby supplying the normative gloss courts use when applying Section 455(a)'s "reasonable observer" test; Canon 3C(1) then lists the same personal, financial, and familial conflicts enumerated in Section 455(b). The Judicial Conference's Committee on Codes of Conduct regularly publishes advisory opinions on the application of the Code.[27]

The Supreme Court's five-canon Code mirrors the lower-court canons almost verbatim and contains the same disqualification language. It is, however, self-policed; no external body can compel a Justice to recuse. Therefore, at the certiorari stage, each Justice decides independently whether to stand down, a feature widely criticized by ethics scholars.[28]

Case-management pressures and institutional variation

The consequences of a recusal differ markedly across judicial levels, reflecting differences in panel structure, reassignment mechanisms, and case-management flexibility.

In the district courts, a Section 455 self-recusal entered at the outset of a case causes little disruption because the clerk immediately transfers the matter to another judge before substantive proceedings begin. When a conflict surfaces only after discovery is well underway or an evidentiary hearing has been held, however, the consequences can be severe: the successor judge must absorb a voluminous record, reconsider interlocutory rulings, and may need to reopen testimony. At the same time, the merging parties approach the deal's contractual drop-dead date. Accordingly, merging parties identify and present every plausible conflict to the initially assigned judge as early as possible, seeking to avoid a mid-stream judicial change. For the same timing reasons,

[25] Code of Conduct for United States Judges (effective March 12, 2019), https://www.uscourts.gov/file/25752/download.

[26] Code of Conduct for Justices of The Supreme Court of the United States (U.S. Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

[27] *See* U.S. Courts, Published Advisory Opinions, https://www.uscourts.gov/administration-policies/judiciary-policies/ethics-policies.

[28] *See, e.g.*, Michael J. Broyde & Hayden H. Hall, *Recusal Reform: Treating a Justice's Disqualification as a Legal Issue*, 10 U. PA. J.L. & PUB. AFF. 79 (2025); Donald K. Sherman, Marco A. White & Virginia Canter, *The Law of Disqualification and Problems with the Supreme Court Code of Conduct,* 3 FORDHAM VOTING RTS. & DEMOCRACY FORUM 185, 189-90 (2025); *Developments in the Law—Judicial Ethics*, 137 HARV. L. REV. 1677, 1689-90 (2024); N.Y.C. Bar Ass'n, *The Supreme Court Needs a Mandatory and Enforceable Code of Ethics* (Feb. 3, 2025); Michael Waldman, Brennan Center for Justice, *New Supreme Court Ethics Code Is Designed to Fail* (Nov. 14, 2023); *Enforceable Ethics for the Supreme Court*, Harv. L. Rev. Blog (Aug. 9, 2024).

Section 144 motions to recuse are rarely, if ever, filed in merger litigation; litigants rely instead on early, self-executing Section 455 screening.

In the court of appeals, the mechanics of a Section 455 recusal are typically minimal: a self-recused judge on a three-member panel is simply replaced by another circuit judge, and briefing or argument dates rarely shift. Section 144 does not apply to circuit court judges.

In the Supreme Court, The Justices are likewise subject to Section 455, but each Justice exercises complete discretion over whether to recuse. No external authority may compel a Justice to step aside, and no substitute appointment is possible. Each Justice is therefore the sole and final judge of her own impartiality. The Court's voluntary adoption of a Code of Conduct in 2023 reiterated the appearance standard but supplied no enforcement mechanism. Scholars, litigants, and legislators have criticized this self-regulatory structure—especially in high-profile cases—and have proposed enforceable ethics rules and independent review of recusal decisions, though none has been enacted.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

Federal Trade Commission and State of North Dakota Plaintiff(s) vs. Sanford Health, Sanford Bismarck and Mid-Dakota Clinic, P.C. Defendant(s).	**CONSENT/REASSIGNMENT FORM** Case No. 1:17-cv-00133-DLH-ARS

Exercise of jurisdiction by the Magistrate Judge assigned is permitted only if all parties voluntarily consent. You may, without adverse substantive consequences, withhold your consent. While consent to the assignment of the case to a Magistrate Judge is entirely voluntary, submission of the Consent/Reassignment Form memorializing consent or requesting reassignment to a District Judge is mandatory.

Consent ☑ **Reassignment** ☐

PLEASE SEE ATTACHED SIGNATURE PAGE
Party(ies) Represented

/s/
Attorney Signature

July 21, 2017
Date

PLEASE SEE ATTACHED SIGNATURE PAGE
Party(ies) Represented

/s/
Attorney Signature

July 21, 2017
Date

DO NOT FILE THE CONSENT/REASSIGNMENT FORM THROUGH THE COURT'S ELECTRONIC CASE FILING (ECF) SYSTEM. Instead, the completed form should be returned to the e-mail address indicated below. Failure to submit the Consent/Reassignment Form in a timely manner may result in a delay in processing the case.

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A NOTE ON MAGISTRATE JUDGES

In *Sanford Health*, the parties consented to have all proceedings, including the FTC's Section 13(b) motion for a preliminary injunction, conducted by a magistrate judge. This procedural choice was highly unusual in merger antitrust litigation because parties typically prefer Article III district judges to decide dispositive motions involving significant legal and economic stakes.[1] As far as I know, this is the only merger antitrust case tried by a magistrate judge. To understand why this was unusual—and what it means for merger antitrust practice—requires examining who magistrate judges are and the scope of their authority in federal litigation.

Who are magistrate judges?

Magistrate judges are judicial officers appointed by the district judges of each federal district court under the authority of 28 U.S.C. § 631. Full-time magistrate judges serve terms of eight years and may be reappointed; part-time magistrate judges serve four-year terms.[2] Unlike Article III judges, magistrate judges do not have life tenure and are not appointed by the President or confirmed by the Senate. They are selected based on merit through a court-administered process and serve to assist district courts in managing their caseloads.

While magistrate judges are commonly involved in antitrust cases, especially in supervising discovery and handling pretrial motions, their role varies significantly depending on whether the parties consent to their expanded authority.

Magistrate judge authority with party consent

Under 28 U.S.C. § 636(c), parties in a civil case may consent to have a magistrate judge conduct all proceedings, including a jury or bench trial, and order the entry of judgment. The judgment entered by a magistrate judge under this provision is treated as if a district judge entered it and is directly appealable to the court of appeals.[3]

In *Sanford Health*, both sides filed a joint consent, which allowed Magistrate Judge Alice R. Senechal to preside over the entire litigation, including deciding whether to enter a Section 13(b) preliminary injunction. The parties' joint consent gave

[1] 28 U.S.C. § 636(c). There are exceptions. For other antitrust cases tried to a magistrate judge, see, for example, King v. Idaho Funeral Service Ass'n, 862 F.2d 744 (9th Cir. 1988); Eastern Auto Distribs., Inc. v. Peugeot Motors of Am., 795 F.2d 329, 334 (4th Cir. 1986); Conoco Inc. v. Inman Oil Co., 774 F.2d 895, 897 n.1 (8th Cir. 1985); Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1386 n.1 (5th Cir. 1983); St. Francis Med. Ctr. v. C.R. Bard, Inc., 657 F. Supp. 2d 1069 (E.D. Mo. 2009), *aff'd*, 642 F.3d 608 (8th Cir. 2011); Ticket Ctr., Inc. v. Banco Popular de Puerto Rico, 613 F. Supp. 2d 162, 169 (D.P.R. 2008); Miles Distribs., Inc. v. Specialty Constr. Brands, Inc., 417 F. Supp. 2d 1030, 1033 (N.D. Ind. 2006); and Jones v. Deja Vu, Inc., 419 F. Supp. 2d 1146, 1148 n.1 (N.D. Cal. 2005).

[2] 28 U.S.C. §§ 631(a), (e).

[3] *Id*. § 636(c)(3).

Judge Senechal the authority to make a final, binding decision on the FTC's request for injunctive relief and not merely recommend a course of action to a district judge.

While authorized by statute, this procedural path is rarely used in federal antitrust cases, particularly merger challenges. Merger litigation often involves preliminary injunction decisions that can effectively determine whether a transaction proceeds or is abandoned. Merging parties typically prefer an experienced trial judge who likely was an experienced litigator before ascending to the bench—qualities magistrate judges may not have in the same depth. Article III judges often come to the bench after distinguished careers handling complex commercial litigation and bring extensive experience presiding over the kind of high-stakes, fast-moving litigation that merger challenges represent.

The *Sanford Health* consent, however, likely reflected practical necessity practical necessity due to the limited availability of Article III judges in the District of North Dakota rather than a strategic preference for a magistrate judge. The District of North Dakota has only two Article III judges. Judge Daniel Hovland, assigned initially to the case, recused himself for unstated reasons. Judge Ralph Erickson had been nominated to the Eighth Circuit Court of Appeals on June 7, 2017—just fifteen days before the FTC filed its complaint on June 22, 2017. As a federal district judge in a two-judge district, Erickson likely already had a full docket of pending cases at the time of his nomination. More critically, Section 13(b) preliminary injunction proceedings typically take approximately six months from the filing of a complaint to a decision. (Indeed, Judge Senechal issued her decision on December 15, 2017, almost exactly six months after the filing of the complaint.) On Erickson's confirmation schedule—with his Senate Judiciary Committee hearing scheduled for July 25, 2017, confirmation on September 28, 2017, and elevation to the Eighth Circuit on October 13, 2017—he would have been elevated to the appellate court well before he could have rendered a decision on the FTC's Section 13(b) motion. Taking on a complex merger case that he could not see through to completion would have been impractical for all parties involved, effectively rendering him unavailable for this litigation from the outset.[4]

If no judge had been available in the District of North Dakota, federal law provides several mechanisms for obtaining a visiting judge from another district. The Eighth Circuit's chief judge could have designated a district judge from within the circuit to sit temporarily in North Dakota,[5] or the Chief Justice could have designated a judge from outside the circuit upon a certificate of necessity.[6] Additionally, senior judges from within or outside the circuit could have been assigned to handle the case.[7] However, these alternatives would likely have involved significant administrative delays that would be problematic for time-sensitive merger litigation. Courts typically require a month or two to arrange for visiting judges, coordinate travel and

[4] For more on Judge Erickson's nomination and confirmation process, see *Judge Ralph Erickson—Nominee to the U.S. Court of Appeals for the Eighth Circuit*, The Vetting Room, https://vettingroom.org/2017/07/25/judge-ralph-erickson/.

[5] 28 U.S.C. § 292(b).

[6] *Id*. § 292(d).

[7] 28 U.S.C. § 294(c).

accommodation, and orient the visiting judge to local procedures—time that the parties in a merger challenge cannot afford given the tight deadlines for preliminary injunction hearings and the need to resolve uncertainty that can undermine deal financing and regulatory approvals. The consent to magistrate judge authority represented the most practical path forward, avoiding the delays inherent in the visiting judge designation process while keeping the case in the proper venue where the parties were prepared to litigate.

The parties' election to proceed with a magistrate judge is entirely voluntary—it cannot be forced on them by the court. However, the *Sanford Health* consent illustrates how practical constraints in small districts can make magistrate judge authority more attractive despite the general preference for experienced trial judges in complex merger litigation.

Magistrate judge authority without party consent

Absent consent, a magistrate judge may still be designated by a district judge to handle various pretrial matters under 28 U.S.C. § 636(b). The scope of this authority depends on whether the matter is considered "dispositive" or "nondispositive." Under 28 U.S.C. § 636(b)(1)(A), certain pretrial motions—including motions to dismiss, for summary judgment, for preliminary injunction, or for class certification—are classified as 'dispositive' because they may terminate the litigation or substantially affect a party's rights. Nondispositive matters are typically procedural issues that do not resolve the merits or substantially affect a party's rights.

A. Nondispositive pretrial matters. Magistrate judges may enter binding orders for pretrial matters not dispositive of a party's claim or defense, such as resolving discovery disputes or ruling on motions to compel. A party may file objections to such an order within 14 days, but the district judge may modify or set aside the order only if it is clearly erroneous or contrary to law.[8] In merger antitrust litigation, magistrate judges frequently handle the intensive discovery supervision that these cases require, resolving disputes over privilege, relevance, and the scope of document production and depositions.

B. Dispositive pretrial matters. For dispositive motions—including motions to dismiss, summary judgment, class certification, or preliminary injunction—a magistrate judge may be assigned to conduct hearings and issue a report and recommendation.[9] The magistrate judge submits a "Report and Recommendation" (R&R) to the district judge and serves it on the parties.[10] Any party may object within 14 days. The district judge must then review de novo any part of the R&R subject to an objection.[11] The judge may accept, reject, or modify the R&R, or recommit the

8 *See* Fed. R. Civ. P. 72(a).

9 *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

10 For illustrative examples, see *In re* Air Cargo Shipping Services Antitrust Litig., No. MD 06-1775(JG)(VVP), 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008) (report and recommendation regarding motions to dismiss); *In re* Payment Card Interchange Fee and Merchant Discount Antitrust Litig., 562 F. Supp. 2d 392 (E.D.N.Y. 2008) (adopting report and recommendation regarding motions to dismiss).

11 28 U.S.C. § 636(b)(1)(C).

matter with instructions.[12] Although the district judge has the discretion to consider new evidence,[13] they typically decline to do so if the party had a full opportunity to present it to the magistrate judge.[14] In a multiparty action where some but not all parties consent to a trial before a magistrate judge, the magistrate judge may enter a judgment as to the consenting parties and a report and recommendation as to the nonconsenting parties.[15]

While district court judges in antitrust cases sometimes appoint magistrate judges to conduct a proceeding on a dispositive motion and make a report and recommendation, I am unaware of any case where a district judge has referred a preliminary injunction motion to a magistrate judge for a report and recommendation in a merger antitrust litigation. Doing so would allow the FTC to file objections to the magistrate judge's recommendation if against the FTC, triggering de novo review by the district judge and potentially extending the timeline for a decision by several months. In fast-moving merger litigation, such delay could jeopardize the transaction, especially when financing, shareholder support, or regulatory approvals are time-sensitive. As a result, district judges typically retain and decide preliminary injunction motions themselves to ensure timely resolution.

[12] *Id.*; *see, e.g.*, *In re* Payment Card Interchange Fee & Merchant Discount Antitrust Litig., 562 F. Supp. 2d 392 (E.D.N.Y. 2008) (adopting in full report and recommendation regarding motions to dismiss).

[13] *Id.*; FED. R. CIV. P. 72(b)(3); *see* United States v. Raddatz, 447 U.S. 667, 673-74 (1980); Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 70 (3d Cir. 2000).

[14] *Carpet Group*, 227 F.3d at 70.

[15] *See* United States v. American Soc'y of Composers, Authors and Publishers, 902 F. Supp. 411, 417 n.6 (S.D.N.Y. 1995)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Federal Trade Commission and State of North Dakota, Plaintiffs, vs. Sanford Health, Sanford Bismarck, and Mid Dakota Clinic, P.C., Defendants.	)	Case No. 1:17-cv-133 **SCHEDULING ORDER**

Plaintiffs Federal Trade Commission and the State of North Dakota bring this action to enjoin consummation of a proposed transaction between the defendant health care providers—Sanford Health/Sanford Bismarck and Mid Dakota Clinic, P.C.

The plaintiffs allege that the proposed transaction would substantially lessen competition and cause significant harm to consumers, in violation of federal law. The parties stipulated to entry of a temporary restraining order, pursuant to which the proposed transaction cannot be closed until five business days after the court rules on the plaintiffs' motion for a preliminary injunction. (See Doc. #7).

Now before the court are the parties' proposals for a scheduling order. The plaintiffs' proposal is based on a two-day preliminary injunction hearing, beginning no later than September 27, 2017. The defendants ask for a four-day hearing on that motion, to begin October 30, 2017. Both sides also propose deadlines for various prehearing milestones.

The scheduling dispute centers on the length of time necessary for pre-hearing discovery. The plaintiffs advise that they provided "complete non-privileged investigatory files" to the plaintiffs by June 27, 2017, and assert that their proposal is

consistent with recent practice in similar cases. (Doc. #44, p. 2). The defendants acknowledge receipt of those investigative files, the volume of which they describe as requiring "significant resources to process, review and analyze." (Doc. #45, p. 1). The defendants state that they have served document and deposition subpoenas on several third parties and that they intend to serve more subpoenas. Additionally, the defendants contend that the plaintiffs have had "a substantial head start" in obtaining expert opinion. Id. at 2.

As the defendants assert, to begin a hearing one month later than the plaintiffs desire will not prejudice the plaintiffs, since the TRO prohibits consummation of the Sanford-MDC transaction until after a ruling on the preliminary injunction motion. Moreover, the defendants assert that the court should not consider the schedule of the parallel administrative proceeding—where a hearing is scheduled to begin on November 28, 2017—since the administrative law judge advised the parties that they could seek a stay of that hearing pending appeal of an order on the motion for a preliminary injunction.

Having considered the parties' positions, the court's schedule, and counsel's reported availability, the court will schedule the hearing to begin October 31, 2017. Depending on courtroom availability, the hearing will beheld in either Bismarck or in Fargo. The court will allow up to four days for presentation of evidence. The court adopts the following prehearing schedule:

Simultaneous Exchange of Preliminary Fact Witness Lists	8/3/2017
Close of Fact Discovery	9/15/2017
Simultaneous Exchange of Initial Expert Report(s)	9/25/2017

Plaintiffs File Memorandum of Law in Support of Motion for Preliminary Injunction	10/2/2017
Simultaneous Exchange of Rebuttal Expert Report(s)	10/9/2017
Simultaneous Exchange of Final Witness Lists	10/16/2017
Defendants File Memorandum in Opposition to Motion for Preliminary Injunction	10/16/2017
Simultaneous Exchange of Exhibit Lists and Deposition Designations	10/18/2017
Simultaneous Exchange of Deposition Counter-Designations and Objections to Exhibit Lists	10/23/2017
Close of Expert Discovery	10/20/2017
Plaintiffs File Reply to Memorandum in Opposition to Motion for Preliminary Injunction	10/23/2017
Proposed Findings and Conclusions of Law Filed	11/10/2017

IT IS SO ORDERED.

Dated this 1st day of August, 2017.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Federal Trade Commission and State of North Dakota, Plaintiffs, vs. Sanford Health, Sanford Bismarck, and Mid Dakota Clinic, P.C., Defendants.	)	Case No. 1:17-cv-133 **ORDER**

Alleging that a proposed transaction between two healthcare providers—Sanford Health/Sanford Bismarck and Mid Dakota Clinic, P.C.—would substantially lessen competition and cause significant harm to consumers, the Federal Trade Commission and the State of North Dakota brought this action to preliminarily enjoin consummation of the proposed transaction pending an FTC administrative hearing. The administrative hearing is currently scheduled to begin on January 17, 2018.[1]

The parties stipulated to entry of a temporary restraining order, under which the proposed transaction cannot be closed until five business days after the court rules on the plaintiffs' motion for a preliminary injunction. (See Doc. #7).

Pursuant to 28 U.S.C. § 636(c), all parties consented to jurisdiction of a magistrate judge. (Doc. #39). Beginning on October 30, 2017, the undersigned magistrate judge held a four-day evidentiary hearing on the motion for a preliminary

[1] At the time of the preliminary injunction hearing, the administrative hearing was scheduled to begin on November 28, 2017, within the five-month period provided by 16 C.F.R. § 3.11(b)(4). The administrative law judge has since granted an extension to January 17, 2018.

injunction. At that hearing, the court received over 1600 exhibits—all admitted pursuant to stipulation by all parties—and heard testimony from sixteen witnesses. Following conclusion of the hearing, the parties submitted proposed findings of fact and conclusions of law. The court's review of documents received into evidence has been limited to those portions of the documents addressed during hearing testimony or cited in the parties' proposed findings of facts and conclusions of law.

The plaintiffs contend the pending transaction would unlawfully lessen competition among four physician service lines—adult primary care physician services, pediatrician services, obstetrician/gynecologist physician services, and general surgeon services—in the Bismarck-Mandan, North Dakota, Metropolitan Statistical Area (Bismarck-Mandan area), which includes the counties of Burleigh, Morton, Oliver, and Sioux. The defendants argue that the plaintiffs' position does not adequately consider the impact of a powerful buyer—Blue Cross Blue Shield of North Dakota. The defendants assert that the presence of that powerful buyer would preclude any anticompetitive effects that might otherwise result from the proposed transaction and that the proposed transaction would benefit consumers in the Bismarck-Mandan area.

Having fully considered the hearing testimony, the exhibits as described above, and the briefs of the parties, the plaintiffs' motion for a preliminary injunction is **GRANTED**.

The court's findings of fact and conclusions of law are being filed contemporaneously with this order. Because some of the testimony concerned sensitive and confidential business information of the defendants and of third parties, portions of the hearing were not open to the public. For the same reason, certain of the exhibits have been sealed and are not available to the public, and the court's findings of fact and

conclusions of law are being filed under seal. A redacted document will be publically filed as soon as possible.

The parties are directed to confer and submit their proposed redactions to the findings of fact and conclusions of law to <ndd_J-Senechal@ndd.uscourts.gov>, no later than 12:00 p.m., Central Standard Time, on December 15, 2017. If the parties do not agree on redactions, the parties shall advise the court of their positions by the same date.

IT IS SO ORDERED.

Dated this 13th day of December, 2017.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge

A NOTE ON FINDINGS AND CONCLUSIONS IN SECTION 13(B) CASES

Section 13(b) of the Federal Trade Commission Act authorizes the FTC to seek "a temporary restraining order or a preliminary injunction" in federal district court whenever the Commission has reason to believe that a law the Commission enforces is being violated or about to be violated.[1] It is this provision that the Commission invokes when it seeks a preliminary injunction blocking the consummation of a merger it alleges violates Section 7 of the Clayton Act pending a final resolution of the merits in an administrative trial. In *Sanford Health*, the district court issued both an Order granting the FTC's motion for a preliminary injunction[2] and the next day issued a Memorandum of Decision, Findings of Fact, Conclusions of Law, and Order.[3] This note explains why.

On October 2, 2017, the FTC filed a motion for a preliminary injunction consistent with the relief requested in its Section 13(b) complaint.[4] A *motion* is a request for a court order made by a party during a proceeding. A motion must be made in writing (unless made during a hearing or trial), must state with particularity the grounds for seeking the order, and must set out the relief or order sought.[5] In ruling on the motion, the court does not enter a judgment, but instead issues an *order*. Hence, the court resolved the FTC's motion by issuing its Order granting the preliminary injunction.

The court issued its Memorandum to comply with Rule 52 of the Federal Rules of Civil procedure. Rule 52 provides in pertinent part:

> In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.[6]

This requirement applies to interlocutory injunctions as well as final judgments.[7] Although the court's Order granted the FTC's motion, the separately issued Memorandum was necessary to provide the findings and conclusions required by Rule 52.

1 15 U.S.C. § 13(b).

2 Order, FTC v. Sanford Health, No. 1:17-cv-00133-DLH-CSM (D.N.D. filed Dec. 14, 2017).

3 Memorandum of Decision, Findings of Fact, Conclusions of Law, and Order, FTC v. Sanford Health, No. 1:17-cv-00133-ARS (D.N.D. Dec. 15, 2017)

4 Plaintiff's Motion for a Preliminary Injunction, FTC v. Sanford Health, No. 1:17-cv-00133-DLH-CSM (D.N.D. filed Oct. 2, 2017).

5 Fed. R. Civ. P. 7(b)(1).

6 *Id*. 52(a)(1).

7 *Id*. 52(a)(2). There is some uncertainty whether, as a matter of civil procedure jurisprudence, the district court's decision to grant or deny a preliminary injunction under Section 13(b) is an interlocutory order, a final judgment, or paradoxically both. *See* FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 165 n.2 (3d Cir. 2022) ("This Court has jurisdiction under 28 U.S.C. § 1291 (final decision) and 28 U.S.C. § 1292(a)(1) (order granting injunctive relief)."); FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir. 1976). The technical answer does not practically matter, since whatever the answer, the district court must comply with Rule 52.

Local AO 450 (rev. 5/10)

United States District Court

District of North Dakota

Federal Trade Commission and
State of North Dakota,

Plaintiffs,

vs.

Sanford Health, Sanford Bismarck,
and Mid Dakota Clinic, P.C.,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 1:17-cv-133

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☑ **Decision on Motion**. This action came before the Court on motion. The issues have been considered and a decision rendered.

☐ **Stipulation**. This action came before the court on motion of the parties. The issues have been resolved.

☐ **Dismissal**. This action was voluntarily dismissed by Plaintiff pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

IT IS ORDERED AND ADJUDGED:

Pursuant to the court's order filed December 13, 2017 and the findings of fact and conclusions of law contemporaneously with the order, the plaintiffs' motion for a preliminary injunction is granted.

Date: December 14, 2017

ROBERT J. ANSLEY, CLERK OF COURT

by: */s/ Leah Riveland-Foster, Deputy Clerk*

A NOTE ON RULE 54 JUDGMENTS

Rule 54 of the Federal Rules of Civil Procedure defines a "judgment" and prescribes the procedure a court must use to enter one.[1] Rule 54(a) states that a judgment is "a decree or any order from which an appeal lies."[2] In practice, the entry of a judgment marks the point at which a ruling becomes immediately appealable and starts the period during which the appeal must be noticed. Under Rule 58, every judgment or amended judgment must be set out in a separate document.[3] In *TransDigm,* the district court, like most federal courts, used the AO 450 form titled "Judgment in a Civil Case" to enter the final judgment.[4]

Rule 54(a) identifies two types of judgments: (1) *final judgments*, which dispose of all remaining claims of all parties in the litigation and are appealable as of right under 28 U.S.C. § 1291,[5] and (2) *interlocutory orders* that Congress has made immediately appealable. The two most common examples of the latter are orders granting or denying a preliminary injunction, which are immediately appealable as of right under Section 1292(a),[6] and interlocutory orders that the district court certifies—and the court of appeals accepts—for immediate review under Section 1292(b).[7]

Rule 54(b) offers a third route to immediate appellate review when, in a multiclaim or multiparty action, the district court finally disposes of fewer than all the claims or parties. Under this rule, the district court may, in its discretion and under prescribed conditions, "direct entry of a final judgment as to one or more, but fewer than all, claims or parties."[8] In effect, Rule 54(b) allows a district court to transform what would otherwise be an unappealable interlocutory order into a partial final judgment that is immediately appealable. Rule 54(b) mediates two competing interests: the "historic federal policy" against piecemeal appeals[9] and the need for immediate review

1 Fed. R. Civ. P. 54.

2 *Id*. 54(a).

3 *Id*. 58(a).

4 *See* Administrative Office of the U.S. Courts, AO Form 450 (Judgment in a Civil Case).

5 28 U.S.C. § 1291 (providing in part that "[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States").

6 *Id*. § 1292(a)(1) (authorizing the immediate appeal of an interlocutory order "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court").

7 *Id*. § 1292(b) (authorizing the immediate appeal of an interlocutory order when (1) the district court certifies in writing that the order presents a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation, and (2) the court of appeals, in its discretion, accepts the appeal).

8 *Id*. 54(b).

9 *See* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 438 (1956); *accord* Reiter v. Cooper, 507 U.S. 258, 265 (1993); Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 8 (1980).

of discrete, fully adjudicated claims in complex, multiclaim or multiparty litigation.[10] When courts invoke this authority, they issue what practitioners call a *Rule 54(b) certification*, creating a *certified judgment* as to specific claims or parties.

A Rule 54(b) certification requires a two-step inquiry.[11] First, the court must confirm *true finality*. That requirement is met only if the order either:

1. fully disposes of at least one entire claim for relief, leaving nothing more to litigate on that claim for any party (*claim-based finality*)[12] or
2. resolves every claim against a particular party, thereby removing that party from the case (*party-based finality*).[13]

An order that merely trims a theory or element from a still-live claim falls short of this requirement.[14] Second, the court must make "an express determination that there is no just reason for delay."[15] If these two conditions are satisfied, the court must direct entry of judgment on a separate document under Rule 58.[16]

In deciding whether to issue a Rule 54(b) certification, the district court must weigh both *judicial-administrative interests* and the *equities involved*.[17] Because certification is discretionary and reviewed only for abuse of discretion, the court should spell out case-specific reasons—such as complex factual overlap, potential duplication of discovery, or imminent time constraints—demonstrating that deferred review would impose a hardship that outweighs any incremental appellate burden.[18] Among the factors courts typically consider are:

[10] *See, e.g.,* Lowery v. Fed. Exp. Corp., 426 F.3d 817, 820 (6th Cir. 2005); Oklahoma Tpk. Auth. v. Bruner, 259 F.3d 1236, 1241 (10th Cir. 2001); Pahlavi v. Palandjian, 744 F.2d 902, 903 (1st Cir. 1984); Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360, 363 (3d Cir. 1975).

[11] *Curtiss-Wright*, 446 U.S. at 7-8.

[12] *See, e.g.*, *Curtiss-Wright*, 446 U.S. at 7-8; Lloyd Noland Found., Inc. v. Tenet Health Care Corp., 483 F.3d 773, 777 (11th Cir. 2007); Gerardi v. Pelullo, 16 F.3d 1363, 1371 (3d Cir. 1994); Ginett v. Computer Task Grp., Inc., 962 F.2d 1085, 1091 (2d Cir. 1992).

[13] *See Ginett*, 962 F.2d at 1091 (2d Cir.1992); 10 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2656 (4th ed. 2023) ("Rule 54(b) applies not only when one or more of the claims are resolved, but also when all claims against a particular party are adjudicated.").

[14] *See* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 742-45 (1976) (rejecting Rule 54(b) certification because liability was decided but remedies remained, so the order was not truly final); *see also* Morrison-Knudsen Co. v. Archer, 655 F.2d 962, 965 (9th Cir. 1981).

[15] Fed. R. Civ. P. 54(b).

[16] *Id*. (requiring "[e]very judgment and amended judgment must be set out in a separate document).

[17] *Curtiss-Wright*, 446 U.S. at 8.

[18] *See* O'Bert ex rel. Estate of O'Bert v. Vargo, 331 F.3d 29, 41 (2d Cir. 2003) (requiring a "written, if brief explanation" of the reasons supporting Rule 54 certification); *accord* NYSA Series Tr. v. Dessein, 631 F. App'x 54, 56 (2d Cir. 2015); Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct & Sewer Auth., 888 F.2d 180, 183 (1st Cir. 1989); *see also In re* Southeast Banking Corp. v. Bassett, 69 F.3d 1539, 1546 (11th Cir.1995) (holding that a failure to provide a "meaning explanation" negates any deference given to the district court's certification); Bldg. Indus. Ass'n of Superior California v. Babbitt, 161 F.3d 740, 745 (D.C. Cir. 1998) (same).

1. The relationship between adjudicated and unadjudicated claims
2. The risk that subsequent developments may moot appellate review
3. The likelihood of duplicative appellate review
4. The presence of offsetting claims or counterclaims
5. The potential for prejudice to the parties resulting from delay in hearing the appeal
6. The likelihood immediate review would promote judicial efficiency[19]

No one factor is dispositive, and the decision to make a Rule 54(b) certification is left to the sound discretion of the district court.[20]

On appeal, the court of appeals must first confirm that the Rule 54(b) certification was proper, as it forms the basis for the court's jurisdiction under 28 U.S.C. § 1291.[21] The court of appeals reviews finality de novo and the district court's "no-just-reason-for-delay" finding for abuse of discretion.[22]

Although Rule 54(b) certifications are fairly common in complex antitrust litigation, they seldom arise in merger cases. Even when a complaint combines a Clayton Act § 7 claim with an FTC Act § 5 claim in Commission actions or parallel state-law counts in suits by attorneys general, the merging parties almost always forgo interlocutory review because any detour to the court of appeals risks delaying the district court's final decision and derailing the deal's timetable. Alleged errors in interlocutory rulings can still be raised after a final judgment, preserving appellate rights without delaying the district court's decision on the injunction.

Granting a dispositive motion does not, by itself, produce a final judgment. Even after a dismissal, summary judgment ruling, or judgment as a matter of law, the court may allow the plaintiff to amend, leave other claims pending, or still have additional

[19] For cases providing a nonexhaustive list of factors to consider, see, for example, Kinsale Ins. Co. v. JDBC Holdings, Inc., 31 F.4th 870, 874 (4th Cir. 2022); Darr v. Muratore, 8 F.3d 854, 862 n.10 (1st Cir. 1993); Corrosioneering, Inc. v. Thyssen Env't Sys., Inc., 807 F.2d 1279, 1283 (6th Cir. 1986); Hayden v. McDonald, 719 F.2d 266, 269 (8th Cir. 1983); Bank of Lincolnwood v. Fed. Leasing, Inc., 622 F.2d 944, 949 (7th Cir. 1980); and Allis–Chalmers Corp. v. Phila. Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975).

[20] *See Curtiss-Wright*, 446 U.S. at 8 ("It is left to the sound judicial discretion of the district court to determine the "appropriate time" when each final decision in a multiple claims action is ready for appeal. This discretion is to be exercised "in the interest of sound judicial administration.") (citing *Sears*, 351 U.S. at 435, 437 (internal citations omitted)).

[21] *See, e.g.*, Ginett v. Computer Task Grp., Inc., 962 F.2d 1085, 1091 (2d Cir. 1992) ("Before we may reach the merits of the appeal, however, we must consider the matter of our own jurisdiction, an issue not raised by either party."); Elliott v. Archdiocese of New York, 682 F.3d 213, 218-19 (3d Cir. 2012); Lloyd Noland Found., Inc. v. Tenet Health Care Corp., 483 F.3d 773, 778 n.5 (11th Cir. 2007).

[22] *See, e.g.*, *Curtiss-Wright*, 446 U.S. at 10 (holding the district court's determination of the certified order's finality is subject to de novo review because it is a question of law and the "no just reason for delay is subject review for abuse of discretion); Peerless Network, Inc. v. MCI Commc'ns Servs., Inc., 917 F.3d 538, 543 (7th Cir. 2019); New Mexico v. Trujillo, 813 F.3d 1308, 1316 (10th Cir. 2016); *Lloyd Noland Found.*, 483 F. 3d at 777, 778 n.5; EJS Props., LLC v. City of Toledo, 689 F.3d 535, 537 (6th Cir. 2012); Info. Res., Inc. v. Dun & Bradstreet Corp., 294 F.3d 447, 451 (2d Cir. 2002).

parties in the case. Until all claims against all parties are resolved—or the court certifies a partial final judgment under Rule 54(b)—the order remains interlocutory and unappealable. To make finality unmistakable, Rule 58 requires the clerk to enter a separate document labeled "Judgment" (typically the AO 450 form), which serves as the formal trigger for post-judgment motions and appeal deadlines.

Once the clerk dockets a final judgment—whether for the entire case or a certified portion under Rule 54(b)— three key procedural consequences follow:

1. *Merger*: Prior unappealed, interlocutory orders merge into the judgment to the extent they relate to the claims actually adjudicated and are reviewable on appeal. Merger, however, does not apply to interlocutory orders unrelated to certified claims, which remain subject to later review.
2. *Deadlines*: Filing the "separate document" under Rule 58 of a Rule 54 judgment starts the 28-day window for post-judgment motions and the 30-day notice-of-appeal period.
3. *Ongoing control (Rule 54(b) only)*: Orders affecting still-pending claims remain modifiable by the district court during any interlocutory appeal.

These safeguards give the losing party an immediate path to appellate review without surrendering the district court's control over what remains.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

FEDERAL TRADE COMMISSION **and** **STATE OF NORTH DAKOTA,** **Plaintiffs,** **v.** **SANFORD HEALTH,** **SANFORD BISMARCK,** **and** **MID-DAKOTA CLINIC, P.C.,** **Defendants.**	**Case No. 1:17-cv-00133-ARS** **Notice of Appeal**

DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given that Sanford Health, Sanford Bismarck, and Mid-Dakota Clinic, defendants in the above captioned case, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the order granting plaintiffs' motion for a preliminary injunction entered in this action on the thirteenth day of December, 2017.

Dated: December 15, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 15, 2017, I electronically filed the foregoing document via the Court's electronic filing system, which will automatically send e-mail notification of this filing to all attorneys of record in this action.

/s/ James A. Kraehenbuehl
James A. Kraehenbuehl

A NOTE ON NOTICES OF APPEAL

A notice of appeal ("NOA") is the document perfecting an appeal of a district court judgment. Once the clerk dockets a timely NOA, the court of appeals acquires exclusive authority over the matters encompassed by the appeal, while the district court retains only those residual powers needed to enforce its judgment, supervise the record, or decide issues truly collateral to the merits (such as costs or attorney fees). This jurisdictional transfer rests on the principle that no two federal courts may exercise authority over the same issue simultaneously.

Legal framework

The authority to take an appeal in a federal civil case rests on a combination of statutory command and implementing rules. The basic right to appeal is granted by 28 U.S.C. § 2107.[1] Section 2107 also establishes the deadline by which a notice of appeal must be filed in the district court.[2] This deadline is jurisdictional. Failure to comply with Section 2107's time limits deprives the court of appeals of subject-matter jurisdiction, and the appeal must be dismissed regardless of the equities or judicial error in the district court.[3]

Federal Rules of Appellate Procedure 3 and 4 implement § 2107 by detailing how and when an appeal must be taken. Rule 3 governs the form and content of the notice itself,[4] while Rule 4 specifies the deadline for filing and identifies the types of post-judgment motions that toll that deadline if timely made.[5] Both rules integrate with Federal Rule of Civil Procedure 58, which determines when a judgment is "entered" and thus when the appeal clock begins.

Amendments to Rule 3, adopted in 2021, clarified several longstanding points of appellate practice. These amendments formally adopt the *merger rule*, under which interlocutory rulings merge into the final judgment and become appealable once that judgment is entered.[6] At the same time, the amended rule permits an appellant to limit

1 28 U.S.C. § 2701(a) (providing that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed").

2 Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). For deadlines in timing a notice of appeal, see *infra* Timing: When the Clock Starts and Stops.

3 Bowles v. Russell, 551 U.S. 205 (2007) ("Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple 'claim-processing rule.' As we have long held, when an 'appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.'") (quoting United States v. Curry, 47 U.S. 106, 113 (1848)).

4 Fed. R. App. P. 3.

5 *Id*. 4(a)(1).

6 *Id*. 3(c)(4); *see, e.g.*, In re Westinghouse Sec. Litig., 90 F.3d 696, 706 (3d Cir. 1996).

the scope of review by expressly designating only part of the judgment or order in the notice of appeal.[7] Finally, the revised rule instructs courts to construe notices of appeal liberally, directing them to excuse technical defects so long as the appellant's intent to appeal is clear.[8] This interpretive rule mitigates the harsh consequences of minor errors and reflects a longstanding policy favoring the resolution of appeals on the merits.[9]

Timing: When the clock starts and stops

In most civil cases, a notice of appeal must be filed within thirty days after the clerk enters the judgment or appealable order on the docket.[10] When the United States or a federal officer is a party, the deadline extends to sixty days.[11] For these purposes, the clerk "enters" the judgment only when the district court (1) files a separate document that sets out the judgment under Federal Rule of Civil Procedure 58 and (2) records that document on the civil docket.[12] By contrast, an immediately appealable interlocutory order is typically regarded as "entered" when it is recorded on the civil docket and does not require a separate document.[13]

Certain post-judgment motions—including motions for a new trial, to amend the judgment, or to alter or add findings—automatically toll the deadline. The time to appeal restarts when the district court disposes of the motion.[14]

The rules also permit a district court to grant one thirty-day extension for "excusable neglect or good cause."[15] In addition, if a party never receives notice that judgment has been entered, under certain conditions, the district court may reopen the appeal window for fourteen days after the date when its order to reopen is entered.[16]

[7] *Id*. 3(c)(6).

[8] *Id*. 3(c)(5), (7).

[9] *See* Smith v. Barry, 502 U.S. 244, 248-49 (1992) (holding that a document not labeled a notice of appeal can serve as an NOA if it satisfies Rule 3 and shows intent to appeal).

[10] Fed. R. App. P. 4(a)(1)(A).

[11] *Id*. 4(a)(1)(B).

[12] If the court omits the separate Rule 58 judgment, the appeal period does not start until the earlier of (a) the clerk's later entry of a Rule 58 judgment or (b) 150 days after the dispositive order is docketed. *See* Fed. R. App. P. 4(a)(7)(A)(ii); Bankers Trust Co. v. Mallis, 435 U.S. 381, 384-85 (1978) (per curiam) (concluding that when the district court's order plainly disposes of the entire case and no party is prejudiced, the appellate court may treat that order and its docket entry as the final judgment despite the absence of a separate Rule 58 document).

[13] *See* Fed. R. Civ. P. 58 advisory committee note (2002).

[14] Fed. R. App. P. 4(a)(4).

[15] *Id*. 4(a)(5).

[16] Rule 4(a)(6) allows reopening only if the movant (i) did not receive notice of entry within 21 days, (ii) moves within the earlier of 180 days after entry or 14 days after actual notice, and (iii) shows no party will be prejudiced. *See* Fed. R. App. P. 4(a)(6); Nunley v. City of L.A., 52 F.3d 792, 795-96 (9th Cir. 1995). The 180-day cap comes from 28 U.S.C. § 2107(c) and is jurisdictional, *e.g.*, Bourne v. Gardner, No. 18-1099, 2018 WL 11446388, at *1 (1st Cir. Aug. 14, 2018) [AUTHORITY], whereas the decision to reopen within that cap is left to the district court's discretion, *e.g.*, McCants on behalf of Est. of Nix v. United States, No. 23-11308, 2023 WL 8253806, at *1 (11th Cir. Nov. 29, 2023); Arai v. Am. Bryce Ranches Inc., 316 F.3d 1066, 1069 (9th Cir.

However, the outer time limits set by Section 2107 are absolute. As the Supreme Court emphasized in *Bowles v. Russell*,[17] a district court cannot extend the deadline even by a single day beyond what the statute and Rule 4 expressly permit.[18]

Content requirements under Rule 3(c)

Under Federal Rule of Appellate Procedure 3(c)(1),[19] the appellant must file a notice of appeal that:

(1) identifies the appellant or appellants (group labels like "Plaintiffs-Appellants" are acceptable only if they clearly include all parties who intend to appeal);[20]
(2) designates the judgment or appealable order being challenged; and
(3) names the court of appeals to which the appeal is taken.

An appellee may defend the judgment on any ground supported by the record—even one the district court rejected or ignored—without filing a notice of cross-appeal.[21] But if the appellee seeks to enlarge its rights or lessen its adversary's rights, it must file its own notice of appeal.[22]

The Rule 3(c) elements are straightforward. The Federal Rules of Appellate Procedure contain suggested templates in the Appendix of Forms to illustrate an NOA's simplicity.[23]

Filing procedures: How and where to file

A notice of appeal must be filed with the clerk of the district court, not the court of appeals.[24] Filing must be completed, not just mailed or prepared, by the applicable deadline.[25] Most district courts require electronic filing through the CM/ECF system,

2003); American Boat Co. v. Unknown Sunken Barge, 418 F.3d 910, 913 (8th Cir. 2005); Nunley v. City of Los Angeles, 52 F.3d 792, 794 (9th Cir. 1995).

17 551 U.S. 205, 214 (2007).

18 *Id.* at 214; *see* Hamer v. Neighborhood Hous. Servs. of Chicago, 583 U.S. 17, 19 (2017) (holding that while the time limits set by Section 2107 are jurisdictional, the time limits prescribed only in a court-made rule are not jurisdictional and subject to forfeiture if not properly raised by the appellee).

19 Fed. R. App. P. 3(c)(1).

20 *See* Torres v. Oakland Scavenger Co., 487 U.S. 312, 317-18 (1988) (holding that failure to name a party in the NOA is a jurisdictional defect that precludes appellate review for that party).

21 Morley Constr. Co. v. Md. Cas. Co., 300 U.S. 185, 191-92 (1937); *accord* El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 479 (1999).

22 *Morley*, 300 U.S. at 191-92; *accord* Greenlaw v. United States, 554 U.S. 237, 244 (2008) (reaffirming that a court of appeals "may not alter a judgment to benefit a nonappealing party"); *see* Fed. R. App. P. 4(a)(3).

23 *Id.* App. of Forms, Forms 1A (Notice of Appeal to a Court of Appeals from a Judgment of a District Court) & 1B (Notice of Appeal to a Court of Appeals from an Appealable Order of a District Court) (eff. Dec. 1, 2021).

24 *Id.* 3(a)(1) ("An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4."); *see also id.* 4(d) (permitting transfer of misfiled notice from court of appeals to district court).

25 *Id.* 3(a)(1).

and parties must comply with all local formatting and service rules.[26] The district clerk, not the appellant, must send a copy of the notice of appeal to each party's counsel of record except for the appellant's counsel.[27] In most cases, the clerk's service obligation is satisfied when the CM/ECF system transmits a notice of electronic filing to all counsel of record.[28] The district clerk must also "promptly" send a copy of the notice of appeal and the docket entries to the clerk of the court of appeals named in the notice.[29]

When filing the notice of appeal, the appellant must pay a single docketing fee—currently $605—consisting of a $5 district-court filing fee[30] and a $500 appellate docketing fee.[31] The district clerk collects the full amount, retains the district court portion, and forwards the appellate portion, together with the notice, to the circuit clerk.[32] Parties filing separate notices of appeal each pay a separate fee, but parties filing a joint notice of appeal pay only one fee.[33]

Next steps

Once the clerk of the court of appeals receives a copy of the notice of appeal from the district clerk, the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant.[34] At this stage, the circuit clerk also assigns an appellate docket number. Still, the appellant must perfect the appeal in the

[26] *See* Fed. R. Civ. P. 5(d)(3) (requiring electronic filing in most civil cases); Fed. R. App. P. 25(a)(2)(B) (defining the time of filing for electronic submissions). Case Management/Electronic Case Files (CM/ECF) is the federal judiciary's nationwide electronic docketing and filing system, administered by the Administrative Office of the United States Courts, that permits attorneys to file pleadings online and automatically serve parties through notices of electronic filing (NEF). *See* Administrative Office of the United States Courts, Electronic Filing (CM/ECF). Local rules govern implementation of CM/ECF.

[27] Fed. R. App. P. 3(d)(1) (providing "[t]he district clerk must serve notice of the filing of a notice of appeal by sending a copy to each party's counsel of record—excluding the appellant's").

[28] *See* Fed. R. Civ. P. 5(b)(2)(E) (providing service of a document may be made "by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending"); Fed. R. App. P. 25(c)(2) (slightly different articulation but same substance). In most districts, the clerk's duty to "send a copy" under Rule 3(d)(1) is satisfied when the CM/ECF system transmits a notice of electronic filing (NEF) to counsel of record. *See, e.g.*, D.D.C. L.R. 5.4(b)(6) ("An attorney or pro se party who obtains a CM/ECF password consents to electronic service of all documents, subsequent to the original complaint, that are filed by electronic means pursuant to Fed. R. Civ. P. 5(b)(2)(E).").

[29] *Id*. 3(d)(1). The district clerk's obligation to send the docket entries to the clerk of the court of appeals is a continuing one. *Id*.

[30] 28 U.S.C. § 1917.

[31] *See* 28 U.S.C. § 1913 (authorizing the Judicial Conference of the United States to set court fees and costs); Judicial Conference of the United States, Court of Appeals Miscellaneous Fee Schedule § 1 (setting a fee of $600 for docketing a case on appeal or review or docketing any other proceeding).

[32] Fed. R. App. P. 3(e) ("Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.).

[33] Court of Appeals Miscellaneous Fee Schedule § 1, *supra* note 31.

[34] Fed. R. App. P. 12(a).

court of appeals by undertaking the following steps within 14 days after the notice is filed:

(1) File with the circuit clerk a representation statement naming the parties that the attorney represents on the appeal.[35]

(2) Either (a) file a transcript order form with the district clerk that specifies the portions to be transcribed or (b) file a certificate that no transcript is needed.[36] If the appellant orders less than the entire transcript, within the same 14-day window, the appellant must file a statement of the issues that the appellant intends to present on the appeal and serve that statement, together with the transcript order or certificate, on the appellee.[37] Any appellee that believes additional pages are necessary must place its own order within 14 days after being served with the appellant's form or certificate.[38]

(3) Do whatever else is necessary to enable the clerk to assemble and forward the portions of the record designated by the appellant to the court of appeals.[39]

(4) If the appellant is a corporation, file a Rule 26.1 corporate disclosure statement with the circuit clerk.[40]

A few circuits also require a short docketing or jurisdictional statement filed with the circuit clerk under their local rules.[41]

Once these ministerial filings are on the appellate docket, the circuit clerk issues the briefing schedule. The Federal Rules of Appellate Procedure provide, in an ordinary civil appeal, that the appellant must serve its opening brief 40 days after the record is filed; the appellee then has 30 days to serve its answering brief; and the appellant has 21 days to serve its reply brief.[42] Briefing often deviates from this schedule since courts of appeal are usually receptive to joint or unopposed motions to alter the schedule. The Administrative Conference of the United States Courts reports that the median time from filing the notice of appeal to the circuit court's last opinion

35 *Id*. 12(b).

36 *Id*. 10(b)(1)-(2). Rule 10(a) defines the record on appeal: "The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." Id. 10(a). Rule 11(a), however, directs the district clerk to forward to the circuit only the docket sheet and those pleadings, exhibits, and transcripts that the parties designate (or that the court of appeals later orders), leaving the balance of the Rule 10(a) record in the district court. *See id*. 11(a).

37 *Id*. 10(b)(3)(A).

38 *Id*. 10(b)(3)(B)-(C).

39 *Id*. 11(a).

40 *Id*. 26.1.

41 *See, e.g.*, 2d Cir. R. 12.1(b)(1) (2025) (requiring a counseled appellant to file a "Civil Appeal Pre-Argument Statement" (Form C) within 14 days after the notice of appeal); D.C. Cir. R. 12 (2024) (requiring a docketing statement and provisional certificate soon after docketing).

42 Fed. R. App. P. 31(a)(1).

or final order is 11.2 months.[43] Among the courts with significant antitrust dockets, the D.C. Circuit is one of the fastest, with a median time of 9.8 months, while the Ninth Circuit is one of the longest, with a median time of 13.1 months.[44]

A merger agreement's termination or "drop dead" is typically one year from the signing of the agreement, often with an extension of an additional six months when the merging parties anticipate a lengthy second request investigation and want to preserve an option to litigate. However, even with aggressive second request compliance, expedited litigation discovery, and a cooperative district judge, most transactions can only barely proceed from signing to a final district court decision within 18 months. As a result, when the district court enters a blocking injunction, the merging parties rarely appeal. In the few cases when the merging parties do appeal, they almost always file an immediate motion for expedited treatment of the appeal, typically requesting a compressed briefing schedule, priority oral argument, and a final decision within six months or less. Circuit courts, cognizant of the timing pressures the deals face, frequently grant these motions, usually on or close to the schedules the merging parties proposed. Even so, as the table below suggests, even with expedited treatment, the merging parties voluntarily terminate their merger agreement and dismiss the appeal soon after docketing.

[43] ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. B-4A (U.S. Courts of Appeals—Median Times for Civil and Criminal Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2023, for "Other Civil Appels") (Sept. 30, 2024).

[44] *Id*.

Appeals by Merging Parties after Injunction Entered
(Some examples)

	Anthem/Cigna (D.C. Circuit)[45]	JetBlue/Spirit (First Circuit)[46]	Tapestry/Capri (Second Circuit)[47]
Docketed	Feb. 10, 2017	Jan. 23, 2024	Oct. 29, 2024
Opening brief	On file	Feb. 26, 2024	Nov. 20, 2024
Answering brief	Mar. 13, 2017	Apr. 11, 2024	Dec. 20, 2024
Reply brief	Mar. 20, 2017	Apr. 25, 2024	Dec. 30, 2024
Oral argument	Mar. 24, 2017	—	—
Decision	Apr. 28, 2017	—	—
Time to disposition	2.5 months	—	—

Expedited treatment is usually less important when the merging parties prevail in district court. Unless the district court or the court of appeals enters an injunction pending appeal blocking the deal, the parties will close their transaction. Once the deal is closed, there is no longer the timing pressure for expedited treatment.

[45] *See* Order, United States v. Anthem, No. 17-5024 (D.C. Cir. Feb. 17, 2017) (resolving emergency motion for expedited treatment and setting briefing and oral argument schedule); Opinion, United States v. Anthem, Inc., No. 17-5024 (D.C. Cir. Apr. 28, 2017) (affirming grant of permanent injunction).

[46] *See* Order of the Court, United States v. JetBlue Airways Corp., No. 24-1092 (1st Cir. Feb. 2, 2024) (resolving defendants-appellants' motion to expedite the appeal and "contemplate[ing] argument during the court's June sitting). On March 4, 2024, the parties terminated the merger agreement and filed a motion for voluntary dismissal the next day. *See* Judgment, United States v. JetBlue Airways Corp., No. 24-1092 (1st Cir. Mar. 5, 2024) (dismissing appeal).

[47] *See* Order, FTC v. Tapestry, Inc., No. 24-2848 (2d Cir. Nov. 6, 2024) (resolving defendants-appellants' motion to expedite the appeal and observing "[t]he appeal shall be heard as soon as practicable following completion of briefing). On Novermber 14, 2024, the parties terminated the merger agreement and filed a motion for voluntary dismissal on November 20, 2024. *See* Mandate, FTC v. Tapestry, Inc., No. 24-2848 (2d Cir. Nov. 20, 2024).

The Appeal

United States Court of Appeals
For the Eighth Circuit

No. 17-3783

Federal Trade Commission; State of North Dakota,

Plaintiffs - Appellees,

v.

Sanford Health; Sanford Bismarck; Mid Dakota Clinic, P.C.,

Defendants - Appellants.

State of Minnesota; State of Alaska; State of California; State of Delaware; State of Hawaii; State of Idaho; State of Iowa; State of Mississippi; State of Massachusetts; State of Pennsylvania; Puerto Rico; State of Wyoming,

Amici on Behalf of Appellee(s).

Appeal from United States District Court
for the District of North Dakota - Bismarck

Submitted: November 13, 2018
Filed: June 13, 2019

Before COLLOTON, SHEPHERD, and STRAS, Circuit Judges.

COLLOTON, Circuit Judge.

This is an antitrust case arising under § 7 of the Clayton Act, 15 U.S.C. § 18. The Federal Trade Commission and the State of North Dakota moved to enjoin Sanford Bismarck's acquisition of Mid Dakota Clinic, P.C., alleging that the merger would violate the Act. The district court[1] granted a preliminary injunction after determining that the plaintiffs were likely to succeed in proving that the acquisition would substantially lessen competition in four types of physician services in the Bismarck-Mandan area. The companies appeal, and we affirm.

Sanford is an integrated healthcare system operating in North Dakota and several other States. In the Bismarck-Mandan region, Sanford operates an acute care hospital and multiple clinics. The company employs approximately thirty-seven adult primary care physicians, five pediatricians, eight OB/GYN physicians, and four general surgeons.

Sanford's two main competitors in the Bismarck-Mandan region are Mid Dakota and Catholic Health Initiatives St. Alexius Health. Mid Dakota is a multi-speciality physician group that includes approximately twenty-three adult primary care physicians, six pediatricians, eight OB/GYN physicians, and five general surgeons. Catholic Health employs eighty-eight physicians, the majority of whom are hospitalists; five are adult primary care physicians.

In North Dakota, there are three leading commercial insurers: Blue Cross Blue Shield North Dakota, Medica, and Sanford Health Plan. Blue Cross is the largest, accounting for 61% of the North Dakota health insurance market in 2016. Blue Cross

[1]The Honorable Alice R. Senechal, United States Magistrate Judge for the District of North Dakota, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. § 636(c).

has a participation agreement with every general acute care hospital in the State and with approximately 99% of practicing physicians. Sanford and Medica accounted for 31% and 8% of the 2016 market, respectively.

In 2015, Mid Dakota offered itself for sale, and both Catholic Health and Sanford submitted purchase proposals. Mid Dakota initially executed a letter of intent with Catholic Health, but after Catholic Health terminated the deal, Mid Dakota began negotiations with Sanford. The two entities executed a term sheet in August 2016 providing that Sanford would acquire the assets of Mid Dakota. Ten months later, they signed a stock purchase agreement in which Sanford agreed to purchase the outstanding capital stock of Mid Dakota. If the companies merge, then Sanford will have the following market shares in the Bismarck-Mandan region: 99.8% of general surgeon services, 98.6% of pediatric services, 85.7% of adult primary care physician services, and 84.6% of OB/GYN physician services.

The Federal Trade Commission and North Dakota Attorney General brought an action seeking to enjoin the merger. Section 7 of the Clayton Act provides that no person engaged in commerce and subject to the jurisdiction of the FTC shall acquire the stock or assets of another person if "the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18. The FTC alleged that Sanford's acquisition of Mid Dakota would contravene this proscription and sought an injunction under 15 U.S.C. §§ 26 and 53(b). The complaint asserted that Sanford's plan "to purchase [Mid Dakota's] assets through two separate transactions" would "violate Section 7 of the Clayton Act by substantially lessening competition." After a four-day evidentiary hearing, the district court found that the plaintiffs were likely to succeed on the merits of their claim. The court therefore issued a preliminary injunction.

We review the district court's grant of a preliminary injunction for abuse of discretion. *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006). "An abuse of

discretion occurs where the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *Id.* at 503-04. A district court may enjoin a proposed merger if the FTC shows that "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999) (quoting 15 U.S.C. § 53(b)).

To evaluate the FTC's likelihood of success on the merits, the district court employed a burden-shifting method endorsed by the D.C. Circuit in *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990). Under this approach, the plaintiffs must first present a *prima facie* case that the merger will result in an undue market concentration for a particular product or service in a particular geographic area. That showing creates a presumption that the merger will substantially lessen competition. The burden of production then shifts to the defendant to rebut the presumption, and, on a sufficient showing, back to the plaintiffs to present additional evidence of anticompetitive effects. The ultimate burden of persuasion remains at all times with the plaintiffs.

The companies argue that the district court improperly shifted the ultimate burden of persuasion to the defendants when it required them to produce rebuttal evidence that "clearly shows" that no anticompetitive effects were likely. The district court cited *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), where the Court said 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." *Id.* at 363 (emphasis added). The D.C. Circuit in *Baker Hughes* reviewed later decisions that used the term "show" instead of "clearly show," and concluded that the Supreme Court, without overruling

Philadelphia National Bank, "has at the very least lightened the evidentiary burden on a section 7 defendant." 908 F.2d at 990-91.

We conclude that there was no legal error by the district court here. The court followed the analytical framework of *Baker Hughes*, and specified that "[t]he FTC has the burden of persuasion at all times." While *Baker Hughes* adverted to the Supreme Court's shift in terminology since the 1960s, the D.C. Circuit also recognized that "[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Id.* at 991. In the context of this case, where the plaintiffs presented strong evidence of monopolization or near-monopolization in each service line, it was necessary for the defendants to make a strong presentation in rebuttal. We are not convinced that the quotation from *Philadelphia National Bank*, read in the context of the district court's order as a whole, shifted the burden of persuasion to the defendants or required the defendants to do anything more than produce evidence showing that the FTC's *prima facie* case "inaccurately predicts the relevant transaction's probable effect on future competition." *Id.*

Turning to the district court's findings of fact, we review the court's determination of the relevant market for clear error. *FTC v. Lundbeck, Inc.*, 650 F.3d 1236, 1239 (8th Cir. 2011). The district court first defined the four relevant product markets as adult primary care services, pediatric services, OB/GYN physician services, and general surgeon services, and defined the relevant geographic market as the Bismarck-Mandan area. The district court employed the "hypothetical monopolist test," which is commonly used in antitrust actions to define the relevant market. *See Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015). The test asks whether a hypothetical monopolist could impose a "small but significant nontransitory increase in price" in the proposed market. *Id.* If consumers would defeat the price increase by switching to products outside of the proposed market, then the market definition is too narrow and must be

redefined. Here, the court found that "commercial health insurers would accept a hypothetical monopolist's [small but significant nontransitory increase in price] rather than market a health insurance plan in the Bismarck-Mandan area that did not include Bismarck-Mandan area physicians providing adult PCP services, pediatrician services, OB/GYN services, and general surgeon services." The court's determination was supported by empirical analysis of claims data and testimony of representatives from North Dakota's three largest insurance companies, including Sanford Health Plan—the insurance provider within Sanford Health's integrated care system. The representatives each testified that an insurance plan's network must include each of these services to be competitive in the Bismarck-Mandan area.

The companies argue that the district court failed to account for Blue Cross's dominant position in the market: a provider in North Dakota, they argue, would not be able to impose a price increase on Blue Cross. In determining the relevant market, however, the question is not whether a monopolist would increase prices on an insurer, but whether the insurer "will shift from one product to the other in response to changes in their relative costs." *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1278 (8th Cir. 1981). When applied to a merger between health care providers, the hypothetical monopolist test evaluates whether an insurer could avoid a price increase by contracting with physicians who offer services that are outside of the proposed service markets or who are located in a region outside of the proposed geographic market. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 342 (3d Cir. 2016); Horizontal Merger Guidelines § 4.1.3 ("The hypothetical monopolist's incentive to raise prices depends both on the extent to which customers would likely *substitute away* from the products in the candidate market in response to such a price increase and on the profit margins earned on those products.") (emphasis added). Blue Cross's alleged bargaining power would not impact its ability to find substitute physician services when facing a price increase; the undisputed testimony was that there are no functional substitutes to a plan offering adult primary care services, pediatric services,

OB/GYN physician services, general surgeon services in the Bismarck-Mandan area. The court thus did not clearly err in defining the relevant market.

The district court next found that the government made a sufficient *prima facie* showing because "[t]he changes in [Herfindahl-Hirschman Index] in each of the four physician service lines are well above the Merger Guidelines' threshold for presumption that the proposed transaction is likely to enhance market power." In rebuttal, the companies raised four principal arguments: (1) market concentration has no relationship to bargaining power in the North Dakota healthcare market, (2) Catholic Health was poised to enter the market to compete with Sanford after the merger, (3) merger efficiencies offset the potential to harm consumers, and (4) Mid Dakota's weakened condition justified the merger. The district court evaluated the evidence in support of these contentions and found that the FTC's evidence still carried the day.

The companies first argued that the ordinary presumption that increased market concentration will lead to increased prices does not apply to the North Dakota healthcare market, because Blue Cross is a dominant buyer that sets reimbursement rates using a statewide pricing schedule. Even if a provider has a monopoly or near-monopoly in one region, they argue, the provider would be unable to increase Blue Cross's reimbursement rates, so the merger would not impact prices. The district court viewed this contention as a "powerful buyer defense," and evaluated whether (1) Blue Cross, as a powerful buyer, could use its leverage to sponsor entry to the market, or (2) whether Blue Cross would be able to obtain lower prices from alternative suppliers after a merger. *See* Horizontal Merger Guidelines § 8. Finding that neither was likely, the court rejected the proffered defense.

On appeal, the companies dispute the district court's characterization of their argument as a powerful buyer *defense*, and complain again that the district court shifted the burden of persuasion. Yet however the submission is described, the

district court expressly placed the burden of persuasion on the plaintiffs, and found that despite the market power of Blue Cross, there was a relationship between market concentration after the merger and bargaining leverage. A Blue Cross representative testified that Sanford, after the proposed merger, would indeed have the power to force Blue Cross to choose between raising prices or leaving the Bismarck-Mandan region. And there was evidence that Blue Cross in the past was forced to modify contract terms with a near-monopoly provider in another area of the State. The district court did not clearly err in crediting this evidence and finding that it outweighed the testimony of the companies' expert that the merged company would be unlikely to extract higher reimbursements from Blue Cross.

The companies also argued that Catholic Health, a competitor of Sanford, was poised to enter and compete in the Bismarck-Mandan market. They contend that Catholic Health's entrance would counteract the anticompetitive effects of the merger. Entry of competitors into a market can offset anticompetitive effects, however, only if the entrance is "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." Horizontal Merger Guidelines § 9; *see also FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 55 (D.D.C. 1998). The court found that Catholic Health would not be able to enter the market quickly after the merger. Catholic Health's president testified that the company faced difficulties recruiting physicians in the Bismarck-Mandan area. Although the president testified that the company could recruit doctors to enter the market in the short term, Appellants' App. I, at 174, he also explained that it would take up to twice as long to establish a name and reputation that could compete with Sanford. *Id*. at 156. On appeal, the companies point to testimony that Catholic Health intended to enter the market and had recruited a top physician in Bismarck. But the district court did not clearly err in giving more weight to Catholic Health's testimony that it could not timely compete with Sanford in the Bismarck-Mandan market, and in finding that entry of this competitor would not come soon enough to offset anticompetitive effects of the merger.

The companies further assert that the district court erred in evaluating the quality efficiencies that would be generated by the merger. In the district court, the companies pointed to five consumer benefits that would be available to more consumers in the Bismarck-Mandan region after the merger: (1) Imagenetics, a program integrating genetic medicine into primary care, (2) behavioral health therapists embedded into primary care clinics, (3) cancer care trials and cancer care outreach to communities outside the Bismarck-Mandan area, (4) a combined and customized electronic medical record system that would better integrate and coordinate patient care, and (5) recruitment of subspecialists to the area.

For these efficiencies to counteract anticompetitive effects, they must be independently verifiable and derived specifically from the merger: "[T]hey must be efficiencies that cannot be achieved by either company alone." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721-22 (D.C. Cir. 2001). The district court found, however, that only the Imagenetics program was merger-specific. This putative benefit was not enough to offset the anticompetitive effects of the merger, the court found, because "[e]fficiencies almost never justify a merger to monopoly or near-monopoly." Horizontal Merger Guidelines § 10; *see also Saint Alphonsus*, 778 F.3d at 790.

The companies argue that the other four proposed efficiencies were also merger-specific, but the district court's finding was adequately supported by the record. The FTC's expert reported that Mid Dakota could make the other quality gains without the merger: he provided evidence that patient demands—not practice size—drive physician recruitment, that a combined electronic medical record system was neither required nor certain to integrate and coordinate patient care, and that Mid Dakota and Sanford already provided community outreach services and could expand those services without the merger. Sanford's own executive admitted that Mid Dakota could employ a behavioral health therapist without the merger. The companies argued in the district court that Mid Dakota did not *offer* these quality improvements, but the relevant issue was whether Mid Dakota was *capable* of

developing them without the merger. On the record as a whole, the district court's finding on merger-specific efficiencies was not clear error.

The district court also understood the companies to raise a "weakened competitor" defense, asserting that dim long-term prospects of Mid Dakota justified its merger with Sanford. The court rejected this argument based on sufficient evidence that Mid Dakota was financially healthy. Mid Dakota increased revenues in the three years before the lawsuit; physician compensation was 32% above the national average; and minutes from a Mid Dakota shareholder meeting in 2015 shows that the motivation to sell was high share value, not concern about long-term viability. The companies argue that they did not raise a freestanding "weakened competitor defense," but merely urged the district court to consider the financial status of Mid Dakota in the context of its arguments about efficiencies and potential entry to the market by Catholic Health. Assuming that is true, the district court's findings on those asserted efficiencies were not clearly erroneous.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3783

Federal Trade Commission; State of North Dakota

Plaintiffs - Appellees

v.

Sanford Health; Sanford Bismarck; Mid-Dakota Clinic, P.C.

Defendants - Appellants

State of Minnesota; State of Alaska; State of California; State of Delaware; State of Hawaii; State of Idaho; State of Iowa; State of Mississippi; State of Massachusetts; State of Pennsylvania; Puerto Rico; State of Wyoming

Amici on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:17-cv-00133-ARS)

JUDGMENT

Before COLLOTON, SHEPHERD and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 13, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3783

Federal Trade Commission and State of North Dakota

Appellees

v.

Sanford Health, et al.

Appellants

State of Minnesota, et al.

Amici on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:17-cv-00133-ARS)

MANDATE

In accordance with the opinion and judgment of 06/13/2019, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

August 06, 2019

Clerk, U.S. Court of Appeals, Eighth Circuit

A NOTE ON APPELLATE JUDGMENTS AND MANDATES

In the federal appellate system, the judgment and the mandate serve distinct procedural and jurisdictional functions. The judgment is the court of appeals' formal resolution of the appeal. The mandate, by contrast, is the official instruction to the lower court to give effect to that judgment, marking the end of the appellate court's jurisdiction. Understanding the difference between these two documents is necessary for tracking the status of an appeal and identifying when jurisdiction is transferred back to the trial court.

Judgments. A judgment is the formal resolution of an appeal. Governed by Federal Rule of Appellate Procedure 36, the judgment is prepared and entered by the clerk of the court, usually on the same day as the court's opinion or order. It reflects only the result, such as "affirmed," "reversed," "vacated," or "remanded," without explanation. The reasoning, if any, appears in the accompanying opinion.

Entry of judgment initiates the deadlines for further review. A party may seek panel rehearing or rehearing en banc under FRAP 40, which must be filed within 14 days (or 45 days if the United States or a federal agency is a party). The judgment also initiates the period to file a petition for a writ of certiorari, typically 90 days from the entry of judgment or the denial of rehearing. Importantly, the judgment itself does not transfer jurisdiction back to the lower court.

Mandates. The mandate is the court of appeals' formal instruction to the district court to act in accordance with its judgment. Governed by FRAP 41, the mandate consists of a certified copy of the judgment, often accompanied by the court's opinion or order. It signals that the appellate process has concluded and that the district court may resume jurisdiction.

If no petition for rehearing is filed, the mandate issues seven days after the deadline to seek rehearing expires. If a petition is filed and denied, the mandate issues seven days after the denial. The court of appeals may extend or shorten this period for good cause.

The mandate functions as both a procedural mechanism and a jurisdictional boundary. It ensures that the transition from appellate review to district court proceedings occurs in an orderly and legally coherent manner by clearly marking when authority passes from the appellate court back to the trial court.

Until the mandate issues, the court of appeals retains exclusive authority over the case and may modify, stay, or recall its judgment. The district court may not take action inconsistent with the appellate disposition. This reflects a core principle of federal appellate procedure: only one court at a time has authority to act on a case-the appellate court before the mandate issues, and the district court thereafter. This rule maintains judicial hierarchy and prevents conflicting or premature actions.

The Aftermath

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	**PUBLIC**
Sanford Health, **a corporation;**	)	**Docket No. 9376**
Sanford Bismarck, **a corporation; and**	)	
Mid Dakota Clinic, P.C., a corporation,	)	
Respondents	)	

JOINT MOTION TO DISMISS COMPLAINT

Complaint Counsel and Respondents Sanford Health, Sanford Bismarck (collectively "Sanford") and Mid Dakota Clinic, P.C. ("MDC") jointly move to dismiss the complaint in the above-captioned matter. Following a decision from the United States Court of Appeals for the Eighth Circuit affirming a district court decision granting the Federal Trade Commission's motion for a preliminary injunction, Respondents are abandoning their efforts to pursue a proposed merger. Attached as Exhibit A is a declaration from Sanford's Chief Legal Officer, Ms. Jennifer G. Grennan, attesting that Sanford will abandon the proposed transaction. *See* Ex. A ¶ 10.

As such, the complaint is now moot. Accordingly, the parties respectfully request that the Commission dismiss the complaint.

A proposed order is attached.

Dated: June 25, 2019

Respectfully submitted,

/s/ Kevin Hahm
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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of Sanford Health, a corporation; Sanford Bismarck, a corporation; and Mid Dakota Clinic, P.C., a corporation;	Docket No. 9376

DECLARATION OF JENNIFER G. GRENNAN

I, Jennifer G. Grennan, hereby certify the following:

1. I am Chief Legal Officer for Sanford, a North Dakota non-profit corporation.
2. I am authorized to execute this declaration on behalf of Sanford.
3. Sanford Bismarck, a subsidiary of Sanford, entered into an agreement to acquire Mid Dakota Clinic, P.C. ("MDC") (the "proposed transaction").
4. On June 21, 2017, the Federal Trade Commission ("FTC") filed an administrative complaint seeking to enjoin the proposed transaction as a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act ("administrative proceeding").
5. On June 22, 2017, the FTC and the State of North Dakota filed a complaint in the United States District Court of North Dakota ("District Court") seeking to preliminarily enjoin the proposed transaction until the conclusion of the administrative proceeding.
6. On December 13, 2017, the District Court granted the FTC's and North Dakota's motion for a preliminary injunction (the "District Court Decision").
7. On June 13, 2019, the United States Court of Appeals for the Eighth Circuit affirmed the District Court Decision (the "Eighth Circuit Decision").
8. Sanford does not intend to seek further judicial review of the Eighth Circuit Decision.
9. Previously, Sanford and MDC committed that, in the event that a preliminary injunction is granted by the District Court and affirmed on appeal, Sanford will

abandon the proposed transaction without further litigating the administrative proceeding.

10. In light of the Eighth Circuit Decision, Sanford will abandon the proposed transaction.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: June 24, 2019

Jennifer G. Grennan
Chief Legal Officer
Sanford

PUBLIC

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	**PUBLIC**
Sanford Health, **a corporation;**	)	**Docket No. 9376**
Sanford Bismarck, **a corporation; and**	)	
Mid Dakota Clinic, P.C., **a corporation**,	)	
Respondents	)	

[PROPOSED] ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Complaint Counsel's and Respondents' Joint Motion to Dismiss Complaint. Having considered the motion, it is hereby

ORDERED that the Joint Motion to Dismiss Complaint dated June 25, 2019, is **GRANTED** and the complaint is dismissed without prejudice.

By the Commission.

ISSUED: _____

_____
April Tabor
Secretary

PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2019, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-135
Washington, D.C. 20580

I hereby certify that on June 25, 2019, I delivered via electronic mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, D.C. 20580

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Counsel for Respondent MDC

Dated: June 25, 2019

By: */s/ David Owyang*
David Owyang, Attorney

PUBLIC

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: June 25, 2019

By: */s/ David Owyang*
David Owyang, Attorney

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
Sanford Health, a corporation,	)	
Sanford Bismarck, a corporation,	)	**DOCKET NO. 9376**
and	)	
Mid Dakota Clinic, P.C., a corporation.	)	

ORDER DISMISSING COMPLAINT

On June 21, 2017, the Commission issued an administrative Complaint alleging that Respondents Sanford Health, Sanford Bismarck (collectively "Sanford"), and Mid Dakota Clinic, P.C. ("MDC") had executed a term sheet in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The Complaint further alleged that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

On June 22, 2017, pursuant to Section 13(b) of the FTC Act and Section 16 of the Clayton Act, the Commission[1] filed a complaint in the United States District Court for the District of North Dakota ("District Court") seeking a temporary restraining order and a preliminary injunction to prevent Respondents from consummating the proposed acquisition until final resolution of this administrative proceeding. On December 13, 2017, the District Court granted the Commission's motion for a preliminary injunction. After an appeal by Sanford and MDC, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's decision on June 13, 2019.

[1] The State of North Dakota was co-Plaintiff in this action.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

After Healthcare System Sanford Health Abandons Acquisition of North Dakota Healthcare Provider Mid Dakota Clinic, FTC Dismisses Case from Administrative Trial Process

Share This Page

FOR RELEASE

July 9, 2019

TAGS: Health Care | Hospitals and Clinics | Bureau of Consumer Protection | Competition | Merger | Horizontal

Following the decision last week of Sanford Health to abandon its proposed acquisition of Mid Dakota Clinic, the Federal Trade Commission has dismissed its case challenging the transaction through the Commission's administrative trial process.

FTC Chairman Joseph J. Simons issued the following statement:

"These two physicians' groups have competed vigorously in the Bismarck-Mandan region of North Dakota. The FTC alleged that the proposed acquisition would give Sanford at least a 75 to 85 percent share of the market for providing adult primary care physician services, pediatric services, and obstetrics and gynecology services, and would leave the region with only one physician group offering general surgery physician services. Now that the acquisition is abandoned, consumers in the Bismarck-Mandan region of North Dakota will continue to benefit from competition between Sanford Health and Mid Dakota Clinic in these vital physician services."

A June 13, 2019 decision by the Eighth Circuit Court of Appeals upheld a December 2017 preliminary injunction issued by the district court that halted the acquisition pending a full administrative trial on the merits. When the respondents appealed the district court's ruling and sought to have the preliminary injunction lifted, the administrative trial was stayed.

The FTC filed its federal complaint challenging the acquisition jointly with the Office of the Attorney General of North Dakota in June 2017. The complaint alleged that Sanford and Mid Dakota are each other's closest rivals in the four-county Bismarck-Mandan region.

The Commission's vote to dismiss the administrative complaint was 5-0.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. Like the FTC on Facebook, follow us on Twitter,

read our blogs, and subscribe to press releases for the latest FTC news and resources.

PRESS RELEASE REFERENCE:

FTC and State Attorney General Challenge Physician Group Acquisition in North Dakota

Statement by Federal Trade Commission Acting Bureau of Competition Director Bruce Hoffman on the Court Ruling Granting a Preliminary Injunction in the Sanford Health/Mid Dakota Clinic Matter

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Rights of Action

RIGHTS OF ACTION

THE DEPARTMENT OF JUSTICE

Clayton Act § 15. Restraining violations; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof. [15 U.S.C. § 25]

THE FEDERAL TRADE COMMISSION

FTC Act § 13(b). (b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and

be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

FTC Act § 5(a). Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) [*Substantive prohibition—see above*]

(2) The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations [with limited exceptions] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) – (4) [*Omitted*]

(b) *Proceeding by Commission; modifying and setting aside orders*. Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. [*Remainder of subsection omitted*]

[*Remainder of section omitted* [1]]

Clayton Act § 11. Enforcement provisions

(a) *Commission, Board, or Secretary authorized to enforce compliance*. Authority to enforce compliance with sections 13, 14, 18 [Clayton Act § 7], and 19 of this title by the persons respectively subject thereto is vested in . . . the Federal Trade

1. The remainder of Section 5 sets for the procedure for the Commission to adjudicate alleged violations of Section 5. The only relief the Commission may enter is a *cease and desist order*, which is essentially an injunction.

Commission where applicable to all other character of commerce to be exercised as follows:

(b) *Issuance of complaints for violations; hearing; intervention; filing of testimony; report; cease and desist orders; reopening and alteration of reports or orders.* Whenever the Commission, Board, or Secretary vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission, Board, or Secretary requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission, Board, or Secretary, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission, Board, or Secretary. If upon such hearing the Commission, Board, or Secretary, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission, Board, or Secretary may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission, Board, or Secretary may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission, Board, or Secretary conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided, however, That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) *Review of orders; jurisdiction; filing of petition and record of proceeding; conclusiveness of findings; additional evidence; modification of findings; finality of judgment and decree.* Any person required by such order of the commission, board, or Secretary to cease and desist from any such violation may obtain a review of such

order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission, board, or Secretary be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission, board, or Secretary, and thereupon the commission, board, or Secretary shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission, board, or Secretary until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission, board, or Secretary, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission, board, or Secretary as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission, board, or Secretary is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission, board, or Secretary. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, board, or Secretary, the court may order such additional evidence to be taken before the commission, board, or Secretary, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission, board, or Secretary may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

(d) *Exclusive jurisdiction of Court of Appeals*. Upon the filing of the record with its jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission, board, or Secretary shall be exclusive. [15 U.S.C. § 21]

[*Remainder of section omitted* [2]]

2. The remainder of Section 11 addresses liability under the antitrust laws and service of complaints, orders and other processes.

PRIVATE PARTIES
(including the states)

Clayton Act § 4. Suits by persons injured

(a) *Amount of recovery; prejudgment interest*. Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [prejudgment interest provision redacted] [15 U.S.C. § 15(a)]

[*Sections 4(b)-4(c) omitted*]

Clayton Act § 4C. Actions by State Attorneys General

(a) Parens patriae; monetary relief; damages; prejudgment interest

(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title [the Sherman Act]. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity. [15 U.S.C. § 15c(a)(1)]

Clayton Act § 16. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff. [15 U.S.C. § 26]

FTC Litigation

FEDERAL COURT INJUNCTIONS

FEDERAL RULES OF CIVIL PROCEDURE

Rule 65. Injunctions and Restraining Orders

(a) Preliminary Injunction.

(1) *Notice.* The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits.* Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

(1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; Expiration.* Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) *Expediting the Preliminary-Injunction Hearing.* If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) *Motion to Dissolve.* On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires

(c) *Security*. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) *Contents.* Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) *Persons Bound.* The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) *Other Laws Not Modified*. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. §2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. §2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) *Copyright Impoundment*. This rule applies to copyright-impoundment proceedings.

No. 23-6188

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,
Plaintiff

v.

IQVIA HOLDINGS, INC., and
PROPEL MEDIA, INC.
Defendants

BRIEF OF AMICUS CURIAE TECHFREEDOM IN SUPPORT OF DEFENDANT IQVIA HOLDINGS, INC., and PROPEL MEDIA, INC.

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December 7, 2023

CORPORATE DISCLOSURE STATEMENT

TechFreedom is a non-profit entity and does not issue stock or ownership interests. It does not have a parent corporation; nor does any publicly held corporation have an ownership interest in it.

Dated: December 7, 2023

/s/Bilal Sayyed
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INTEREST OF AMICUS CURIAE TECHFREEDOM[1]

TECHFREEDOM is a nonprofit, nonpartisan think tank based in Washington, D.C. TechFreedom has an interest in ensuring that antitrust law enforcement promotes the public interest by protecting efficient and welfare enhancing conduct from liability under the antitrust and other competition laws.

TechFreedom's employees have extensive expertise with the laws and regulations enforced by the Federal Trade Commission. Bilal Sayyed, Senior Competition Counsel for TechFreedom, served as Director of the Office of Policy Planning at the FTC from 2018 to 2021. The Office of Policy Planning (OPP) initiated and managed the Chairman's Hearings on Competition and Consumer Protection in the 21st Century during his tenure. Following the Hearings, staff of the Bureaus of Competition and Economics and OPP, working with the Department of Justice, drafted the 2020 VERTICAL MERGER GUIDELINES and the 2020 FEDERAL TRADE COMMISSION COMMENTARY ON VERTICAL MERGER ENFORCEMENT. Additionally, under his leadership, the Commission inquired into over 500 acquisitions by Google, Facebook, Amazon, Apple, and Microsoft. Sayyed has continued to focus on mergers and the FTC as Senior Competition Counsel at TechFreedom. *See, e.g.,* Bilal Sayyed, *Actual Potential Entrants, Emerging Competitors, and the Merger Guidelines: Examples from FTC Enforcement 1993-2022* (Dec. 20, 2022), https://ssrn.com/abstract=4308233.

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person contributed money intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Trade Commission ("Commission") requests that this court preliminary enjoin the acquisition of substantially all of the assets of Propel Media, Inc., by IQVIA Holdings Inc., alleging that the acquisition will harm competition in a market for "health care professionals programmatic advertising."

The Commission makes an extraordinary argument: (i) that the district court may preliminarily enjoin the acquisition if the Commission shows it has "fair and tenable chance" of finding, after an administrative trial, that the acquisition is anticompetitive; (ii) that the Commission may establish that showing by reference to market share, concentration statistics, and the fact of existing competition between the defendants; and, (iii) that the court should not and cannot properly take account of defendants' evidence of potential efficiencies associated with the transaction, or actual or potential entry into the relevant market, in determining whether a preliminary injunction should issue. Such evidence, the Commission says, is only properly considered, in the first instance, by itself, sitting as the initial decider of fact.

The Commission is wrong. The district court may, and should, consider the defendants' evidence on efficiencies, entry, and any other factor that may call into question the Commission's prima facie case in this preliminary injunction proceeding. Like appellate courts and district courts have done over the past thirty-years (at least), this court should evaluate the Commission's ultimate likelihood of success in an administrative trial within the framework articulated in *United States v. Baker Hughes*, 908 F.3d 981 (D.C. Cir. 1990).

ARGUMENT

I. In Evaluating the Commission's Request for a Preliminary Injunction, the District Court Must Evaluate the Commission's Reasonable Probability of Prevailing on the Merits after an Administrative Trial

Section 13(b) of the Federal Trade Commission Act allows the Commission to obtain a preliminary injunction in advance of an administrative trial seeking to permanently enjoin a merger. 15 U.S.C. § 53(b). Here, the Commission seeks to preliminarily enjoin the acquisition of substantially all of the assets of Propel Media, Inc., by IQVIA Holdings Inc., prior to an administrative trial to "prohibit[ ] any transaction between [IQVIA Holdings and Propel Media] that combines their businesses in the relevant market, except as may be approved by the Commission." Federal Trade Commission, Complaint, In the Matter of IQVIA Holdings Inc., and Propel Media, Inc., Docket No. 9416 (July 17, 2023) at 47.

The Commission makes an extraordinary argument: (i) that the district court may preliminarily enjoin the acquisition if the Commission shows it has "fair and tenable chance" of finding, after an administrative trial, that the acquisition is anticompetitive; (ii) that the Commission may establish that showing by reference to market share, concentration statistics, and the fact of existing competition between the defendants; and, (iii) that the court should not and cannot properly take account of defendants' evidence of potential efficiencies associated with the transaction, or actual or potential entry into the relevant market, in determining whether a preliminary injunction should issue.

The Commission asks this court to interpret and apply language from one of the first matters to preliminarily enjoin a merger pursuant to Section 13(b) of the FTC Act. See *F.T.C. v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1090 (S.D.N.Y 1977). In doing so, the Commission asks this court to ignore the stubborn fact that no other court has interpreted and applied such a standard, and that, for nearly thirty-five years, appellate and district courts have applied the burden-shifting framework articulated in *United States v. Baker Hughes,* 908 F.3d 981 (D.C. Cir. 1990), in evaluating Commission requests to preliminary enjoin a merger.

In reviewing the Commission's request for a preliminary injunction, the court "must 1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities." *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984)."To determine likelihood of success on the merits, [the court] measure[s] the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [merger] 'may be substantially to lessen competition, or to tend to create a monopoly' in violation of Section 7 of the Clayton Act." *FTC v. Heinz*, 246 F.3d 708, 714 (D.C. Cir. 2001). Appellate courts interpret this standard to require that the Commission "raise[ ] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *FTC v. Heinz*, 246 F.3d 708, 714 (D.C. Cir. 2001); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984).

This standard requires the Commission show a likelihood of ultimate success in its later effort to permanently enjoin the transaction through an administrative hearing. Before granting a request for a 13(b) preliminary injunction, the court must evaluate the Commission's arguments and evidence in the context of the applicable Section 7 case law to evaluate whether there is a "reasonable probability of anticompetitive effect." *Warner Commc'ns Inc.*, 742 F.2d at 1160. Merging parties may rebut any presumption that attaches to the agency's success in raising serious, substantial, difficult, or doubtful questions. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008). In a vertical merger (or, as here, with respect to a merger that has a vertical component), "the government cannot use a short cut to establish a presumption of anticompetitive effect . . . because vertical mergers produce no immediate change in the relevant market share." *United States v. AT&T*, 916 F.3d 1029, 1032 (D.C. Cir. 2019).

Neither the district courts nor appellate courts are required to "rubber-stamp an injunction whenever the FTC provides some threshold evidence"; rather, the courts "must exercise independent judgment" and "evaluate the FTC's chance of success on the basis of all evidence before it, from the defendants as well as from the FTC." *Whole Foods Mkt., Inc.*, 548 F.3d at 1035. "[M]erging parties are entitled to oppose [a request for a preliminary injunction] with their own evidence, and that evidence may force the FTC to respond with a more substantial showing." *Id.*

Contrary to the Commission's argument that in a request for a preliminary injunction under 13(b) that it is owed significant deference and that the district court

should not seriously scrutinize its allegations, district courts frequently find that the Commission has not met its burden, and therefore deny requests for a 13(b) injunction. *See, e.g., FTC v. Microsoft Corp.,* 2023 WL 4443412 (N.D. Cal. Jul. 10, 2023); *FTC v. Meta Platforms Inc.*, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023); *FTC v. Thomas Jefferson Univ.,* 505 F. Supp. 3d 522 (E.D. Pa. 2020); *FTC v. Rag-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020); *FTC v. Steris Corp*., 133 F. Supp. 3d 962 (N.D. Ohio 2015); *FTC v. LabCorp*., 2011 WL 3100372 (C.D. Cal. Feb. 22, 2011); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶¶ 75,725 (D.N.M. 2007); *FTC v. Arch Coal, Inc.,* 329 F. Supp. 2d 109 (D.D.C. 2004). But the standard is not tilted away from the F.T.C.; as referenced throughout this brief, district courts often find that the Commission has met its burden and grant a preliminary injunctions.

The Commission argues that the district court is not only authorized, but required, to issue a preliminary injunction if the Commission makes a prima facie case of potential harm from the merger. It further argues that the court not only need not, but must not, consider defendant's evidence that may undercut the Commission's prima facie case; that inquiry, the Commission says, is left for itself, initially in an administrative trial, and then on appeal. Only after an appeal can a federal court consider the merging parties arguments and evidence that may undercut or rebut the Commission's prima facie case.

The law requires no such thing; in fact, it requires the opposite -- that the district court consider and evaluate evidence the defendants introduce that may rebut any presumption of illegality arising from the Commission's market share and concentration evidence, or so-called direct evidence of potential competitive harm.

The is only sensible, for the only way that the District Court can consider the Commission's likelihood of ultimate success on the merits is to gauge how its evidence will be judged against the law that is applicable in a challenge under Section 7 of the Clayton Act.

II. The District Court Should Apply the *Baker Hughes* Framework to Evaluate the Commission's Request for a Preliminary Injunction

As many courts have done, the district court should adopt the *Baker Hughes* framework for its evaluation of the FTC's likelihood of success on the merits—the required showing of "reasonable probability."

The Commission appears to argue that reliance on and adherence to the *Baker Hughes* framework, which requires an inquiry into the strength of the plaintiff's evidence, and consideration of the defendant's rebuttal to the plaintiff's evidence of anticompetitive harm, goes beyond the district court's authority in a preliminary injunction hearing under 13(b). It does not.

In *Baker Hughes*, the D.C. Circuit articulated a now broadly accepted approach to evaluating the government's challenge to a horizontal merger:

> The basic outline of a Section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. The burden of producing evidence to

> rebut this presumption then shifts to the defendant. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times. *United States v. Baker Hughes*, 908 F.3d 981, 982-983 (D.C. Cir. 1990) (internal citations omitted).

"Although *Baker Hughes* was a permanent injunction matter," courts "can nonetheless use its analytical approach in evaluating the Commission's showing of likelihood of success" in a preliminary injunction matter. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001); *accord FTC v. Sanford Health*, 926 F.3d 959, 962, 964-66 (8th Cir. 2019) (to evaluate the FTC's request for a preliminary injunction in an acquisition of a health care company, "the district court employed . . . *Baker Hughes*" and, after considering the parties' rebuttal arguments, properly enjoined the merger, pending an administrative trial); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016) (in a review of a district court decision not to grant the Commission's request for a preliminary injunction in the merger of competing hospitals, the appellate court "assess[ed] Section 7 claims" under the *Baker Hughes* framework and, after reviewing the merging parties' rebuttal arguments, reversed the district court); *FTC v. Heinz*, 246 F.3d 708, 714-15 (D.C. Cir. 2001) (in evaluating whether the FTC was entitled to a preliminary injunction in the intended merger of two baby-food companies, the appellate court evaluated whether the FTC "raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance" using the approach of *Baker Hughes*, notwithstanding that "*Baker Hughes* was decided at the merits stage as opposed to

the preliminary injunction relief state."); *FTC v. University Health*, 938 F.2d 1206, 1218-19 (11th Cir. 1991) (evaluating the district court's denial of the Commission's request for a preliminary injunction in a merger of hospitals, using the *Baker Hughes* framework to evaluate whether the FTC "raise[d] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation and study by the FTC in the first instance").

District courts routinely apply the *Baker Hughes* framework when the Commission seeks a preliminary injunction in merger matters. *See FTC v. Thomas Jefferson Univ.,* 505 F. Supp. 3d 522, 538 (E.D. Pa. 2020); *FTC v. Peabody Energy*, 492 F. Supp. 3d 865, 883, 907-18 (E.D. Mo. 2020); *FTC v. Rag-Stiftung*, 436 F. Supp. 3d 278, 290-91 (D.D.C. 2020); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 44-45 (D.D.C. 2018); *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 197 (D.D.C. 2018); *FTC v. Staples*, 190 F. Supp. 3d 100, 115-116 (D.D.C. 2016); *FTC v. Sysco*, 113 F. Supp. 3d 1, 23-4 (D.D.C. 2015); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1074-75 (N.D. Ill. 2012); *FTC v. LabCorp.*, 2011 WL 3100372, at *21 (C.D. Cal. Feb. 22, 2011); *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 36 (D.D.C. 2009); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶¶ 75,725, 2007 WL 1793441, *52-53 (D.N.M. 2007).

As noted above, unlike in a horizontal merger case, in a vertical merger (or a merger with a vertical component) "the government cannot use a short cut to establish a presumption of anticompetitive effect . . . because vertical mergers produce no immediate change in the relevant market share." *United States v. AT&T*, 916 F.3d 1029, 1032 (D.C. Cir. 2019).

In establishing its prima facie case—the first *Baker Hughes* step—the Commission must provide fact-specific evidence for a showing of possible harm before the burden shifts to the defendants to rebut the Commission's prima facie case. Where the Commission establishes its prima facia case, the district court does not commit reversible error in a 13(b) proceeding if it finds that the defendant has rebutted the Commission's prima facia showing and refuses to grant a preliminary injunction.

The appellate and district courts that have applied the *Baker Hughes* framework to the review of Commission requests for preliminary injunctions did not do so in error. The *Baker Hughes* framework is simply a structured mode of analysis to review the parties' factual evidence and arguments. The Commission mistakes the district court's potential reliance on the defendants' evidence rebutting the Commission's prima facia case as the adoption of a merits-based analysis; this court should not adopt the Commission's error as its own. The use of the *Baker Hughes* framework, and the court's consideration of factors other than market share, concentration, and definition of relevant market to evaluate the Commission's likelihood of success after an administrative trial is not legal error nor an abuse of discretion. A failure by the district court to consider evidence that rebuts the Commission's prima facia case is likely to be viewed as error.

III. Consideration of Entry and Expansion Evidence Is a Required Step in the Evaluation of a Preliminary Injunction Request

"If entry barriers are low, the threat of outside entry can significantly alter the anticompetitive effects of the merger by deterring the remaining entities from colluding or exercising market power." *FTC v. Heinz*, 246 F.3d 708, 717, n. 13 (D.C. Cir. 2001). "A court's finding that there exists ease of entry into the relevant product market can be sufficient to offset the government's prima facie case of anti-competitiveness." *FTC v. Cardinal Health, Inc.,* 12 F. Supp 2d 34, 55 (D.D.C. 1998). Because of this, district courts routinely consider the likelihood of third-party entry or expansion in preliminary injunction matters. *See, e.g.*, *FTC v. Peabody Energy*, 492 F. Supp. 3d 865, 911-12 (E.D. Mo. 2020) (consideration of entry and expansion by other coal producers) eliminated); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 66-70 (D.D.C. 2018) ("a prima facie showing of anticompetitive effects associated with a merger can be rebutted by … evidence that there are no significant entry barriers in the relevant market"); *FTC v. Tronox Ltd*., 332 F. Supp. 3d 187, 213 (D.D.C. 2018) ("entry or expansion into the relevant market by new competitors can mitigate the expected anticompetitive effects of a proposed transaction"); *FTC v. Sysco*, 113 F. Supp. 3d 1, 80-81 (D.D.C. 2015) (considering defendants arguments that the entry of new competitors and the expansion of existing competitors will keep the industry competitive); *FTC v. OSF Healthcare Sys*., 852 F. Supp. 2d 1069, 1076 (N.D. Ill. 2012) (FTC likelihood of success in the primary care physician services market is distinctly lower than in the general acute care market because, among other things "the PCP market is not subject to the same prohibitive barriers to entry that exist in

the GAC market"); *FTC v. LabCorp.*, 2011 WL 3100372, ¶ 166 (C.D. Cal. Feb. 22, 2011) ("even assuming a prima facie case, defendants have presented sufficient rebuttal evidence, particularly about new entrants"); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶¶ 75,725, 245 (D.N.M. 2007) ("The Defendants have, however, rebutted this presumption with proof of ease of entry, cognizable efficiencies, or other recognized defenses.")

No harm or legal error attaches to analyzing the entry evidence offered by the defendants at the preliminary injunction stage; it is, in fact, a necessary component of determining the Commission's ultimate likelihood of success.

IV. Consideration of The Parties' Efficiency Claims Is a Required Step in the Evaluation of a Preliminary Injunction Request

The Commission argues that it would be improper for the district court to consider efficiencies associated with the transaction in the evaluation of its preliminary injunction request. The Commission is simply wrong.

Efficiency claims are properly and routinely considered in a Section 13(b) proceeding. "It is a foundation of section 7 doctrine . . . that evidence on a variety of factors can rebut a prima facia case." *Baker Hughes*, 908 F.3d 981, 984 (D.C. Cir. 1990). The Commission argues that the evaluation of efficiencies "should [be], at a minimum, deferred to the merits stage" and thus excluded from the merging parties' rebuttal arguments. The Commission's position is not supported by merger case law.

Appellate courts have considered efficiency claims in requests to preliminarily enjoin a merger under 13(b) since at least the FTC's request to preliminary enjoin University Health's proposed acquisition of the assets of a competing hospital. *FTC*

v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 1991). "[I]n certain circumstances, a defendant may rebut the government's prima facie case with evidence showing that the intended merger would create significant efficiencies in the relevant market." *Id.* at 1222. To the Eleventh Circuit, it was "clear that whether an acquisition would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition. . . . [E]vidence that a proposed acquisition would create significant efficiencies benefiting consumers is useful in evaluating the ultimate issue—the acquisition's overall effect on competition." *Id.*

In the thirty years since *University Health*, other appellate courts have made clear that the evaluation of efficiency claims is a component of their review of a preliminary injunction request. S*ee*, *e.g.*, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054-55 (8th Cir. 1999) (in a preliminary injunction matter, the court stated that "the evidence shows that a hospital that is larger and more efficient . . . will provide better medical care than either of those hospitals could separately."); *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019) (in preliminary injunction matter, efficiency claims relevant to the competitive effects analysis); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3rd Cir. 2016) (to overturn a district court's denial of a preliminary injunction against the merger of two hospitals, the Commission "must show either that the combination would not have anticompetitive effects or that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger."); *FTC v. H.J. Heinz*, 246 F.3d 708, 720 (D.C.

Cir. 2001) (in a preliminary injunction matter, the court noted a "trend among lower courts . . . to recognize the [efficiency] defense"). *See also St. Alphonsus Med. Ctr. NAMPA v. St. Luke's*, 778 F.3d 775, 790 (9th Cir. 2015) (in the review of a consummated merger, this court noted that, "because Section 7 of the Clayton Act only prohibits those mergers whose effect 'may be substantially to lessen competition,' a defendant can rebut a prima facie case with evidence that a proposed merger will create a more efficient combined entity and thus increase competition").

Similarly, district courts routinely consider efficiencies in preliminary injunction matters. *See, e.g.*, *FTC v. Thomas Jefferson Univ.,* 505 F. Supp. 3d 522, 538 (E.D. Pa. 2020) (defendants can rebut presumption by showing "that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger."); *FTC v. Peabody Energy*, 492 F. Supp. 3d 865, 913 (E.D. Mo. 2020) ("even if evidence of efficiencies alone is insufficient to rebut the government's prima facie case, such evidence may nevertheless be relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition.") (internal quotation marks eliminated); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 71-72 (D.D.C. 2018) ("efficiencies produced by a merger can form part of a defendant's rebuttal of the FTC's prima facie case") (internal citations omitted);; *FTC v. Sysco*, 113 F. Supp. 3d 1, 81 (D.D.C. 2015) ("efficiencies resulting from the merger may be considered in rebutting the governments prima facie case"); *FTC v. LabCorp.*, 2011 WL 3100372, ¶ 164 (C.D. Cal. Feb. 22, 2011) ("In evaluating the legality of a merger

or acquisition under section 7, courts consider the procompetitive benefit of efficiencies related to the transaction."); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶¶ 75,725, 245 (D.N.M. 2007) ("The Defendants have, however, rebutted this presumption with proof of ease of entry, cognizable efficiencies, or other recognized defenses.")

No harm or legal error attaches to analyzing the efficiency claims of the merging parties at the preliminary injunction stage; it is a necessary component of determining the Commission's ultimate likelihood of success.

CONCLUSION

The court should evaluate the Commission's request for a preliminary injunction consistent with the full burden-shifting framework of *Baker-Hughes* and disregard the Commission's request to enjoin this transaction solely on the basis of the to-be-combined firms' market share, industry concentration (which is disputed), and the loss of existing competition between the merging parties. Even at the preliminary injunction stage, this court must (and should) take account of the defendants' efficiency and entry claims in its evaluation of the Commission's ultimate likelihood of success on its challenge to the proposed acquisition.

Date: December 7, 2023

Respectfully submitted,

/s/ Bilal Sayyed

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CERTIFICATE OF SERVICE

I certify that on December 7, 2023, I filed the foregoing Amicus Brief with the Court's CM/ECF system. Counsel for Plaintiff and Counsel for Defendant are registered users of the Court's appellate CM/ECF system.

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“Litigating the Fix”

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, **Plaintiff,** **v.** **ARCH COAL, INC., et al.,** **Defendants.**	**Civil Action No. 04-0534 (JDB)**
STATE OF MISSOURI, et al., **Plaintiffs,** **v.** **ARCH COAL, INC., et al.,** **Defendants.**	**Civil Action No. 04-0535 (JDB)** **(Consolidated Cases)**

ORDER

Upon consideration of plaintiff Federal Trade Commission's motion in limine to exclude, for the purposes of the preliminary injunction proceeding, all evidence and argument on the issue of Arch Coal, Inc.'s proposed sale of the Buckskin mine to Peter Kiewit Sons, Inc., the opposition

filed by defendants Arch Coal, Inc., Triton Coal Co., and New Vulcan Coal Holdings, LLC, plaintiff's reply thereto, and the entire record herein, it is this 7th day of July, 2004, hereby

ORDERED that plaintiff's motion is DENIED.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

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Appeals

APPEALS

JUDICIAL CODE

28 U.S.C. § 1291. Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292. Interlocutory Decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d) [Jurisdiction of the Court of Appeals of the Federal Circuit over appeals from the Court of International Trade and the Court of Claims—omitted]

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

28 U.S.C. § 1294. Circuits in which Decisions Reviewable

Except as provided in sections 1292(c), 1292(d), and 1295[1] of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 1. Scope of Rules; Definition; Title

(a) *Scope of Rules*.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) *Definition*. In these rules, 'state' includes the District of Columbia and any United States commonwealth or territory.

(c) *Title*. These rules are to be known as the Federal Rules of Appellate Procedure.

[1 Section 1295 deals with the appellate jurisdiction of the United States Federal Court of Appeals for the Federal Circuit.]

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.
  (1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).
  (2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.
  (3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.
  (4) An appeal by permission under 28 U.S.C. §1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.
  (1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.
  (2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.
  (1) The notice of appeal must:
    (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as “all plaintiffs,” “the defendants,” “the plaintiffs A, B, et al.,” or “all defendants except X”;
    (B) designate the judgment, order, or part thereof being appealed; and
    (C) name the court to which the appeal is taken.
  (2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.
  (3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.
  (4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.
  (5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) Payment of Fees. Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)

(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) Motion for Extension of Time.

(A) the district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case. [Omitted]

(c) Appeal by an Inmate Confined in an Institution. [Omitted]

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must

note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.
  (1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.
  (2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.
  (3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.
  (1) The petition must include the following:
    (A) the facts necessary to understand the question presented;
    (B) the question itself;
    (C) the relief sought;
    (D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and
    (E) an attached copy of:
      (i) the order, decree, or judgment complained of and any related opinion or memorandum, and
      (ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.
  (2) A party may file an answer in opposition or a cross-petition within 10 days after the petition is served.
  (3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):
  (1) a paper produced using a computer must not exceed 5,200 words; and
  (2) a handwritten or typewritten paper must not exceed 20 pages.

(d) Grant of Permission; Fees; Cost Bond; Filing the Record.
  (1) Within 14 days after the entry of the order granting permission to appeal, the appellant must:
    (A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Substantive Merger Antitrust Law

CLAYTON ACT § 7

Clayton Act § 7. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, 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]

[*Remainder of section omitted*]

The Incipiency Standard

FTC v. Tapestry, Inc.
1:24-cv-03109 (JLR), 2024 WL 4647809 (S.D.N.Y. Oct. 24, 2024)
(excerpt[1])

JENNIFER L. ROCHON, United States District Judge:

. . .

LEGAL STANDARDS

I. 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." 15 U.S.C. § 18. Through Section 7, Congress provided "authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce [i]s still in its incipiency." Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962). Determining whether a merger violates Section 7 therefore "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963).

"Congress used the words '*may be* substantially to lessen competition'" in Section 7 "to indicate that its concern was with probabilities, not certainties." *Brown Shoe*, 370 U.S. at 323. "Although Section 7 requires more than a mere possibility of competitive harm, it does not require proof of certain harm." *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (quotation marks omitted). "Instead, the [plaintiff] must show that the proposed merger is likely to substantially lessen competition, which encompasses a concept of reasonable probability." *Id.* (emphasis and quotation marks omitted); *accord Fruehauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979); *FTC v. Advoc. Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016). "[T]here is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967); *accord Fruehauf*, 603 F.2d at 352-53; *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 858 (6th Cir. 2005).

1 Footnotes omitted.

A NOTE ON THE INCIPIENCY STANDARD

The *incipiency standard* is a defining principle of merger enforcement under Section 7 of the Clayton Act. Section 7 of the original Clayton Act of 1914 prohibited acquisitions whose effect "may be to substantially lessen competition . . . or tend to create a monopoly."[1] Unlike the Sherman Act, which addresses restraints of trade or monopolization after they have occurred or become imminent, Section 7 operates as a prophylactic measure. Its purpose is to prevent harmful concentration and anticompetitive market structures before they take hold, thus preserving competitive conditions in advance of measurable harm.

Congress drafted the original Section 7 with the intent that the statute would prohibit mergers and acquisitions in their incipiency before they could be reached under the Sherman Act as interpreted at the time.[2] The 1914 Senate report explicitly stated that Section 7 was designed to address incipient monopolies and restraints that fell outside the scope of the Sherman Act.

> Broadly stated, the bill in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies *in their incipiency and before consummation*.[3]

This concern persisted through the Celler-Kefauver Act of 1950,[4] which amended Section 7 by expanding its reach to asset acquisitions and sharpening its focus on the cumulative competitive effects of serial acquisitions. As the House Report on the 1950 amendments explained:

> Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended

[1] Clayton Act § 7, ¶ 1, ch. 323, § 7, 38 Stat. 730, 731-32 (1914).

[2] Congress apparently believed that the new "rule of reason" created by the Supreme Court in Standard Oil Co. v. United States, 221 U.S. 1 (1911), required proof of an actual restraint of trade and not just a likely one.

[3] S. REP. NO. 63-698, at 1 (July 22, 1914) (emphasis added). Interestingly, the original bill as passed by the House on June 5, 1914, House bill prohibited acquisitions whose effect "is to eliminate or substantially lessen competition . . . or create a monopoly." H.R. 15657, 63d Cong. § 8 (June 2, 1914) (as passed by the House). The Senate amended the language, striking the "is" and inserting "may be," changing the standard from actual effects to the incipiency standard. H.R. 15657, 63d Cong. § 6 (Sept. 2, 1914) (as passed by the Senate). The conference committee adopted the Senate change, inserted the words "tend to" before create, and change the section number to 7. H.R. REP. NO. 63-1168, at 3, 12-13 (Sept. 25, 1914). These conference changes was adopted by both houses in the final bill. Clayton Act § 7, ch. 323, § 7, 38 Stat. 730,0020731-32 (1914).

[4] Pub. L. No. 81-899, 64 Stat. 1125 (1950).

> to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize.[5]

The Senate Report echoed this theme, stating that "[t]he intent here…is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[6]

The Supreme Court acknowledged this purpose in *Brown Shoe Co. v. United States*,[7] observing:

> [I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was [Section 7's] provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum.[8]

Although Section 7 permits enforcement based on a forward-looking prediction, it does not authorize action based on mere speculation or ephemeral possibilities. From its beginning, Congress made clear that the statute requires a showing of a *reasonable probability*—not a mere possibility—that the merger will substantially lessen competition or tend to create a monopoly. The legislative record reflects that this issue was actively debated during consideration of the 1950 amendments. Both committee hearings and floor debates examined whether the statutory phrase "may be" required proof of possible, probable, or certain anticompetitive effects. The final Senate Report settled the question:

> The use of these words ("may be") means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed (sic) effect . . . . The words "may be" have been in section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.[9]

[5] H.R. REP. NO. 81-1191, at 8 (Aug. 4, 1949) (to accompany II. R. 2734).

[6] S. REP. NO. 81-1775, at 4-5 (June 2, 1950) ("The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.').

[7] 370 U.S. 294 (1962).

[8] *Id*. at 317-18.

[9] S. REP. NO. 81-1775, at 6

Courts have repeatedly endorsed the "reasonable probability" requirement.[10] A "mere possibility" will not suffice.[11]

Because Section 7 requires only a reasonable probability of anticompetitive effect—and not proof of certainty—it follows that merger enforcement under the incipiency standard carries some risk that mergers ultimately shown to be benign will be prohibited. This risk is inherent in any predictive standard applied ex ante rather than after harm has occurred. The structure of Section 7 thus reflects the judgment that the risk of permitting harmful mergers to escape enforcement outweighs the cost of occasionally prohibiting mergers that ultimately would not have harmed competition.

[10] *See, e.g.*, *Brown Shoe*, 370 U.S. at 323 & n.9; FTC v. Microsoft Corp., 136 F.4th 954, 964 (9th Cir. 2025); Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 423 (5th Cir. 2008); FTC v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C. Cir. 2001); United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019); Fruehauf Corp. v. FTC., 603 F.2d 345, 351 (2d Cir. 1979); BOC Int'l, Ltd. v. FTC, 557 F.2d 24, 28 (2d Cir. 1977); FTC v. PepsiCo, Inc., 477 F.2d 24, 27 (2d Cir. 1973).

[11] *See, e.g.*, FTC v. Consol. Foods Corp., 380 U.S. 592, 598 (1965); United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 598 (1957); United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019); *Chicago Bridge*, 534 F.3d at 423; *Fruehauf*, 603 F. 2d at 351; FTC v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C. Cir. 2001); FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 408 (S.D.N.Y. 2024); New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 198 (S.D.N.Y. 2020); United States v. AT & T Inc., 310 F. Supp. 3d 161, 189 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); United States v. Energy Sols., Inc., 265 F. Supp. 3d 415, 436 (D. Del. 2017); United States v. Anthem, Inc., 236 F. Supp. 3d 171, 191 (D.D.C.), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

THE *BAKER HUGHES* THREE-STEP BURDEN SHIFTING APPROACH

UNITED STATES V. BAKER HUGHES INC.
908 F.2d 981 (D.C. Cir. 1990)
(excerpt[1])

CLARENCE THOMAS, Circuit Judge

. . .

The basic outline of a section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. *See United States v. Citizens & Southern Nat'l Bank,* 422 U.S. 86, 120-22 (1975); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 363 (1963). The burden of producing evidence to rebut this presumption then shifts to the defendant. *See, e.g., United States v. Marine Bancorporation,* 418 U.S. 602, 631 (1974); *United States v. General Dynamics Corp.,* 415 U.S. 486, 496-504 (1974); *Philadelphia Bank,* 374 U.S. at 363. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times. *See Kaiser Aluminum & Chem. Corp. v. FTC,* 652 F.2d 1324, 1340 & n. 12 (7th Cir.1981).

. . .

Finally, we consider the strength of the showing that a section 7 defendant must make to rebut a prima facie case. The district court simply reviewed the evidence that the defendants presented and concluded that the acquisition was not likely to substantially lessen competition. The government argues that the court erred by failing to require the defendants to make a "clear" showing. *See* Brief for Appellant at 13. The relevant precedents, however, suggest that this formulation overstates the defendants' burden. We conclude that a "clear" showing is unnecessary, and we are satisfied that the district court required the defendants to produce sufficient evidence.

The government's "clear showing" language is by no means unsupported in the case law. In the mid-1960s, the Supreme Court construed section 7 to prohibit virtually any horizontal merger or acquisition. At the time, the Court envisioned an ideal market as one composed of many small competitors, each enjoying only a small market share; the more closely a given market approximated this ideal, the more competitive it was presumed to be. *See United States v. Aluminum Co. of Am.,* 377 U.S. 271, 280 (1964) ("It is the basic premise of [section 7] that competition will be most vital 'when there

[1] Footnotes omitted.

are many sellers, none of which has any significant market share.'") (quoting *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 363 (1963)).

This perspective animated a series of decisions in which the Court stated that a section 7 defendant's market share measures its market power, that statistics alone establish a prima facie case, and that a defendant carries a heavy burden in seeking to rebut the presumption established by such a prima facie case. The Court most clearly articulated this approach in *Philadelphia Bank:*

> Th[e] intense congressional concern with the trend toward concentration [underlying section 7] warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think 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 (emphasis added). *Philadelphia Bank* involved a proposed merger that would have created a bank commanding over 30% of a highly concentrated market. While acknowledging that the banks could in principle rebut the government's prima facie case, the Court found unpersuasive the banks' evidence challenging the alleged anticompetitive effect of the merger. *See id.* at 366-72.

In *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966), the Court further emphasized the weight of a defendant's burden. Despite evidence that a post-merger company had only a 7.5% share of the Los Angeles retail grocery market, the Court, citing anticompetitive "trends" in that market, ordered the merger undone. The Court summarily dismissed the defendants' contention that the post-merger market was highly competitive. *Id.* at 277-78. Noting that the market was "marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers," the *Von's Grocery* Court predicted that, if the merger were not undone, the market "would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed." *Id.* at 278; *see also United States v. Pabst Brewing Co.,* 384 U.S. 546, 550-52 (1966) (acquisition producing brewer accounting for 4.49% of nationwide beer sales violates section 7; brewer's rebuttal evidence virtually ignored).

Although the Supreme Court has not overruled these section 7 precedents, it has cut them back sharply. In *General Dynamics,* 415 U.S. at 498-504, the Court affirmed a district court determination that, by presenting evidence that undermined the government's statistics, section 7 defendants had successfully rebutted a prima facie case. In so holding, the Court did not expressly reaffirm or disavow *Philadelphia Bank's* statement that a company must "clearly" show that a transaction is not likely to have substantial anticompetitive effects. The Court simply held that the district court was justified, based on all the evidence, in finding that "no substantial lessening of competition occurred or was threatened by the acquisition." *General Dynamics,* 415 U.S. at 498.

General Dynamics began a line of decisions differing markedly in emphasis from the Court's antitrust cases of the 1960s. Instead of accepting a firm's market share as virtually conclusive proof of its market power, the Court carefully analyzed defendants' rebuttal evidence. [12] These cases discarded *Philadelphia Bank* 's insistence that a defendant "clearly" disprove anticompetitive effect, and instead described the rebuttal burden simply in terms of a "showing." *See, e.g., United States v. Marine Bancorporation,* 418 U.S.602, 631 (1974) (after government established prima facie case, "the burden was then upon appellees *to show* that the concentration ratios, which can be unreliable indicators of actual market behavior, did not accurately depict the economic characteristics of the [relevant] market") (citation omitted) (emphasis added);*United States v. Citizens & Southern Nat'l Bank,* 422 U.S. 86, 120 (1975) (after government established prima facie case, "[i]t was . . . incumbent upon [the defendant] *to show* that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition") (emphasis added). Without overruling *Philadelphia Bank,* then, the Supreme Court has at the very least lightened the evidentiary burden on a section 7 defendant. *See generally* Note, 92 Harv. L. Rev. at 491 (describing impact of *General Dynamics* on section 7 jurisprudence).

In the aftermath of *General Dynamics* and its progeny, a defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition. *See American Stores,* 872 F.2d at 842 (defendant can rebut prima facie case "through evidence *demonstrating* that statistics on market share, market concentration, and market concentration trends portray inaccurately the merger's probable effects on competition") (emphasis added); *cf. Waste Management,* 743 F.2d at 981 (defendant can rebut prima facie case "by *a demonstration* that the merger will not have anticompetitive effects") (emphasis added). The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully. A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor.

[12] Judge Posner has elucidated this point:

> The most important developments that cast doubt on the continued vitality of such cases as *Brown Shoe* and *Von's* are found in other cases, where the Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act. . . . Applied to cases brought under Section 7, this principle requires the district court . . . to make a judgment whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.

Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir.1986), *cert. denied*, 481 U.S. 1038 (1987).

By focusing on the future, section 7 gives a court the uncertain task of assessing probabilities. In this setting, allocation of the burdens of proof assumes particular importance. By shifting the burden of producing evidence, present law allows both sides to make competing predictions about a transaction's effects. If the burden of production imposed on a defendant is unduly onerous, the distinction between that burden and the ultimate burden of persuasion--always an elusive distinction in practice--disintegrates completely. A defendant required to produce evidence "clearly" disproving future anticompetitive effects must essentially persuade the trier of fact on the ultimate issue in the case--whether a transaction is likely to lessen competition substantially. Absent express instructions to the contrary, we are loath to depart from settled principles and impose such a heavy burden. *See Kaiser Aluminum & Chem. Corp. v. FTC,* 652 F.2d 1324, 1340 & n. 12 (7th Cir.1981); *cf. Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253-56 (1981) (applying similar production-burden-shifting analysis to employment discrimination suits under title VII, and noting that "[t]he ultimate burden of persuading the trier of fact . . . remains at all times with the plaintiff," *id.* at 253, 101 S.Ct. at 1093); 9 J. Wigmore, *Evidence* § 2489, at 300 (J. Chadbourn rev.ed. 1981) (burden of persuasion "never shifts" away from plaintiff).

Imposing a heavy burden of production on a defendant would be particularly anomalous where, as here, it is easy to establish a prima facie case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl-Hirschman Index cannot guarantee litigation victories. *Cf. Ball Memorial Hosp.,* 784 F.2d at 1336 (explaining that "[m]arket share is just a way of estimating market power, which is the ultimate consideration," and noting that "[w]hen there are better ways to estimate market power, the court should use them"). Requiring a "clear showing" in this setting would move far toward forcing a defendant to rebut a probability with a certainty.

A NOTE ON *BAKER HUGHES*

1. The *Baker-Hughes* three-step burden-shifting approach has been adopted by all modern courts in analyzing horizontal merger challenges under Section 7 of the Clayton Act. This is not too surprising since, apart from its analytical appeal, the opinion was written by a now-Supreme Court Justice Thomas and joined by now Supreme Court Justice Ginsberg.

2. The *Baker-Hughes* approach was also adopted by Judge Richard Leon in his vertical merger analysis of AT&T/Time Warner.[13] Unlike horizontal cases, where *Philadelphia National Bank*[14] provides a rebuttable presumption of likely substantial

[13] United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. June 12, 2018) (denying injunction and dismissing complaint in AT&T/Time Warner), *aff'd*, 916 F.3d 1029 (D.C. Cir. Feb. 26, 2019).

[14] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

lessening of competition based on the combined firm's market share and changes in the level of market concentration,[15] there are no analogous presumptions in vertical merger cases.[16] Accordingly, Judge Leon sensibly generalized *Baker Hughes* so that the first step requires the plaintiff to prove a prima facie case of likely substantially lessening of competition as a result of the merger by whatever means available the law permits.[17] The D.C. Circuit endorsed Judge Leon's generalized approach:

> Under this framework, the government must first establish a *prima facie* case that the merger is likely to substantially lessen competition in the relevant market. . . . [Since no presumption is available,] [t]he government must make a "fact-specific" showing that the proposed merger is "likely to be anticompetitive." Once the *prima facie* case is established, the burden shifts to the defendant to present evidence that the *prima facie* case "inaccurately predicts the relevant transaction's probable effect on future competition" or to "sufficiently discredit" the evidence underlying the *prima facie* case. Upon such rebuttal, "the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times."[18]

3. The *Baker Hughes* approach is grounded in the principle that Section 7 only admits negative defenses to the element of anticompetitive harm. As generalized by Judge Leon and endorsed by the D.C. Circuit, *Baker Hughes* requires the plaintiffs to bear the initial burden of making out a prima facie case of the *gross* anticompetitive effect. I emphasize gross anticompetitive effect here because the plaintiff's burden is only to adduce sufficient evidence to support a finding that the challenged transaction would result in the requisite anticompetitive effect, say under a theory of coordinated or unilateral effects, without considering countervailing effects. So, in the case of a horizontal merger, the plaintiffs can prove their prima facie case of anticompetitive harm by applying the *Philadelphia National Bank* presumption to market shares and concentration statistics, without regard to any countervailing factors.[19] There is no reason why the plaintiffs' burden in the first step should be any greater in proving a prima facie case of anticompetitive harm in the case of a nonhorizontal merger.

[15] *Id*. at 363 ("Specifically, we think that a [horizontal] 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."). In *General Dynamics*, the Supreme Court reaffirmed that the *PNB* presumption was only rebuttable, not conclusive. *See* United States v. General Dynamics Corp., 415 U.S. 486, 497-98 (1974).

[16] *AT&T*, 310 F. Supp. 3d at 192.

[17] *Id*. at 192-93.

[18] *AT&T*, 916 F.3d at 1032 (internal citations omitted).

[19] *See* Fed. R. Evid. 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.").

4. These countervailing considerations enter into the second step, where the defendants have the burden of production. So, for example, where the plaintiff has made out its prima case of anticompetitive harm through some theory that the challenged conduct will result in significant upward pricing pressure, the defendants can raise the downward pricing pressure resulting from entry, repositioning, countervailing bargaining power, product improvement, cost reductions or other efficiencies as a negative defense to say that the *net* effect of the challenged conduct will not be to raise price. It is important to note that *Baker Hughes* itself is explicit that the defendants only have the burden of production (sometimes called the burden of going forward),[20] which requires the defendants to adduce sufficient evidence to raise a genuine issue for the trier of fact—that is, enough evidence to support a finding in the defendants' favor in light of all of the evidence in the record—whether there would be a likely net anticompetitive effect when these additional considerations are taken into account.[21] While the strength of the plaintiffs' prima facie case determines the quantum of evidence necessary for the defendants to raise a genuine issue (hence the idea of a sliding scale that *Baker Hughes* recognized[22]), as the Supreme Court has

[20] United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990) ("The *burden of producing evidence* to rebut this presumption then shifts [in the second step] to the defendant.") (emphasis added) *accord* Illumina, Inc. v. FTC, 88 F.4th 1036, 1058 (5th Cir. 2023); FTC v. Sanford Health, 926 F.3d 959, 962-63 (8th Cir. 2019); FTC v. Butterworth Health Corp., No. 96-2440, 1997 WL 420543, at *1 (6th Cir. July 8, 1997) (per curiam) (unpublished); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1219 (11th Cir. 1991); United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109, 146 (D. Mass. 2024); FTC v. IQVIA Holdings Inc., 710 F. Supp. 3d 329, 350 (S.D.N.Y. 2024); FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 883 (E.D. Mo. 2020); United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017); FTC v. ProMedica Health Sys., Inc., No. 3:11 CV 47, 2011 WL 1219281, at *53 (N.D. Ohio Mar. 29, 2011); FTC v. Swedish Match, 131 F. Supp. 2d 151, 167 (D.D.C. 2000); California v. Sutter Health Sys., 84 F. Supp. 2d 1057, 1067 (N.D. Cal.), *aff'd*, 217 F.3d 846 (9th Cir. 2000).

[21] *See* Microsoft Corp. v. I4I Ltd. P'ship, 564 U.S. 91, 100 n.4 (2011) (noting that the "burden of production" specifies "which party must come forward with evidence at various stages in the litigation").

[22] *See Baker Hughes*, 908 F.2d at 981 ("The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully."); *accord* FTC v. Sanford Health, 926F.3d 959, 963 (8th Cir. 2019); United States v. Anthem, Inc., 855 F.3d 345, 349-50 (D.C. Cir. 2017); Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 426 (5th Cir. 2008); FTC v. H.J. Heinz Co., 246 F.3d 708, 725 (D.C. Cir. 2001); FTC v. Kroger Co., No. 3:24-CV-00347-AN, 2024 WL 5053016, at *2 (D. Or. Dec. 10, 2024); FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 464 (S.D.N.Y. 2024); FTC v. IQVIA Holdings Inc., 710 F. Supp. 3d 329, 389 (S.D.N.Y. 2024); United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 37 (D.D.C. 2022); FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 883 (E.D. Mo. 2020); New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 207 (S.D.N.Y. 2020); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 311 (D.D.C. 2020); FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 212 (D.D.C. 2018); United States v. Aetna Inc., 240 F. Supp. 3d 1, 19 (D.D.C. 2017); FTC v. Staples, Inc., 190 F. Supp. 3d 100, 115 (D.D.C. 2016); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015); FTC v. ProMedica Health Sys., Inc., No. 3:11 CV 47, 2011 WL 1219281, at *56 (N.D. Ohio Mar. 29, 2011); FTC v. Foster, No. CIV 07-352 JBACT, 2007 WL 1793441, at *55 (D.N.M. May 29, 2007); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 129 (D.D.C. 2004).

stated the burden of production does not require the defendants to prove anything by a preponderance of the evidence.[23]

5. If the defendants are successful in raising a genuine issue as to anticompetitive effect, then in the third step the burden of persuasion is on the plaintiffs to prove a net anticompetitive effect, all evidence considered. As *Baker Hughes* stated, the ultimate burden of persuasion on the elements of the plaintiffs' prima facie case—which includes the element of net anticompetitive effect—"remains with the [plaintiff] at all times."[24] If the defendants fail to adduce sufficient evidence to rebut the plaintiff's prima facie case (that is, to raise a genuine issue whether the transaction is not likely anticompetitive), the case ends and the plaintiff wins. When the evidence equally favors both sides on each element of the offense, the party that bears the burden of persuasion loses.[25]

6. Thomas modeled his three-step burden-shifting approach in *Baker Hughes* after the Supreme Court's allocation of the burden of proof in *Texas Dep't of Community Affairs v. Burdine*, a Title VII case alleging unlawful disparate treatment.[26] In *Burdine*, the issue was whether the Fifth Circuit correctly held that once the plaintiff in a Title VII case had made out a prima facie case of discrimination, the burden shifts to the defendant to prove by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for the employment decisions as well as prove that the individuals hired or promoted were better qualified than the plaintiff. The Supreme Court, in a unanimous decision, reversed. In assessing the burden on the plaintiffs to establish a prima facie case in the first step, the Court observed:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. The prima facie case serves an important function in the litigation: it eliminates the

[23] *See* Director, Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 278 (1994) ("A standard of proof, such as preponderance of the evidence, can apply only to a burden of persuasion, not to a burden of production."). Some merger antitrust opinions say only that the defendants in the second stage have the burden to "rebut" the prima facie case without explicitly noting that the burden is one of production, but even these cases cite the three-step *Baker Hughes* approach and implicitly acknowledge that the burden cannot be so high as the burden of persuasion, since they also say that this burden always rests with the plaintiffs. *See Anthem*, 855 F.3d at 349-50.

[24] *See, e.g.*, *Baker Hughes*, 908 F.2d at 983 ("If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts [in the third step] to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times."); *accord Anthem*, 855 F.3d at *Sanford Health*, 926 F.3d at 962-63; *Chicago Bridge & Iron*, 534 F.3d at 423; *Heinz*, 246 F.3d at 715; *Butterworth Health*, 1997 WL 420543, at *1; FTC v. Univ. Health, Inc., 938 F.2d 1206, 1219 (11th Cir. 1991).

[25] *See* Microsoft Corp., 564 U.S. at 100 n.4 (noting that the "burden of persuasion" specifies "which party loses if the evidence is balanced").

[26] *See Baker Hughes*, 908 F.2d at 991 (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-56 1981).

> most common nondiscriminatory reasons for the plaintiff's rejection. . . . [T]he prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.[27]

Under *Baker Hughes*, the plaintiff in a Section 7 bears an analogous burden: to prove by a preponderance of the evidence that the merger is likely to be anticompetitive in the absent of atypical countervailing factors. The *Burdine* Court's treatment of the defendant's burden in the second step is equally instructive:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.[28]

This is the heart of the *Burdine* decision in rejecting the Fifth Circuit's assignment of the burden of persuasion to the defendant in the second step. In effect, proof of the prima facie case, which considers only a subset of factors probative of intentional discrimination, establishes a rebuttable presumption of unlawful conduct.

7. If the defendant succeeds in raising a genuine issue of fact whether an essential element of the violation is present—intentional discrimination in *Burdine* and anticompetitive effect in Section 7 cases—the burden returns to the plaintiff in the third step, where it merges with the burden of persuasion. This follows "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims" and hence "bear the burden of persuasion regarding the essential aspects of their claims,"[29] a rule that the Court has presumed or held that the default rule applies in a wide variety of cases.[30] The *Burdine* Court has acknowledged that there are exceptions to this rule where the burden of persuasion on certain elements of the plaintiff's claim may be shifted to the

[27] *Burdine*. 450 U.S. at 253-54 (internal citations and footnotes omitted).

[28] Id. at 254-55 (internal citations and footnotes omitted).

[29] Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 56, 57 (2005).

[30] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (standing); Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 806 (1999) (Americans with Disabilities Act); Hunt v. Cromartie, 526 U.S. 541, 553 (1999) (equal protection); Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., 532 U.S. 588, 593 (2001) (securities fraud); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (preliminary injunctions); Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 287 (1977) (First Amendment).

defendant, but these elements are typically affirmative defenses.[31] The element of anticompetitive effect is the core of an antitrust violation, and Thomas was correct in applying the default rule on the burden of persuasion to it.

[31] *Schaffer*, 546 U.S. at 534.

Market Definition

BROWN SHOE CO. V. UNITED STATES
370 U.S. 294 (1962)
(excerpt[1])

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

. . .

The Product Market.

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.42 However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States v. E. I. duPont de Nemours & Co.,* 353 U. S. 586, 593-595 [1957]. 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. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in any line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable · probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.

. . .

The Geographic Market.

We agree with the parties and the District Court that insofar as the vertical aspect of this merger is concerned, the relevant geographic market is the entire Nation. The relationships of product value, bulk, weight and consumer demand enable manufacturers to distribute their shoes on a nationwide basis, as Brown and Kinney, in fact, do. The anticompetitive effects of the merger are to be measured within this range of distribution.

1 Footnotes omitted.

FTC v. Sanford Health
No. 1:17-CV-133, at 21-24 (D.N.D. Dec. 15, 2017),
***aff'd*, 926 F.3d 959 (8th Cir. June 13, 2019)**

Excerpts on the Relevant Product Market[1]

Alice R. Senechal, United States Magistrate Judge[2]

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FINDINGS OF FACT

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VI. Definition of Relevant Market

53. In antitrust analysis, a relevant market identifies a set of products or services and a geographic area of competition in which to analyze the potential effects of a proposed transaction. The purpose of market definition is to identify options available to consumers.

54. The parties' principal dispute is the proper definition of a relevant market, specifically whether BCBSND's dominance should be considered in defining that market or whether it should instead be considered only as a defense.

55. For reasons discussed below,[5] this court finds it appropriate to consider BCBSND's dominance as a defense rather than as part of the market definition process.

56. The plaintiffs' proposed relevant market definition is derived from application of a hypothetical monopolist test (HMT). The HMT is an iterative process that begins by identifying a candidate market and then asking whether a hypothetical monopolist of that candidate market could profitably impose at least a "small but significant nontransitory increase in price" (SSNIP) over particular products or services. A SSNIP is typically considered to be five percent. If a hypothetical monopolist would find it profitable to impose at least a SSNIP in that candidate market, the conditions of the HMT are satisfied and the candidate market is considered the relevant market for purposes of antitrust analysis. If conditions of the HMT are not satisfied, the candidate market is expanded and the same analysis is applied to the expanded market. The process continues until conditions of the HMT are satisfied. (PX 6000, pp. 29-30; Tr-2, pp. 61-65; Tr-4, p. 91).

57. Courts often use the HMT in defining relevant markets for purposes of antitrust analysis. United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 51 (D.D.C. 2011). The Merger Guidelines issued by the FTC and the United States Department of Justice endorse use of the HMT. U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines §§ 4.1.1-4.1.3 (2010).

[1] Reported at 2017 WL 10810016, at *10-*11.

[2] All parties mutually consented to a trial by a magistrate judge pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. *See* Consent/Reassignment Form, FTC v. Sanford Health, No. 1:17-CV-133 (D.N.D. July 21, 2017)

58. It is appropriate to use the HMT to define the relevant market in this case.

59. In healthcare merger cases, other courts have defined relevant markets in terms of specific types of physician services. See Saint Alphonsus Med. Cent.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 (9th Cir. 2015); Woman's Clinic, Inc. v. St. John's Health Sys., Inc., 252 F. Supp. 2d 857, 867 (W.D. Mo. 2002). That approach is appropriate for this case.

60. A relevant product market definition may be based on a distinct category of customers. FTC v. Advocate Health Care Network, 841 F.3d 460, 468 (7th Cir. 2016). The plaintiffs' proposed market definition includes only commercial insurers, to the exclusion of government payers—Medicare and Medicaid. There is no evidence that contracting with government payers involves the two-stage competition described above. The process of providers reaching agreements with BCBSND is not so similar to that involved in contracting with government providers that government providers should be included as customers in the relevant market. This court finds it appropriate to consider a relevant market limited to a distinct category of customers—commercial health insurance plans.

61. Since the purpose of market definition is to identify options available to consumers, the definition focuses on consumers' ability to substitute products or sellers in areas outside the geographic area in order to defeat a price increase—an inquiry referred to as "demand-side" substitution. In analyzing a healthcare merger, the demand-side substitution inquiry must be done in the context of the two-stage competition model, where the immediate purchasers of physician services are commercial insurers. Because they are the immediate purchasers of physician services, it is logical to consider the process by which commercial insurers build provider networks.

62. Since commercial insurers market their products to health insurance plan purchasers, the insurers must consider the needs and preferences of their insureds—employers, employees, and employees' families. (PX 6000, pp. 25-26; Tr-2, pp. 60-61; Tr-4, p. 112). When the HMT is employed in analyzing a healthcare merger, the inquiry is whether a hypothetical monopolist of a candidate physician services market (or a candidate geographic market) could negotiate a SSNIP from commercial insurers. (Tr-2, pp. 61-62; PX 6000, p. 31).

. . .

FTC v. SANFORD HEALTH
No. 1:17-CV-133, at 21-24 (D.N.D. Dec. 15, 2017),
***aff'd*, 926 F.3d 959 (8th Cir. June 13, 2019)**

Excepts on the Relevant Geographic Market[1]

ALICE R. SENECHAL, United States Magistrate Judge

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FINDINGS OF FACT

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63. The geographic market definition considers "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." United States v. Phila. Nat'l Bank, 374 U.S. 321, 357 (1963).

64. The Merger Guidelines support use of the HMT to define a geographic market, and other courts have endorsed that approach. See Horizontal Merger Guidelines § 4.2; Advocate Health, 841 F.3d at 468-73. Dr. Town agreed that, if one were going to define a geographic market in this situation, use of the HMT—or SSNIP—test would be an appropriate method for doing so. (Tr-4, p. 112). It is appropriate to use the HMT to define the geographic market for this case.

65. The Bismarck-Mandan area includes the cities of Bismarck and Mandan and smaller communities within the surrounding 40 to 50 mile radius. The population of the Bismarck-Mandan area is approximately 130,000, with approximately 93,000 of those people living within either Bismarck or Mandan. The cities closest to Bismarck and Mandan (Minot, Dickinson, and Jamestown) are each between 90 and 110 miles away. Clinics within the Bismarck-Mandan area are almost all within an eight-mile radius of central Bismarck. (PX 3002, p. 2; PX 6000, pp. 55, 235).

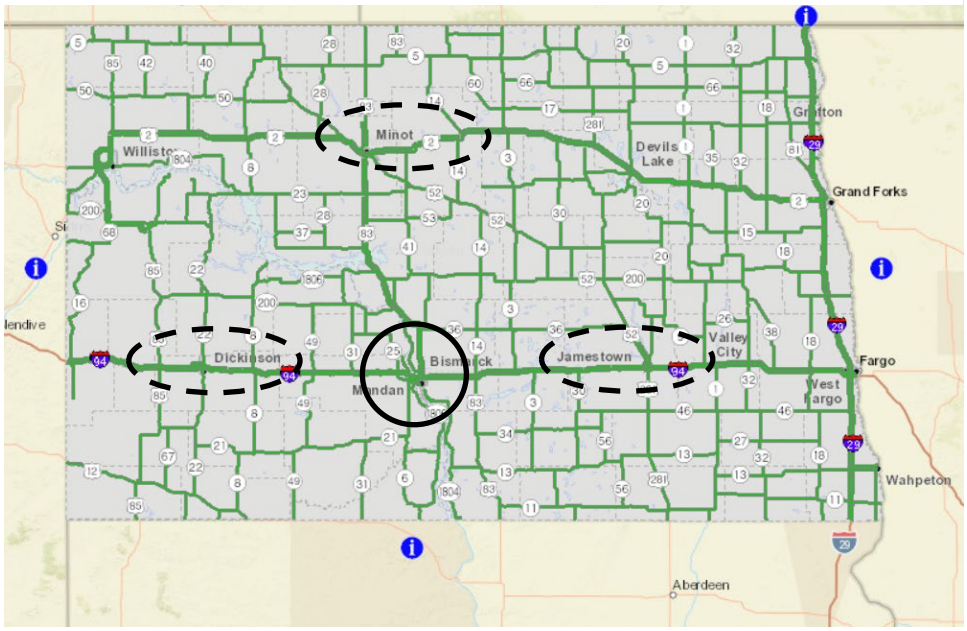
66. Both MDC and Sanford Bismarck consider their primary geographic market to be the area encompassing the four counties that the plaintiffs include in their proposed definition of the relevant market. (JX 0012, pp. 202-03; JX 0007, p. 31). Dr. Sacher's quantitative analysis confirms that patients residing within the Bismarck-Mandan area prefer to receive healthcare services within that area, (PX 6000, pp. 62, 64, 70, 155), and the defendants do not question that fact. A health insurance plan that did not include Bismarck-Mandan area adult PCP services, pediatrician services, OB/GYN physician services, and general surgeon services would not be marketable in the Bismarck-Mandan area. The relevant geographic market is the Bismarck-Mandan area—Burleigh, Morton, Oliver, and Sioux Counties.

67. The plaintiffs established that commercial health insurers would accept a hypothetical monopolist's SSNIP rather than market a health insurance plan in the Bismarck-Mandan area that did not include Bismarck-Mandan area adult PCP services, pediatrician services, OB/GYN physician services, and general surgeon services.

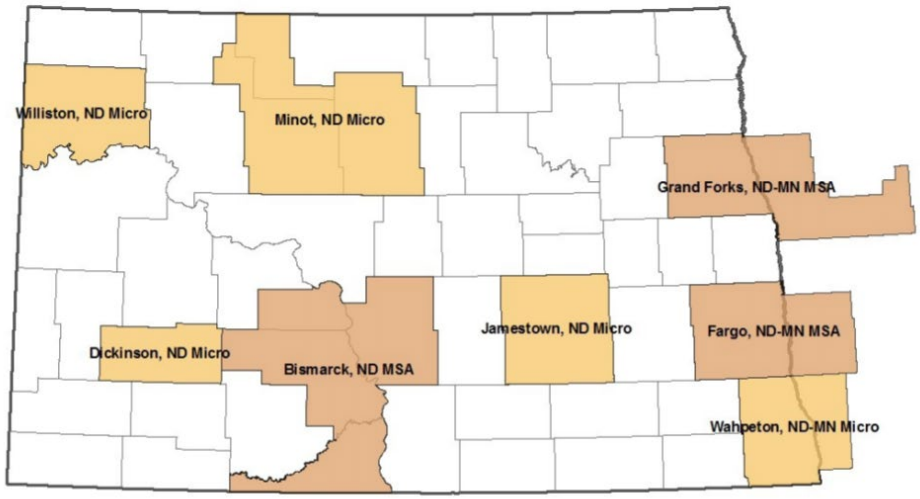
[1] Reported at 2017 WL 10810016, at *11.

68. The relevant market is adult PCP services, pediatrician services, OB/GYN physician services, and general surgeon services sold to or provided to commercial insurers and their members in the Bismarck-Mandan area.

North Dakota County Map



Metropolitan and Micropolitan Areas in North Dakota



Horizontal Merger Guidelines

U.S. Department of Justice

and the

Federal Trade Commission

Issued: August 19, 2010

impractical due to transportation costs. Arbitrage on a modest scale may be possible but sufficiently costly or limited that it would not deter or defeat a discriminatory pricing strategy.

4. Market Definition

When the Agencies identify a potential competitive concern with a horizontal merger, market definition plays two roles. First, market definition helps specify the line of commerce and section of the country in which the competitive concern arises. In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. Second, market definition allows the Agencies to identify market participants and measure market shares and market concentration. See Section 5. The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.

The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.

Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects. For example, evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products form a relevant market. Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.

Where analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects.

Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis. They are considered in these Guidelines in the sections addressing the identification of market participants, the measurement of market shares, the analysis of competitive effects, and entry.

Customers often confront a range of possible substitutes for the products of the merging firms. Some substitutes may be closer, and others more distant, either geographically or in terms of product attributes and perceptions. Additionally, customers may assess the proximity of different products differently. When products or suppliers in different geographic areas are substitutes for one another to varying degrees, defining a market to include some substitutes and exclude others is inevitably a simplification that cannot capture the full variation in the extent to which different products compete against each other. The principles of market definition outlined below seek to make this inevitable simplification as useful and informative as is practically possible. Relevant markets need not have precise metes and bounds.

Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with their shares in a broad market. Although excluding more distant substitutes from the market inevitably understates their competitive significance to some degree, doing so often provides a more accurate indicator of the competitive effects of the merger than would the alternative of including them and overstating their competitive significance as proportional to their shares in an expanded market.

> *Example 4:* Firms A and B, sellers of two leading brands of motorcycles, propose to merge. If Brand A motorcycle prices were to rise, some buyers would substitute to Brand B, and some others would substitute to cars. However, motorcycle buyers see Brand B motorcycles as much more similar to Brand A motorcycles than are cars. Far more cars are sold than motorcycles. Evaluating shares in a market that includes cars would greatly underestimate the competitive significance of Brand B motorcycles in constraining Brand A's prices and greatly overestimate the significance of cars.

Market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes. As a result, properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers. However, a group of products is too narrow to constitute a relevant market if competition from products outside that group is so ample that even the complete elimination of competition within the group would not significantly harm either direct customers or downstream consumers. The hypothetical monopolist test (see Section 4.1.1) is designed to ensure that candidate markets are not overly narrow in this respect.

The Agencies implement these principles of market definition flexibly when evaluating different possible candidate markets. Relevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive and may not align with how industry members use the term "market."

Section 4.1 describes the principles that apply to product market definition, and gives guidance on how the Agencies most often apply those principles. Section 4.2 describes how the same principles apply to geographic market definition. Although discussed separately for simplicity of exposition, the principles described in Sections 4.1 and 4.2 are combined to define a relevant market, which has both a product and a geographic dimension. In particular, the hypothetical monopolist test is applied to a group of products together with a geographic region to determine a relevant market.

4.1 Product Market Definition

When a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the Agencies define a relevant product market around Product A to evaluate the importance of that competition. Such a relevant product market consists of a group of substitute products including Product A. Multiple relevant product markets may thus be identified.

4.1.1 The Hypothetical Monopolist Test

The Agencies employ the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets. The Agencies use the

hypothetical monopolist test to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms.

The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.[4] For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. The SSNIP is employed solely as a methodological tool for performing the hypothetical monopolist test; it is not a tolerance level for price increases resulting from a merger.

Groups of products may satisfy the hypothetical monopolist test without including the full range of substitutes from which customers choose. The hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase.

> *Example 5:* Products A and B are being tested as a candidate market. Each sells for $100, has an incremental cost of $60, and sells 1200 units. For every dollar increase in the price of Product A, for any given price of Product B, Product A loses twenty units of sales to products outside the candidate market and ten units of sales to Product B, and likewise for Product B. Under these conditions, economic analysis shows that a hypothetical profit-maximizing monopolist controlling Products A and B would raise both of their prices by ten percent, to $110. Therefore, Products A and B satisfy the hypothetical monopolist test using a five percent SSNIP, and indeed for any SSNIP size up to ten percent. This is true even though two-thirds of the sales lost by one product when it raises its price are diverted to products outside the relevant market.

When applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product. The third product is a closer substitute if, in response to a SSNIP on the first product, greater revenues are diverted to the third product than to the second product.

> *Example 6:* In Example 5, suppose that half of the unit sales lost by Product A when it raises its price are diverted to Product C, which also has a price of $100, while one-third are diverted to Product B. Product C is a closer substitute for Product A than is Product B. Thus Product C will normally be included in the relevant market, even though Products A and B together satisfy the hypothetical monopolist test.

The hypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant market

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[4] If the pricing incentives of the firms supplying the products in the candidate market differ substantially from those of the hypothetical monopolist, for reasons other than the latter's control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment.

satisfying the test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects. Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.

> *Example 7:* In Example 4, including cars in the market will lead to misleadingly small market shares for motorcycle producers. Unless motorcycles fail the hypothetical monopolist test, the Agencies would not include cars in the market in analyzing this motorcycle merger.

4.1.2 Benchmark Prices and SSNIP Size

The Agencies apply the SSNIP starting from prices that would likely prevail absent the merger. If prices are not likely to change absent the merger, these benchmark prices can reasonably be taken to be the prices prevailing prior to the merger.[5] If prices are likely to change absent the merger, e.g., because of innovation or entry, the Agencies may use anticipated future prices as the benchmark for the test. If prices might fall absent the merger due to the breakdown of pre-merger coordination, the Agencies may use those lower prices as the benchmark for the test. In some cases, the techniques employed by the Agencies to implement the hypothetical monopolist test focus on the difference in incentives between pre-merger firms and the hypothetical monopolist and do not require specifying the benchmark prices.

The SSNIP is intended to represent a "small but significant" increase in the prices charged by firms in the candidate market for the value they contribute to the products or services used by customers. This properly directs attention to the effects of price changes commensurate with those that might result from a significant lessening of competition caused by the merger. This methodology is used because normally it is possible to quantify "small but significant" adverse price effects on customers and analyze their likely reactions, not because price effects are more important than non-price effects.

The Agencies most often use a SSNIP of five percent of the price paid by customers for the products or services to which the merging firms contribute value. However, what constitutes a "small but significant" increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms' positions in it, and the Agencies may accordingly use a price increase that is larger or smaller than five percent. Where explicit or implicit prices for the firms' specific contribution to value can be identified with reasonable clarity, the Agencies may base the SSNIP on those prices.

> *Example 8:* In a merger between two oil pipelines, the SSNIP would be based on the price charged for transporting the oil, not on the price of the oil itself. If pipelines buy the oil at one end and sell it at the other, the price charged for transporting the oil is implicit, equal to the difference between the price paid for oil at the input end and the price charged for oil at the output end. The relevant product sold by the pipelines is better described as "pipeline transportation of oil from point A to point B" than as "oil at point B."

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[5] Market definition for the evaluation of non-merger antitrust concerns such as monopolization or facilitating practices will differ in this respect if the effects resulting from the conduct of concern are already occurring at the time of evaluation.

Example 9: In a merger between two firms that install computers purchased from third parties, the SSNIP would be based on their fees, not on the price of installed computers. If these firms purchase the computers and charge their customers one package price, the implicit installation fee is equal to the package charge to customers less the price of the computers.

Example 10: In Example 9, suppose that the prices paid by the merging firms to purchase computers are opaque, but account for at least ninety-five percent of the prices they charge for installed computers, with profits or implicit fees making up five percent of those prices at most. A five percent SSNIP on the total price paid by customers would at least double those fees or profits. Even if that would be unprofitable for a hypothetical monopolist, a significant increase in fees might well be profitable. If the SSNIP is based on the total price paid by customers, a lower percentage will be used.

4.1.3 Implementing the Hypothetical Monopolist Test

The hypothetical monopolist's incentive to raise prices depends both on the extent to which customers would likely substitute away from the products in the candidate market in response to such a price increase and on the profit margins earned on those products. The profit margin on incremental units is the difference between price and incremental cost on those units. The Agencies often estimate incremental costs, for example using merging parties' documents or data the merging parties use to make business decisions. Incremental cost is measured over the change in output that would be caused by the price increase under consideration.

In considering customers' likely responses to higher prices, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to:

- how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions;

- information from buyers, including surveys, concerning how they would respond to price changes;

- the conduct of industry participants, notably:

  - sellers' business decisions or business documents indicating sellers' informed beliefs concerning how customers would substitute among products in response to relative changes in price;

  - industry participants' behavior in tracking and responding to price changes by some or all rivals;

- objective information about product characteristics and the costs and delays of switching products, especially switching from products in the candidate market to products outside the candidate market;

- the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market, with a higher recapture percentage making a price increase more profitable for the hypothetical monopolist;

- evidence from other industry participants, such as sellers of complementary products;

- legal or regulatory requirements; and

- the influence of downstream competition faced by customers in their output markets.

When the necessary data are available, the Agencies also may consider a "critical loss analysis" to assess the extent to which it corroborates inferences drawn from the evidence noted above. Critical loss analysis asks whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits. While this "breakeven" analysis differs from the profit-maximizing analysis called for by the hypothetical monopolist test in Section 4.1.1, merging parties sometimes present this type of analysis to the Agencies. A price increase raises profits on sales made at the higher price, but this will be offset to the extent customers substitute away from products in the candidate market. Critical loss analysis compares the magnitude of these two offsetting effects resulting from the price increase. The "critical loss" is defined as the number of lost unit sales that would leave profits unchanged. The "predicted loss" is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase. The price increase raises the hypothetical monopolist's profits if the predicted loss is less than the critical loss.

The Agencies consider all of the evidence of customer substitution noted above in assessing the predicted loss. The Agencies require that estimates of the predicted loss be consistent with that evidence, including the pre-merger margins of products in the candidate market used to calculate the critical loss. Unless the firms are engaging in coordinated interaction (see Section 7), high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price.[6] Higher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture percentage necessary for the candidate market to satisfy the hypothetical monopolist test.

Even when the evidence necessary to perform the hypothetical monopolist test quantitatively is not available, the conceptual framework of the test provides a useful methodological tool for gathering and analyzing evidence pertinent to customer substitution and to market definition. The Agencies follow the hypothetical monopolist test to the extent possible given the available evidence, bearing in mind that the ultimate goal of market definition is to help determine whether the merger may substantially lessen competition.

4.1.4 Product Market Definition with Targeted Customers

If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP. Markets to serve targeted customers are also known as price discrimination markets. In practice, the Agencies identify price discrimination markets only where they believe there is a realistic prospect of an adverse competitive effect on a group of targeted customers.

> *Example 11:* Glass containers have many uses. In response to a price increase for glass containers, some users would substitute substantially to plastic or metal containers, but baby food manufacturers would not. If a

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[6] While margins are important for implementing the hypothetical monopolist test, high margins are not in themselves of antitrust concern.

hypothetical monopolist could price separately and limit arbitrage, baby food manufacturers would be vulnerable to a targeted increase in the price of glass containers. The Agencies could define a distinct market for glass containers used to package baby food.

The Agencies also often consider markets for targeted customers when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product. If prices are negotiated individually with customers, the hypothetical monopolist test may suggest relevant markets that are as narrow as individual customers (see also Section 6.2 on bargaining and auctions). Nonetheless, the Agencies often define markets for groups of targeted customers, i.e., by type of customer, rather than by individual customer. By so doing, the Agencies are able to rely on aggregated market shares that can be more helpful in predicting the competitive effects of the merger.

4.2 Geographic Market Definition

The arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Both supplier and customer locations can affect this. The Agencies apply the principles of market definition described here and in Section 4.1 to define a relevant market with a geographic dimension as well as a product dimension.

The scope of geographic markets often depends on transportation costs. Other factors such as language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability may impede long-distance or international transactions. The competitive significance of foreign firms may be assessed at various exchange rates, especially if exchange rates have fluctuated in the recent past.

In the absence of price discrimination based on customer location, the Agencies normally define geographic markets based on the locations of suppliers, as explained in subsection 4.2.1. In other cases, notably if price discrimination based on customer location is feasible as is often the case when delivered pricing is commonly used in the industry, the Agencies may define geographic markets based on the locations of customers, as explained in subsection 4.2.2.

4.2.1 Geographic Markets Based on the Locations of Suppliers

Geographic markets based on the locations of suppliers encompass the region from which sales are made. Geographic markets of this type often apply when customers receive goods or services at suppliers' locations. Competitors in the market are firms with relevant production, sales, or service facilities in that region. Some customers who buy from these firms may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future producer of the relevant product(s) located in the region would impose at least a SSNIP from at least one location, including at least one location of one of the merging firms. In this exercise the terms of sale for all products produced elsewhere are held constant. A single firm may operate in a number of different geographic markets, even for a single product.

Example 12: The merging parties both have manufacturing plants in City X. The relevant product is expensive to transport and suppliers price their products for pickup at their locations. Rival plants are some distance away in City Y. A hypothetical monopolist controlling all plants in City X could profitably impose a SSNIP at these plants. Competition from more distant plants would not defeat the price increase because supplies coming from more distant plants require expensive transportation. The relevant geographic market is defined around the plants in City X.

When the geographic market is defined based on supplier locations, sales made by suppliers located in the geographic market are counted, regardless of the location of the customer making the purchase.

In considering likely reactions of customers to price increases for the relevant product(s) imposed in a candidate geographic market, the Agencies consider any reasonably available and reliable evidence, including:

- how customers have shifted purchases in the past between different geographic locations in response to relative changes in price or other terms and conditions;
- the cost and difficulty of transporting the product (or the cost and difficulty of a customer traveling to a seller's location), in relation to its price;
- whether suppliers need a presence near customers to provide service or support;
- evidence on whether sellers base business decisions on the prospect of customers switching between geographic locations in response to relative changes in price or other competitive variables;
- the costs and delays of switching from suppliers in the candidate geographic market to suppliers outside the candidate geographic market; and
- the influence of downstream competition faced by customers in their output markets.

4.2.2 Geographic Markets Based on the Locations of Customers

When the hypothetical monopolist could discriminate based on customer location, the Agencies may define geographic markets based on the locations of targeted customers.[7] Geographic markets of this type often apply when suppliers deliver their products or services to customers' locations. Geographic markets of this type encompass the region into which sales are made. Competitors in the market are firms that sell to customers in the specified region. Some suppliers that sell into the relevant market may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region would impose at least a SSNIP on some customers in that region. A region forms a relevant geographic market if this price increase would not be defeated by substitution away from the relevant product or by arbitrage,

[7] For customers operating in multiple locations, only those customer locations within the targeted zone are included in the market.

e.g., customers in the region travelling outside it to purchase the relevant product. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

> *Example 13:* Customers require local sales and support. Suppliers have sales and service operations in many geographic areas and can discriminate based on customer location. The geographic market can be defined around the locations of customers.

> *Example 14:* Each merging firm has a single manufacturing plant and delivers the relevant product to customers in City X and in City Y. The relevant product is expensive to transport. The merging firms' plants are by far the closest to City X, but no closer to City Y than are numerous rival plants. This fact pattern suggests that customers in City X may be harmed by the merger even if customers in City Y are not. For that reason, the Agencies consider a relevant geographic market defined around customers in City X. Such a market could be defined even if the region around the merging firms' plants would not be a relevant geographic market defined based on the location of sellers because a hypothetical monopolist controlling all plants in that region would find a SSNIP imposed on all of its customers unprofitable due to the loss of sales to customers in City Y.

When the geographic market is defined based on customer locations, sales made to those customers are counted, regardless of the location of the supplier making those sales.

> *Example 15:* Customers in the United States must use products approved by U.S. regulators. Foreign customers use products not approved by U.S. regulators. The relevant product market consists of products approved by U.S. regulators. The geographic market is defined around U.S. customers. Any sales made to U.S. customers by foreign suppliers are included in the market, and those foreign suppliers are participants in the U.S. market even though located outside it.

5. Market Participants, Market Shares, and Market Concentration

The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects. The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.

Market shares can directly influence firms' competitive incentives. For example, if a price reduction to gain new customers would also apply to a firm's existing customers, a firm with a large market share may be more reluctant to implement a price reduction than one with a small share. Likewise, a firm with a large market share may not feel pressure to reduce price even if a smaller rival does. Market shares also can reflect firms' capabilities. For example, a firm with a large market share may be able to expand output rapidly by a larger absolute amount than can a small firm. Similarly, a large market share tends to indicate low costs, an attractive product, or both.

5.1 Market Participants

All firms that currently earn revenues in the relevant market are considered market participants. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.

Firms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP, without incurring

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4.2.E. Considerations for Innovation and Product Variety Competition

Firms can compete for customers by offering varied and innovative products and features, which could range from minor improvements to the introduction of a new product category. Features can include new or different product attributes, services offered along with a product, or higher-quality services standing alone. Customers value the variety of products or services that competition generates, including having a variety of locations at which they can shop.

Offering the best mix of products and features is an important dimension of competition that may be harmed as a result of the elimination of competition between the merging parties.

When a firm introduces a new product or improves a product's features, some of the sales it gains may be at the expense of its rivals, including rivals that are competing to develop similar products and features. As a result, competition between firms may lead them to make greater efforts to offer a variety of products and features than would be the case if the firms were jointly owned, for example, if they merged. The merged firm may have a reduced incentive to continue or initiate development of new products that would have competed with the other merging party, but post-merger would "cannibalize" what would be its own sales.[73] A service provider may have a reduced incentive to continue valuable upgrades offered by the acquired firm. The merged firm may have a reduced incentive to engage in disruptive innovation that would threaten the business of one of the merging firms. Or it may have the incentive to change its product mix, such as by ceasing to offer one of the merging firms' products, leaving worse off the customers who previously chose the product that was eliminated. For example, competition may be harmed when customers with a preference for a low-price option lose access to it, even if remaining products have higher quality.

The incentives to compete aggressively on innovation and product variety depend on the capabilities of the firms and on customer reactions to the new offerings. Development of new features depends on having the appropriate expertise and resources. Where firms are two of a small number of companies with specialized employees, development facilities, intellectual property, or research projects in a particular area, competition between them will have a greater impact on their incentives to innovate.

Innovation may be directed at outcomes beyond product features; for example, innovation may be directed at reducing costs or adopting new technology for the distribution of products.

4.3. Market Definition

The Clayton Act protects competition "in any line of commerce in any section of the country."[74] The Agencies engage in a market definition inquiry in order to identify whether there is any line of commerce or section of the country in which the merger may substantially lessen competition or tend to create a monopoly. The Agencies identify the "area of effective competition" in which competition may be lessened "with reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country.')."[75] The Agencies refer to the process of identifying market(s) protected by the Clayton Act as a "market definition" exercise and the markets so defined as "relevant antitrust markets,"

[73] Sales "cannibalization" refers to a situation where customers of a firm substitute away from one of the firm's products to another product offered by the same firm.
[74] 15 U.S.C. § 18.
[75] *Brown Shoe*, 370 U.S. at 324.

or simply "relevant markets." Market definition can also allow the Agencies to identify market participants and measure market shares and market concentration.

A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements. The outer boundaries of a 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."[76] Within a broad relevant market, however, effective competition often occurs in numerous narrower relevant markets.[77] Market definition ensures that relevant antitrust markets are sufficiently broad, but it does not always lead to a single relevant market. Section 7 of the Clayton Act prohibits any merger that may substantially lessen competition "in any line of commerce" and in "any section of the country," and the Agencies protect competition by challenging a merger that may lessen competition in any one or more relevant markets.

Market participants often encounter a range of possible substitutes for the products of the merging firms. However, a relevant market cannot meaningfully encompass that infinite range of substitutes.[78] There may be effective competition among a narrow group of products, and the loss of that competition may be harmful, making the narrow group a relevant market, even if competitive constraints from significant substitutes are outside the group. The loss of both the competition between the narrow group of products and the significant substitutes outside that group may be even more harmful, but that does not prevent the narrow group from being a market in its own right.

Relevant markets need not have precise metes and bounds. Some substitutes may be closer, and others more distant, and defining a market necessarily requires including some substitutes and excluding others. Defining a relevant market sometimes requires a line-drawing exercise around product features, such as size, quality, distances, customer segment, or prices. There can be many places to draw that line and properly define a relevant market. The Agencies recognize that such scenarios are common, and indeed "fuzziness would seem inherent in any attempt to delineate the relevant . . . market."[79] Market participants may use the term "market" colloquially to refer to a broader or different set of products than those that would be needed to constitute a valid relevant antitrust market.

The Agencies rely on several tools to demonstrate that a market is a relevant antitrust market. For example, the Agencies may rely on any one or more of the following to identify a relevant antitrust market.

A. Direct evidence of substantial competition between the merging parties can demonstrate that a relevant market exists in which the merger may substantially lessen competition and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the metes and bounds of the market are only broadly characterized.

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[76] *Id.* at 325.

[77] *Id.* ("[W]ithin [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."). Multiple overlapping markets can be appropriately defined relevant markets. For example, a merger to monopoly for food worldwide would lessen competition in well-defined relevant markets for, among others, food, baked goods, cookies, low-fat cookies, and premium low-fat chocolate chip cookies. Illegality in any of these in any city or town comprising a relevant geographic market would suffice to prohibit the merger, and the fact that one area comprises a relevant market does not mean a larger, smaller, or overlapping area could not as well.

[78] *United States v. Cont'l Can Co.*, 378 U.S. 441, 449 (1964); *see also FTC v. Advoc. Health Care Network*, 841 F.3d 460, 469 (7th Cir. 2016) ("A geographic market does not need to include all of the firm's competitors; it needs to include the competitors that would substantially constrain the firm's price-increasing ability." (cleaned up)).

[79] *Phila. Nat'l Bank*, 374 U.S. at 360 n.37.

B. Direct evidence of the exercise of market power can demonstrate the existence of a relevant market in which that power exists. This evidence can be valuable when assessing the risk that a dominant position may be entrenched, maintained, or extended, since the same evidence identifies market power and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the metes and bounds of the market are only broadly characterized.

C. A relevant market can be identified from evidence on observed market characteristics ("practical indicia"), such 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.[80] Various practical indicia may identify a relevant market in different settings.

D. Another common method employed by courts and the Agencies is the hypothetical monopolist test.[81] This test examines whether a proposed market is too narrow by asking whether a hypothetical monopolist over this market could profitably worsen terms significantly, for example, by raising price. An analogous hypothetical monopsonist test applies when considering the impact of a merger on competition among buyers.

The Agencies use these tools to define relevant markets because they each leverage market realities to identify an area of effective competition.

Section 4.3.A below describes the Hypothetical Monopolist Test in greater detail. Section 4.3.B addresses issues that may arise when defining relevant markets in several specific scenarios.

4.3.A. The Hypothetical Monopolist Test

This Section describes the Hypothetical Monopolist Test, which is a method by which the Agencies often define relevant antitrust markets. As outlined above, a relevant antitrust market is an area of effective competition. The Hypothetical Monopolist/Monopsonist Test ("HMT") evaluates whether a group of products is sufficiently broad to constitute a relevant antitrust market. To do so, the HMT asks whether eliminating the competition among the group of products by combining them under the control of a hypothetical monopolist likely would lead to a worsening of terms for customers. The Agencies generally focus their assessment on the constraints from competition, rather than on constraints from regulation, entry, or other market changes. The Agencies are concerned with the impact on economic incentives and assume the hypothetical monopolist would seek to maximize profits.

When evaluating a merger of sellers, the HMT asks whether a hypothetical profit-maximizing firm, not prevented by regulation from worsening terms, that was the only present and future seller of a group of products ("hypothetical monopolist") likely would undertake at least a small but significant and non-transitory increase in price ("SSNIP") or other worsening of terms ("SSNIPT") for at least one

[80] *Brown Shoe*, 370 U.S. at 325, *quoted in United States v. U.S. Sugar Corp.*, 73 F.4th 197, 204-07 (3d Cir. 2023) (affirming district court's application of *Brown Shoe* practical indicia to evaluate relevant product market that included, based on the unique facts of the industry, those distributors who "could counteract monopolistic restrictions by releasing their own supplies").

[81] *See FTC v. Penn State Hershey Med. Center*, 838 F.3d 327, 338 (3d Cir. 2016). While these guidelines focus on applying the hypothetical monopolist test in analyzing mergers, the test can be adapted for similar purposes in cases involving alleged monopolization or other conduct. *See, e.g.*, *McWane, Inc. v. FTC*, 783 F.3d 814, 829-30 (11th Cir. 2015).

product in the group.[82] For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. Analogously, when considering a merger of buyers, the Agencies ask the equivalent question for a hypothetical monopsonist. This Section often focuses on merging sellers to simplify exposition.

4.3.B. Implementing the Hypothetical Monopolist Test

The SSNIPT. A SSNIPT may entail worsening terms along any dimension of competition, including price (SSNIP), but also other terms (broadly defined) such as quality, service, capacity investment, choice of product variety or features, or innovative effort.

Input and Labor Markets. When the competition at issue involves firms buying inputs or employing labor, the HMT considers whether the hypothetical monopsonist would undertake at least a SSNIPT, such as a decrease in the offered price or a worsening of the terms of trade offered to suppliers, or a decrease in the wage offered to workers or a worsening of their working conditions or benefits.

The Geographic Dimension of the Market. The hypothetical monopolist test is generally applied to a group of products together with a geographic region to determine a relevant market, though for ease of exposition the two dimensions are discussed separately, with geographic market definition discussed in Section 4.3.D.2.

Negotiations or Auctions. The HMT is stated in terms of a hypothetical monopolist *undertaking* a SSNIPT. This covers settings where the hypothetical monopolist sets terms and makes them worse. It also covers settings where firms bargain, and the hypothetical monopolist would have a stronger bargaining position that would likely lead it to extract a SSNIPT during negotiations, or where firms sell their products in an auction, and the bids submitted by the hypothetical monopolist would result in the purchasers of its products experiencing a SSNIPT.

Benchmark for the SSNIPT. The HMT asks whether the hypothetical monopolist likely would worsen terms relative to those that likely would prevail absent the proposed merger. In some cases, the Agencies will use as a benchmark different outcomes than those prevailing prior to the merger. For example, if outcomes are likely to change absent the merger, e.g., because of innovation, entry, exit, or exogenous trends, the Agencies may use anticipated future outcomes as the benchmark. Or, if suppliers in the market are coordinating prior to the merger, the Agencies may use a benchmark that reflects conditions that would arise if coordination were to break down. When evaluating whether a merging firm is dominant (Guideline 6), the Agencies may use terms that likely would prevail in a more competitive market as a benchmark.[83]

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[82] If the pricing incentives of the firms supplying the products in the group differ substantially from those of the hypothetical monopolist, for reasons other than the latter's control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment. Analogous considerations apply when considering a SSNIPT for terms other than price.

[83] In the entrenchment context, if the inquiry is being conducted after market or monopoly power has already been exercised, using prevailing prices can lead to defining markets too broadly and thus inferring that dominance does not exist when, in

Magnitude of the SSNIPT. What constitutes a "small but significant" worsening of terms depends upon the nature of the industry and the merging firms' positions in it, the ways that firms compete, and the dimension of competition at issue. When considering price, the Agencies will often use a SSNIP of five percent of the price charged by firms for the products or services to which the merging firms contribute value. The Agencies, however, may consider a different term or a price increase that is larger or smaller than five percent.[84]

The Agencies may base a SSNIP on explicit or implicit prices for the firms' specific contribution to the value of the product sold, or an upper bound on the firms' specific contribution, where these can be identified with reasonable clarity. For example, the Agencies may derive an implicit price for the service of transporting oil over a pipeline as the difference between the price the pipeline firm paid for oil at one end and the price it sold the oil for at the other and base the SSNIP on this implicit price.

4.3.C. Evidence and Tools for Carrying Out the Hypothetical Monopolist Test

Section 4.2 describes some of the qualitative and quantitative evidence and tools the Agencies can use to assess the extent of competition among firms. The Agencies can use similar evidence and analogous tools to apply the HMT, in particular to assess whether competition among a set of firms likely leads to better terms than a hypothetical monopolist would undertake.

To assess whether the hypothetical monopolist likely would undertake at least a SSNIP on one or more products in the candidate market, the Agencies sometimes interpret the qualitative and quantitative evidence using an economic model of the profitability to the hypothetical monopolist of undertaking price increases; the Agencies may adapt these tools to apply to other forms of SSNIPTs.

One approach utilizes the concept of a "recapture rate" (the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market). A price increase is profitable when the recapture rate is high enough that the incremental profits from the increased price plus the incremental profits from the recaptured sales going to other products in the candidate market exceed the profits lost when sales are diverted outside the candidate market. It is possible that a price increase is profitable even if a majority of sales are diverted outside the candidate market, for example if the profits on the lost sales are relatively low or the profits on the recaptured sales are relatively high.

Sometimes evidence is presented in the form of "critical loss analysis," which can be used to assess whether undertaking at least a SSNIPT on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits. Critical loss analysis compares the magnitude of the two offsetting effects resulting from the worsening of terms. The "critical loss" is defined as the number of lost unit sales that would leave profits unchanged. The "predicted loss" is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the worsening of terms. The worsening of terms raises the hypothetical monopolist's profits if the predicted loss is less than the

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fact, it does. The problem with using prevailing prices to define the market when a firm is already dominant is known as the "Cellophane Fallacy."

[84] The five percent price increase is not a threshold of competitive harm from the merger. Because the five percent SSNIP is a minimum expected effect of a hypothetical monopolist of an *entire* market, the actual predicted effect of a merger within that market may be significantly lower than five percent. A merger within a well-defined market that causes undue concentration can be illegal even if the predicted price increase is well below the SSNIP of five percent.

critical loss. While this "breakeven" analysis differs somewhat from the profit-maximizing analysis called for by the HMT, it can sometimes be informative.

The Agencies require that estimates of the predicted loss be consistent with other evidence, including the pre-merger margins of products in the candidate market used to calculate the critical loss. Unless the firms are engaging in coordinated interaction, high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price. Higher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture rate[85] necessary for the candidate market to satisfy the hypothetical monopolist test. Similar considerations inform other analyses of the profitability of a price increase.

4.3.D. Market Definition in Certain Specific Settings

This Section provides details on market definition in several specific common settings. In much of this section, concepts are presented for the scenario where the merger involves sellers. In some cases, clarifications are provided as to how the concepts apply to merging buyers; in general, the concepts apply in an analogous way.

4.3.D.1. Targeted Trading Partners

If the merged firm could profitably target a subset of customers for changes in prices or other terms, the Agencies may identify relevant markets defined around those targeted customers. The Agencies may do so even if firms are not currently targeting specific customer groups but could do so after the merger.

For targeting to be feasible, two conditions typically must be met. First, the suppliers engaging in targeting must be able to set different terms for targeted customers than other customers. This may involve identification of individual customers to which different terms are offered or offering different terms to different types of customers based on observable characteristics.[86] Markets for targeted customers need not have precise metes and bounds. In particular, defining a relevant market for targeted customers sometimes requires a line-drawing exercise on observable characteristics. There can be many places to draw that line and properly define a relevant market. Second, the targeted customers must not be likely to defeat a targeted worsening of terms by arbitrage (e.g., by purchasing indirectly from or through other customers). Arbitrage may be difficult if it would void warranties or make service more difficult or costly for customers, and it is inherently impossible for many services. Arbitrage on a modest scale may be possible but sufficiently costly or limited, for example due to transaction costs or search costs, that it would not deter or defeat a discriminatory pricing strategy.

If prices are negotiated or otherwise set individually, for example through a procurement auction, there may be relevant markets that are as narrow as an individual customer. Nonetheless, for analytic convenience, the Agencies may define cluster markets for groups of targeted customers for whom the

[85] The recapture rate is sometimes referred to as the aggregate diversion ratio, defined in Section 4.2.B.

[86] In some cases, firms offer one or more versions of products or services defined by their characteristics (where brand might be a characteristic). When customers can select among these products and terms do not vary by customer, the Agencies will typically define markets based on products rather than the targeted customers. In such cases, relevant antitrust markets may include only some of the differentiated products, for example products with only "basic" features, or products with "premium features." The tools described in Section 4.2 can be used to assess competition among differentiated products.

conditions of competition are reasonably similar. (See Section 4.3.D.4 for further discussion of cluster markets.)

Analogous considerations arise for a merger involving one or more buyers or employers. In this case, the analysis considers whether buyers target suppliers, for example by paying targeted suppliers or workers less, or by degrading the terms of supply contracts for targeted suppliers. Arbitrage would involve a targeted supplier selling to the buyer indirectly, through a different supplier who could obtain more favorable terms from the buyer.

If the HMT is applied in a setting where targeting of customers is feasible, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the targeted group would undertake at least a SSNIPT on some, though not necessarily all, customers in that group. The products sold to those customers form a relevant market if the hypothetical monopolist likely would undertake at least a SSNIPT despite the potential for customers to substitute away from the product or to take advantage of arbitrage. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

4.3.D.2. Geographic Markets

A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements. A market's geography depends on the limits that distance puts on some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Factors that may limit the geographic scope of the market include transportation costs, language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and local service availability.

4.3.D.2.a. Geographic Markets Based on the Locations of Suppliers

The Agencies sometimes define geographic markets as regions encompassing a group of supplier locations. When they do, the geographic market's scope is determined by customers' willingness to switch between suppliers. Geographic markets of this type often apply when customers receive goods or services at suppliers' facilities, for example when customers buy in-person from retail stores. A single firm may offer the same product in a number of locations, both within a single geographic market or across geographic markets; customers' willingness to substitute between products may depend on the location of the supplier. When calculating market shares, sales made from supplier locations in the geographic market are included, regardless of whether the customer making the purchase travelled from outside the boundaries of the geographic market (see Section 4.4 for more detail about calculating market shares).

If the HMT is used to evaluate the geographic scope of the market, it requires that a hypothetical profit-maximizing firm that was the only present or future supplier of the relevant product(s) at supplier locations in the region likely would undertake at least a SSNIPT in at least one location. In this exercise, the terms of sale for products sold to all customers at facilities outside the region are typically held constant.[87]

[87] In some circumstances, as when the merging parties operate in multiple geographies, if applying the HMT, the Agencies may apply a "Hypothetical Cartel" framework for market definition, following the approach outlined in Section 4.3.A, n.81.

4.3.D.2.b. Geographic Markets Based on Targeting of Customers by Location

When targeting based on customer location is feasible (see Section 4.3.D.1), the Agencies may define geographic markets as a region encompassing a group of customers.[88] For example, geographic markets may sometimes be defined this way when suppliers deliver their products or services to customers' locations, or tailor terms of trade based on customers' locations. Competitors in the market are firms that sell to customers that are located in the specified region. Some suppliers may be located outside the boundaries of the geographic market, but their sales to customers located within the market are included when calculating market shares (see Section 4.4 for more detail about calculating market shares).

If prices are negotiated individually with customers that may be targeted, geographic markets may be as narrow as individual customers. Nonetheless, the Agencies often define a market for a cluster of customers located within a region if the conditions of competition are reasonably similar for these customers. (See Section 4.3.D.4 for further discussion of cluster markets.)

A firm's attempt to target customers in a particular area with worsened terms can sometimes be undermined if some customers in the region substitute by travelling outside it to purchase the product. Arbitrage by customers on a modest scale may be possible but sufficiently costly or limited that it would not deter or defeat a targeting strategy.[89]

If the HMT is used to evaluate market definition when customers may be targeted by location, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region likely would undertake at least a SSNIPT on some, though not necessarily all, customers in that region. The products sold in that region form a relevant market if the hypothetical monopolist would undertake at least a SSNIPT despite the potential for customers to substitute away from the product or to locations outside the region. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.[90]

4.3.D.3. Supplier Responses

Market definition focuses solely on demand substitution factors, that is, on customers' ability and willingness to substitute away from one product or location to another in response to a price increase or other worsening of terms. Supplier responses may be considered in the analysis of competition between firms (Guideline 2 and Section 4.2), entry and repositioning (Section 3.2), and in calculating market shares and concentration (Section 4.4).

4.3.D.4. Cluster Markets

A relevant antitrust market is generally a group of products that are substitutes for each other. However, when the competitive conditions for multiple relevant markets are reasonably similar, it may be appropriate to aggregate the products in these markets into a "cluster market" for analytic convenience, even though not all products in the cluster are substitutes for each other. For example, competing hospitals may each provide a wide range of acute health care services. Acute care for one health issue is not a substitute for acute care for a different health issue. Nevertheless, the Agencies may

[88] For customers operating in multiple locations, only those customer locations within the targeted region are included in the market.
[89] Arbitrage by suppliers is a type of supplier response and is thus not considered in market definition. (See Section 4.3.D.3)
[90] In some circumstances, as when the merging parties operate in multiple geographies, the Agencies may apply a "Hypothetical Cartel" framework for market definition, as described in Section 4.3.A, n.81.

aggregate them into a cluster market for acute care services if the conditions of competition are reasonably similar across the services in the cluster.

The Agencies need not separately analyze market definition for each product included in the cluster market, and market shares will typically be calculated for the cluster market as a whole.

Analogously, the Agencies sometimes define a market as a cluster of targeted customers (see Section 4.3.D.1) or a cluster of customers located in a region (see Section 4.3.D.2.b).

4.3.D.5. Bundled Product Markets

Firms may sell a combination of products as a bundle or a "package deal," rather than offering products "*a la carte*," that is, separately as standalone products. Different bundles offered by the same or different firms might package together different combinations of component products and therefore be differentiated according to the composition of the bundle. If the components of a bundled product are also available separately, the bundle may be offered at a price that represents a discount relative to the sum of the *a la carte* product prices.

The Agencies take a flexible approach based on the specific circumstances to determine whether a candidate market that includes one or more bundled products, standalone products, or both is a relevant antitrust market. In some cases, a relevant market may consist of only bundled products. A market composed of only bundled products might be a relevant antitrust market even if there is significant competition from the unbundled products. In other cases, a relevant market may include both bundled products and some unbundled component products.

Even in cases where firms commonly sell combinations of products or services as a bundle or a "package deal," relevant antitrust markets do not necessarily include product bundles. In some cases, a relevant market may be analyzed as a cluster market, as discussed in Section 4.3.D.4.

4.3.D.6. One-Stop Shop Markets

In some settings, the Agencies may consider a candidate market that includes one or more "one-stop shops," where customers can select a combination of products to purchase from a single seller, either in a single purchase instance or in a sequence of purchases. Products are commonly sold at a one-stop shop when customers value the convenience, which might arise because of transaction costs or search costs, savings of time, transportation costs, or familiarity with the store or web site.

A multi-product retailer such as a grocery store or online retailer is an example of a one-stop shop. Customers can select a particular basket of groceries from a range of available goods and different customers may select different baskets. Some customers may make multiple stops at specialty shops (e.g., butcher, baker, greengrocer), or they may do the bulk of their shopping at a one-stop shop (the grocery store) but also shop at specialty shops for particular product categories.

There are several ways in which markets may be defined in one-stop shop settings, depending on market realities, and the Agencies may further define more than one relevant antitrust market for a particular merger. For example, a relevant market may consist of only one-stop shops, even if there is significant competition from specialty shops; or it may include both one-stop shops and specialty shops. When a product category is sold by both one-stop shops and specialty suppliers (such as a type of produce sold in grocery stores and produce stands), the Agencies may define relevant antitrust markets for the product category sold by a particular type of supplier, or it may include multiple types of suppliers.

4.3.D.7. Market Definition When There is Harm to Innovation

When considering harm to competition in innovation, market definition may follow the same approaches that are used to analyze other dimensions of competition. In the case where a merger may substantially lessen competition by decreasing incentives to innovate, the Agencies may define relevant antitrust markets around the products that would result from that innovation if successful, even if those products do not yet exist.[91] In some cases, the Agencies may analyze different relevant markets when considering innovation than when considering other dimensions of competition.

4.3.D.8. Market Definition for Input Markets and Labor Markets

The same market definition tools and principles discussed above can be used for input markets and labor markets, where labor is a particular type of input. In input markets, firms compete with each other to attract suppliers, including workers. Therefore, input suppliers are analogous to customers in the discussions above about market definition. In defining relevant markets, the Agencies focus on the alternatives available to input suppliers. An antitrust input market consists of a group of products and a geographic area defined by the location of the buyers or input suppliers. Just as buyers of a product may consider products to be differentiated according to the brand or the identity of the seller, suppliers of a product or service may consider different buyers to be differentiated. For example, if the suppliers are contractors, they may have distinct preferences about who they provide services to, due to different working conditions, location, reliability of buyers in terms of paying invoices on time, or the propensity of the buyer to make unexpected changes to specifications.

The HMT considers whether a hypothetical monopsonist likely would undertake a SSNIPT, such as a reduction in price paid for inputs, or imposing less favorable terms on suppliers. (See Section 4.2.C for more discussion about competition in settings where terms are set through auctions and negotiations, as is common for input markets.)

When defining a market for labor the Agencies will consider the job opportunities available to workers who supply a relevant type of labor service, where worker choice among jobs or between geographic areas is the analog of consumer choices among products and regions when defining a product market. The Agencies may consider workers' willingness to switch in response to changes to wages or other aspects of working conditions, such as changes to benefits or other non-wage compensation, or adoption of less flexible scheduling. Depending on the occupation, alternative job opportunities might include the same occupation with alternative employers, or alternative occupations. Geographic market definition may involve considering workers' willingness or ability to commute, including the availability of public transportation. The product and geographic market definition may involve assessing whether workers may be targeted for less favorable wages or other terms of employment according to factors such as education, experience, certifications, or work locations. The Agencies may define cluster markets for different jobs when firms employ workers in a variety of jobs characterized by similar competitive conditions (see Section 4.3.D.4).

4.4. Calculating Market Shares and Concentration

This subsection further describes how the Agencies calculate market shares and concentration metrics.

[91] *See Illumina*, slip op. at 12 (affirming a relevant market defined around "what . . . developers reasonably sought to achieve, not what they currently had to offer").

FTC v. META PLATFORMS, INC.,
2023 WL 2346238, at *8-*17 (N.D. Cal. 2023)
(excerpt on market definition[1])

EDWARD J. DAVILA, J.

[The FTC brought an action alleging that the vertical acquisition by Meta Platforms, Inc. of Within Unlimited, Inc. violated Section 7 and seeking a preliminary injunction to block the closing of the deal pending an administrative trial on the merits. Meta, formerly known as Facebook, is the leading developer of virtual reality ("VR") devices and apps, including the Oculus Quest 2 VR headset. Within, a privately owned company founded in 2014, creates products, original content, formats, proprietary software, and tools for virtual and augmented reality entertainment, fitness, and learning. Its flagship product, Supernatural, is a complete fitness subscription service exclusively for the Oculus Quest 2 VR headset and is the leading VR dedicated fitness app. The FTC's amended complaint alleges that the acquisition, if consummated, would substantially lessen competition in the national market for VR dedicated fitness apps in violation of Section 7. The complaint's principal theory of anticompetitive harm was that the acquisition would eliminate the possibility that Meta would enter into VR dedicated fitness apps through other means, which the complaint alleges is reasonably probable but for the acquisition—essentially the elimination of actual potential competition. We will examine the application of potential competition theory to this case in Uit 14. For now, we will focus on the court's analysis of product market definition.]

B. Relevant Market Definition

The first step in analyzing a merger challenge under Section 7 of the Clayton Act is to determine the relevant market. *U.S. v. Marine Bancorporation, Inc*., 418 U.S. 602, 619 (1974) (citing [*United States v.*] *E.I. Du Pont*, 353 U.S. 586, 593 (1957)); *see FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) ("A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'"). The relevant market for antitrust purposes is determined by (1) the relevant product market and (2) the relevant geographic market. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 324 (1962).

1. Product Market

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. "Within a general product market, 'well-defined submarkets may exist which, in themselves, constitute product markets

[1] Record citations footnotes omitted.

for antitrust purposes.'" *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1121 (9th Cir. 2018) (quoting *Brown Shoe*, 370 U.S. at 325); *see also Newcal Indus., Inc. v. Ikon Office Sol'n*, 513 F.3d 1038, 1045 (9th Cir. 2008) ("[A]lthough the general market must include all economic substitutes, it is legally permissible to premise antitrust allegations on a submarket."). The definition of the relevant market is "basically a fact question dependent upon the special characteristics of the industry involved." *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1299 (9th Cir. 1982). Products need not be fungible to be included in a relevant market, but a relevant market "cannot meaningfully encompass th[e] infinite range" of substitutes for a product. *Id*. at 1271 (quoting *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 611, 612 n. 31, (1953)). The overarching goal of market definition is to "recognize competition where, in fact, competition exists." *Brown Shoe*, 370 U.S. at 326; *see also U.S. v. Continental Can Co.*, 378 U.S. 441, 449 (1964) ("In defining the product market between these terminal extremes [of fungibility and infinite substitution], we must recognize meaningful competition where it is found to exist."); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1039 (D.C. Cir. 2008) ("As always in defining a market, we must 'take into account the realities of competition.'") (citations omitted).

Courts have used both qualitative and quantitative tools to aid their determinations of relevant markets. A qualitative analysis of the relevant antitrust market, including submarkets, involves "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." *Brown Shoe*, 370 U.S. at 325; *see also*, *e.g.*, *Klein v. Facebook, Inc*., 580 F. Supp. 3d 743, 766–68 (N.D. Cal. 2022) (applying *Brown* Shoe factors). A common quantitative metric used by parties and courts to determine relevant markets is the Hypothetical Monopolist Test ("HMT"), as described in the U.S. Department of Justice and the FTC's 2010 Merger Guidelines. U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* ("2010 Merger Guidelines") § 4 (2010); *see also*, *e.g.*, *U.S. v. H & R Block, Inc*., 833 F. Supp. 2d 36, 51 (D.D.C. 2011) ("An analytical method often used by courts to define a relevant market is to ask hypothetically whether it would be profitable to have a monopoly over a given set of substitutable products. If so, those products may constitute a relevant market.").

There is "no requirement to use any specific methodology in defining the relevant market." *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., Ltd*., 20 F.4th 466, 482 (9th Cir. 2021). As such, courts have determined relevant antitrust markets using, for example, only the Brown Shoe factors, or a combination of the *Brown Shoe* factors and the HMT. *See, e.g.*, *Lucas Auto. Eng., Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766–68 (9th Cir. 2001) (relying on *Brown Shoe* factors alone in review of district court's determination of relevant market); *United States v. Aetna Inc*., 240 F. Supp. 3d 1, 20–21 (D.D.C. 2017) (using HMT and *Brown Shoe* factors to analyze relevant market). The Ninth Circuit has "repeatedly noted that the *Brown Shoe* indicia are practical aids for identifying the areas of actual or potential competition and that their presence or absence does not decide automatically the submarket issue." *Thurman*

Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1375 (9th Cir. 1989) (citations omitted). The suitability of a submarket as a relevant antitrust market "turns ultimately upon whether the factors used to define the submarket are 'economically significant.'" *Id*.

The FTC proposes a relevant product market consisting of VR dedicated fitness apps, meaning VR apps "designed so users can exercise through a structured physical workout in a virtual setting." According to the FTC, VR dedicated fitness apps are distinct from (1) other VR apps and (2) other fitness offerings. To differentiate their proposed market from other VR app markets, the FTC claims that VR dedicated fitness apps have distinct customers and pricing strategies. The FTC further argues that VR dedicated fitness apps are in a separate market from other fitness offerings (e.g., gyms, at-home fitness equipment) because they provide users with "fully immersive, 360-degree environments," are fully portable, save space, cost less, and target a different type of consumer. The FTC claims that these qualitative product differences satisfy the *Brown Shoe* practical indicia of a relevant market, and that the Hypothetical Monopolist Test conducted by the FTC's economics expert further confirms the relevant product market definition.

Unsurprisingly, Defendants disagree. They claim that the FTC's proposed market is impermissibly narrow because it excludes "scores of products, services, and apps" that are "reasonably interchangeable" with VR dedicated fitness apps, including dozens of VR apps categorized as "fitness" apps on the Quest platform, fitness apps on gaming consoles and other VR platforms, and non-VR connected fitness products and services. Defendants argue that members of the FTC's proposed market subjectively consider other VR apps and other fitness offerings to be competing products, and that several such products also possess the very features—portability, immersion, and pricing models—that the FTC highlights as distinguishing or unique to its proposed market. Defendants also contend that Dr. Singer's HMT analysis is fatally flawed due to methodological errors in the survey underlying the test.

In this case, the Court finds the FTC has made a sufficient evidentiary showing that there exists a well-defined relevant product market consisting of VR dedicated fitness apps.

a. *Brown Shoe* Analysis

The Court first examines in turn each of the *Brown Shoe* factors, i.e., "practical indicia [such] 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." 370 U.S. at 325.

i. Industry or Public Recognition

The evidence indicates that Defendants and other VR dedicated fitness app makers viewed VR dedicated fitness apps as an economic submarket of VR apps. For example, [REDACTED] Within's contemporaneous view of untapped market segments indicates that a "fitness first" app paired with a VR headset—i.e., a VR dedicated fitness app—would be in a distinct segment of the overall VR market. Likewise, as

explained in greater detail in the sections below, Meta repeatedly stated that VR dedicated fitness apps constituted a distinct market opportunity within the VR ecosystem due to their unique uses, distinct customers, and distinct prices. And a representative the VR app company Odders Lab testified that the launch of its VR dedicated fitness app did not diminish sales of its VR rhythm app, acknowledging that its VR fitness app "compete[d] more directly with fitness dedicated applications than gaming applications." Industry companies' internal communications showing frequent distinctions between various categories of applications is "strong[] support" of a distinct submarket. *Klein* [*v. Facebook*], 580 F. Supp. 3d [743] at 758 [(N.D. Cal. 2022)].

Participants in the broader fitness industry also recognized VR fitness as a "separate economic entity." [REDACTED] *See United States v. Microsoft Corp.*, 253 F.3d 34, 53 (D.C. Cir. 2001) (rejecting inclusion of middleware products in the relevant market where middleware was a potential, rather than current, competitor).

Defendants claim that members of the VR dedicated fitness app industry understood the market in which they operated to consist of "[s]cores of products, services, and apps available to consumers who want to exercise." [REDACTED] Defendants also contend that "[e]stablished fitness and technology firms . . . view VR fitness as competitive with off-VR products," and point as an example to Apple's inclusion of Supernatural and the Peloton Guide in the "competitive landscape" when it [REDACTED].

Defendants' evidence shows that there is a broad fitness market that includes everything from VR apps to bicycles. This in no way precludes the existence of a submarket constituting a relevant product market for antitrust purposes. *Brown Shoe*, 370 U.S. at 325; *Newcal Indus*., 513 F.3d at 1045. As the Ninth Circuit has noted, a relevant antitrust market "cannot meaningfully encompass th[e] infinite range" of substitutes for a product—yet this is exactly how Defendants propose to define the market. *Twin City Sportservice, Inc. v. Charles O'Finley & Co., Inc*., 512 F.2d 1264, 1271 (9th Cir. 1975). The Court therefore acknowledges that VR dedicated fitness apps compete for consumers with every manner of exercise (including gyms, bike rides, and connected fitness), but finds that Defendants and the broader fitness industry recognized VR dedicated fitness apps as an economically distinct submarket.

ii. Peculiar Characteristics and Uses

The evidence indicates that VR dedicated fitness apps have several "peculiar characteristics and uses" in comparison to both other VR apps and non-VR fitness offerings. *Brown Shoe*, 370 U.S. at 325. Even assuming "[a]lmost all VR applications require body movement," VR dedicated fitness apps are "specifically marketed to customers for the purpose of exercise," To support that marketing, VR dedicated fitness apps (unlike other VR apps) are often characterized by their fitness-specific features, such as trainer-led workout regimens, calorie tracking, and the ability to set and track progress toward fitness goals.

The most "peculiar characteristic" of VR dedicated fitness apps in comparison to non-VR fitness offerings is, of course, the VR technology itself. A VR user is "embodied" in a virtual environment. She is "teleported to a different place, feeling

like when you move your head and look around, you're in a new space and seeing virtual things as if they are real, which is virtual reality." Defendants' fitness industry expert, Dr. Vickey, submitted that non-VR fitness options could also be immersive, describing the non-VR Hydrow rowing machine as an "immersive exercise piece of equipment" because the Hydrow displayed video footage of various locations on a touchscreen the user viewed while rowing. The Court finds that no matter how crisp or accurate a video may be, a two-dimensional screen display is inherently far less immersive than a 360-degree environment. The evidence does not suggest—and the Court is not aware of—any other at-home fitness offering that can transport the user in this way. That a user of a VR dedicated fitness app can exercise in a VR setting is, therefore, a "distinct core functionality" indicative of a submarket. *Klein*, 580 F. Supp. 3d at 767 (quoting *Datel Holdings, Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 997 (N.D. Cal. 2010)).

The FTC puts forth other hallmarks of VR dedicated fitness apps that generally differ from characteristics of non-VR fitness offerings. For example, the FTC argues that "VR headsets are fully portable and take up little space." These appear to be distinguishing features in relation to bulky connected fitness devices, such as the Peloton Bike or Hydrow rowing machine, but Defendants persuasively argue that mobile fitness apps can offer these same functionalities. Nonetheless, the virtual reality fitness experience created by VR dedicated fitness apps appears to be vastly different from a workout conducted on a large and stationary device or based off a mobile phone screen.

With respect to "peculiar . . . uses," Defendants have shown that consumers use non-VR fitness offerings for exercise. Defendants have additionally shown that consumers may use other VR apps for fitness. As explained above, the existence of a broader fitness market does not mean a relevant submarket does not exist. Defendants have themselves recognized the characteristics that distinguish VR dedicated fitness apps from other The Court therefore finds that the "peculiar characteristics and uses" factor of the *Brown Shoe* analysis supports the finding that VR dedicated fitness apps constitute a relevant antitrust product market. *See, e.g.*, *SC Innovations, Inc. v. Uber Techs., Inc.*, 434 F. Supp. 3d 782, 792 (N.D. Cal. 2020) (finding plaintiffs alleged a submarket for ride-sharing services excluding taxis, in part due to distinguishing features such as ability to rate and review drivers and share rides).

iii. Unique Production Facilities

The parties did not explicitly develop arguments regarding unique production facilities in support of their positions regarding the relevant product market. The Court notes, however, that VR dedicated fitness apps require a unique combination of production inputs. [REDACTED] Similarly, most VR companies are unlikely to have the fitness expertise and equipment necessary to create content for VR dedicated fitness apps. [REDACTED]

Although relevant markets are generally defined by demand-side substitutability, supply-side substitution also informs whether alternative products may be counted in the relevant market. *Twin City Sportservice, Inc.*, 512 F.2d at 1271 ("While the majority of the decided cases in which the rule of reasonable interchangeability is

employed deal with the 'use' side of the market, the courts have not been unaware of the importance of substitutability on the 'production' side as well."); *see also Brown Shoe*, 370 U.S. at 325 n.42 ("The cross-elasticity of production facilities may also be an important factor in defining a product market."); Julian von Kalinowski et al., 2 Antitrust Laws & Trade Regulation § 24.02[1][c], at 24–55 (2d ed. 2012) ("Another important factor in defining a product market is the ability of existing companies to alter their facilities to produce the defendant's product. . . . The Supreme Court has long recognized the significance of this factor, often referred to as cross-elasticity of supply.") (footnote omitted); 2010 Merger Guidelines, § 5.1 & n.8 (high supply side substitutability may be used to aggregate products into a market description).

Supply-side substitution focuses on suppliers' "responsiveness to price increases and their ability to constrain anticompetitive pricing by readily shifting what they produce." [*FTC v.*] *RAG-Stiftung*, 436 F. Supp. 3d [278] at 293 [(D.D.C. 2020] (citing *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) ("reasonable market definition must also be based on 'supply elasticity'"), *cert. denied*, 516 U.S. 987 (1995)). Here, as explained above, the evidence indicates that neither general fitness firms nor general VR firms have the production facilities to readily produce a substitute VR dedicated fitness app product, even if VR dedicated fitness apps were to raise prices and make market entry more attractive. That existing companies are not easily able to alter their facilities to produce VR dedicated fitness apps is additional evidence that such apps constitute a distinct product market.

iv. Distinct Customers

The FTC proffered evidence showing that users of VR dedicated fitness apps differ from those of other VR apps along multiple axes. Internal evaluations by Meta and Within found that although overall users of VR apps skewed younger and male, users of VR dedicated fitness apps tended to have an older and more female user base. For example, Meta claimed in its response to the FTC's Second Request regarding the Meta-Within transaction that the overall Quest user base was about [REDACTED]. Meta expected that VR dedicated fitness apps would expand the reach of virtual reality to new customer segments. To that end, Meta's Vice President of Metaverse Content informed the company's board of directors that "Supernatural, FitXR, and . . . other fitness applications, . . . unlike our gaming population . . . had tended to be more successful with on average an older person, on average more women. It was a very different demographic, and . . . we had always been in search of expanding VR beyond gaming into more of a general computing platform."

Defendants acknowledge that VR fitness appeals to different user demographics than other VR apps. Defendants do, however, dispute that VR dedicated fitness apps have a customer base that is distinct from that of non-VR fitness offerings. The evidence indicates that VR dedicated fitness apps are targeted more toward "[REDACTED]" who have less fitness experience and more difficulty finding motivating fitness products (rather than to individuals who have long-term or well-developed fitness routines.) As stated by Within's executive vice president of business development and finance, it was "Within's understanding that Supernatural appeals to [REDACTED] in a way that other existing fitness products do not." Within insiders

also compared Supernatural to [REDACTED]. And in summer 2021—when Meta was in negotiations regarding the acquisition of Supernatural—a Meta employee described Within's business model as "encouraging users who don't think about fitness much as well as users with a light routine, not the fitness buff who is better served by the likes of Peloton cycling or Crossfit classes." [REDACTED] The Court finds the VR dedicated fitness apps have a customer base that is distinct from those of both other VR apps and several other fitness offerings—[REDACTED]. *See, e.g.*, *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 29–30 (D.D.C. 2015) (finding relevant product market in part based on erstwhile competitors' inability to serve certain types of customers).

v. Distinct Prices

The pricing of VR dedicated fitness apps likewise differs in at least one key respect from other VR apps and non-VR fitness offerings. The main difference in comparison to the former category is that VR dedicated fitness apps are more likely to have a subscription-based pricing model. As one of Within's founders testified, Within's daily release of new workout content requires ongoing revenue, which is supported by a subscription membership. Likewise, Meta's Director of Content Ecosystem testified that "subscriptions are particularly good monetization strategies for [fitness] applications" because "fitness applications need to produce content on an ongoing basis . . . in order to not get boring." However, subscription pricing does not provide a clear basis for delineating between VR dedicated fitness apps and other VR apps. Some VR dedicated fitness apps do not charge subscription fees, and other VR apps may also be a good fit for subscription pricing. Nonetheless, the evidence indicates that "the majority of the video game applications on the Quest platform are not a good fit for subscriptions" including because "most of them don't have [an] ongoing content pipeline."

Many fitness offerings, whether virtual or physical, use subscription models. As Meta noted in its June 2022 white paper to the FTC, Supernatural's "monthly subscription model . . . is similar in structure to other connected fitness solutions included specialized equipment solutions (e.g., Peloton, Mirror, Tonal), paid apps (e.g., Apple Fitness+), and other VR fitness apps (e.g., FitXR, Holofit, VZfit), as well as in-person gym memberships (e.g., Equinox, CrossFit, 24 Hour Fitness)." The FTC argues that despite sharing a subscription pricing model, VR dedicated fitness apps tend to be "far less expensive" than "other at-home smart fitness devices." The evidence supports this assertion with respect to several connected fitness devices—Supernatural, the most expensive VR dedicated fitness app,6 costs $399 plus $18.99 per month, while Peloton costs $1,445 plus $44 per month and Tonal costs $3,495 plus $49 per month. There are, however, digital fitness options—generally mobile phone apps—with subscriptions "in the sort of $8 to $12 range."

The Court finds that the VR app and non-VR pricing evidence tilts slightly in favor of the existence of a VR dedicated fitness app market. *See, e.g.*, *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 200–01 (D.D.C. 2018) ("The existence of distinct prices . . . are 'not what one would expect if North American customers were willing and able to substitute one type of titanium dioxide for another in response to a change in their relative prices.'") (citations omitted). Testimony from both Within and Meta indicate

a practical reason for VR fitness apps to be generally best served by a subscription pricing model, which is in line with broader non-VR fitness offerings. And VR dedicated fitness apps are much more affordable than the non-VR fitness products that come closest to offering the level of immersion available in VR. However, in light of the evidence that there exist both other VR apps that can strategically employ a subscription model and non-VR fitness offerings that are comparably priced to VR fitness apps, the overall weight of this factor is lessened.

vi. Sensitivity to Price Changes

The sixth *Brown Shoe* factor evaluates the change in sales of a possible substitute product given a change in the price of products within the relevant market. Because this is in essence the same question posed by the HMT, *see FTC v. Staples*, 970 F. Supp. 1066, 1075 (D.D.C. 1997), the Court will not duplicate its analysis here. Drawing from that analysis, the Court finds this factor to be neutral as to the existence of a VR dedicated fitness app market.

vii. Specialized Vendors

The final *Brown Shoe* factor considers whether a product's distribution requires vendors with specialized knowledge or practices. *See Brown Shoe*, 370 U.S. at 325; *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 120–21 (D.D.C. 2016) (defining product market in part due to necessity that vendors have distinguishing capabilities such as sophisticated IT systems, personalized and high-quality service, and next-day delivery). The FTC has not presented evidence that the VR dedicated fitness app market requires specialized vendors.

* * *

For the reasons explained above, the Court finds that the following *Brown Shoe* "practical indicia" support the FTC's assertion that VR dedicated fitness apps constitute the relevant product market: industry or public recognition; peculiar characteristics and uses; unique production facilities; distinct customers; and (to a lesser degree) distinct prices. These factors indicate that VR dedicated fitness apps present in-market firms with an economic opportunity that is distinct from both other VR apps and other fitness offerings. *See Thurman Indus., Inc.*, 875 F.2d at 1375. The Court therefore finds that the FTC has met its burden of showing that VR dedicated fitness apps constitute a relevant antitrust product market. *Brown Shoe*, 370 U.S. at 325–28; *see also Lucas Auto. Eng*., 275 F.3d at 766–68 (relying on *Brown Shoe* factors alone in review of relevant market); *Klein*, 580 F. Supp. 3d at 766–73 (same); *Newcal Indus.*, 513 F.3d at 1051 ("Even when a submarket is an Eastman Kodak submarket, though, it must bear the 'practical indicia' of an independent economic entity in order to qualify as a cognizable submarket under *Brown Shoe*.").

b. Hypothetical Monopolist Test (HMT)

In the interests of thoroughness, the Court also addresses the parties' HMT arguments. The HMT is a quantitative tool used by courts to help define a relevant market by determining reasonably interchangeable products. *Optronic Techs., Inc.*, 20 F.4th at 482 n.1. The test asks whether a "hypothetical monopolist that owns a given

set of products likely would impose at least a small but significant and nontransitory increase in price (SSNIP) on at least one product in the market, including at least one product sold by one of the merging firms." [*S*]*ee* 2010 Merger Guidelines § 4.1.1. If enough consumers would respond to a SSNIP—often calculated as a five percent increase in price—by making purchases outside the proposed market definition so as to make the SSNIP not profitable, then the proposed market is defined too narrowly. *Optronic Techs., Inc.*, 20 F.4th at 482 n.1.

The FTC's economics expert, Dr. Singer, conducted a hypothetical monopolist test on the VR dedicated fitness app market. To inform his analysis of the response to a SSNIP in the VR dedicated fitness app market, Dr. Singer commissioned Qualtrics to conduct "a survey of Supernatural users to determine what fitness apps they perceive to be a reasonably close substitutes to Supernatural and to VR dedicated fitness products generally." Dr. Singer testified that although an economist's natural path would be to collect data about Supernatural customers' transactions and reactions to any price increases, such data was unavailable here because Supernatural has never changed its price from $18.99 per month. The survey was his "next best" option, and the approach is supported by the 2010 Merger Guidelines. 2010 Merger Guidelines § 4.1.3. Based on his analysis of the survey, Dr. Singer determined that VR dedicated fitness apps constituted a relevant market.

Defendants deride Dr. Singer's survey as "junk science" and urge this Court not to rely on it. In support of their arguments, Defendants relied on the expert reports and testimony of Dr. Dube and Dr. Carlton, who the Court found qualified as experts [respectively] in the design and implementation of surveys and the economics of consumer demand for branded goods, and industrial organizations and microeconomics. Based on the testimony elicited by Defendants from Dr. Singer, Dr. Dube, and Dr. Carlton, the Court is troubled by various apparent flaws in the survey underlying Dr. Singer's HMT. Most pertinently, there appear to be several indications that a high fraction of the 150 surveyed individuals, on whose answers Dr. Singer's analysis necessarily relied, were untruthful in one or more responses. See, e.g., Dube Hr'g Tr. 895:12–25 (respondents claimed to own multiple pieces of bulky, expensive equipment); Carlton Report ¶ 93 (over two dozen respondents claimed to regularly use all 27 fitness products listed on survey). Another facet of concern is the survey's apparent inclusion of a non-VR product in the question designed to capture a hypothetical monopolist's pricing power in a VR-only market. Carlton Hr'g Tr. 1428:21–1429:9. These questions, among others, suggest that the survey data underlying Dr. Singer's HMT analysis may not be reliable, which in turn casts doubt on the conclusions to be drawn from the HMT.

The Court's reservations about the survey do not change its finding that VR dedicated fitness apps constitute a relevant antitrust product market. Because the Court bases its determination of the relevant product market on its *Brown Shoe* analysis, rather than the HMT, it need not determine the validity of Dr. Singer's survey methodology. The *Brown Shoe* factors are sufficient to inform the Court's understanding of the "business reality" of the VR dedicated fitness app market. *Lucas Auto. Eng.*, 275 F.3d at 766–68; *see also United States v. Anthem, Inc.*, 236 F. Supp.

3d 171, (D.D.C. 2017) (noting *Brown Shoe* factors supported the "business reality" of the government's relevant market despite defense argument of "[in]sufficient economic rigor"); *RAG-Stiftung*, 436 F. Supp. 3d at 293 n.3 ("The *Brown Shoe* practical indicia may indeed be old school, and its analytical framework relegated 'to the jurisprudential sidelines.' But *Brown Shoe* remains the law, and this court cannot ignore its dictates.") (citations omitted). Because the Court does not rely on the challenged portions of Dr. Singer's report, the Court DENIES AS MOOT Defendants' motion to strike Dr. Singer's opinion that VR dedicated fitness apps constitute a relevant product market.

2. Geographic Market

"The relevant geographic market is the 'area of effective competition where buyers can turn for alternate sources of supply.'" *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015) (citations omitted). "[I]n a potential-competition case like this one, the relevant geographic market or appropriate section of the country is the area in which the acquired firm is an actual, direct competitor." *Marine Bancorporation*, 418 U.S. at 622. That is, the geographic market must "correspond to the commercial realities of the industry." *Brown Shoe*, 370 U.S. at 336; *see also Staples*, 970 F. Supp. at 1073 (relevant geographic market is region where "consumers can practically turn for alternative sources of the product and in which the antitrust defendant faces competition").

The FTC asserts that the United States is the relevant geographic market, and Defendants do not argue to the contrary. The Court agrees. As one of Within's founders testified, Supernatural is only available to Quest headset users in the United States and Canada mainly [REDACTED]. More broadly, Quest headsets are designed so that a user's geolocation determines the availability and prices of content. Because content developed in other countries may not be available in the United States, and because Supernatural is not available outside of the United States and Canada, the Court finds that the United States is an appropriate relevant geographic market. *See Staples*, 970 F. Supp. at 1073.

Accordingly, the relevant antitrust market for the analysis of the competitive impacts of Meta's acquisition of Within is VR dedicated fitness apps in the United States.

NOTES

1. On January 31, 2023, Judge Davila issued an opinion finding that the FTC failed to show a likelihood of success on the merits of anticompetitive harm and denying the FTC's motion for a preliminary injunction pending the resolution of the merits in an administrative adjudication. The FTC elected not to appeal the district court's decision. In the absence of a preliminary injunction, Meta closed on its

acquisition of Within on February 8.[2] Two weeks later, the FTC dismissed its administrative complaint,[3] ending the FTC's efforts to intervene in the transaction.

2. Unfortunately, expert reports, although cited frequently by the court when admitted into the record, are almost always filed under seal. That was the case here. Expert reports are publicly available.

3. The FTC's economic expert in this case was Dr. Hal J. Singer. Singer received his Ph.D. in economics from The Johns Hopkins University in 1999 and has worked for various economic consulting firms since 1994. He is currently a managing director of Econ One. Since 2022, Singer has also been Professor of Economics at the University of Utah and Director of the Utah Project on Antitrust and Consumer Protection. He is an experienced economic expert witness, testifying almost exclusively for private plaintiffs.

4. Meta's economic expert witness was Professor Dennis W. Carlton. Carlton earned his Ph.D. in Economics in 1975 from MIT and has been an economics professor at the University of Chicago since 1976. He co-authored the leading industrial organization textbook and was Deputy Assistant Attorney General for Economics at the Antitrust Division from 2006 to 2008. He is a leading figure in industrial organization and is an experienced antitrust economics expert.

5. Meta also retained Dr. Theodore Vickey, a fitness expert, and Dr. Jean-Pierre Dube, a marketing expert. I have been able to find essentially nothing on Vickey. Dube has been a professor at the University of Chicago Booth School of Business since receiving his Ph.D. in economics at Northwestern University in 2000. Dube presumably qualified as an expert in market surveys and provided testimony on the inadequacy and unreliability of Singer's market survey that provided data for Singer's HMT application.

2 Jason Rubin, Meta VP of Play, *Within Joins Meta*, Meta Quest Blog (Feb. 8, 2023).

3 Order Returning Matter To Adjudication and Dismissing Complaint, Meta Platforms, Inc., No. 9411 (F.T.C. Feb. 24, 2923),

The Hypothetical Monopolist Test

AN INTRODUCTORY NOTE ON THE HYPOTHETICAL MONOPOLIST TEST

The *Brown Shoe* tests are problematic. The Supreme Court did not establish a threshold for cross-elasticity or reasonable interchangeability of use, nor did it instruct lower courts on how to weigh the various practical indicia. As a result, courts were left to rely on their own judgment. No coherent test emerged in the lower courts, and instead, courts generally deferred to the market definitions alleged by the antitrust enforcement agencies. By allowing the government to define the market, courts effectively ensured that market shares would trigger the *Philadelphia National Bank* presumption of anticompetitive effect. For this reason, Justice Potter Stewart, dissenting in *Von's Grocery*,[1] famously observed: "The sole consistency that I can find is that in litigation under § 7, the Government always wins."[2] Unfortunately, this approach also led to considerable confusion, flawed analysis, and poor judicial decisions.

The *hypothetical monopolist test* (HMT), first introduced in the 1982 Merger Guidelines, brought a more structured, economically grounded method to market definition. It is rooted in the Guidelines' principle that "mergers should not be permitted to create or enhance market power or to facilitate its exercise."[3] The test evaluates whether a firm with monopoly control over a proposed *candidate market*—that is, a tentative grouping of products and geographic areas under consideration—could profitably raise price by a small but significant amount (SSNIP), typically 5%, for at least one year. If enough customers would switch to products outside the candidate market to make the price increase unprofitable, then the market is too narrow for even a monopolist to increase price profitably. If the price increase would be profitable, the candidate market satisfies the HMT. By focusing on actual competitive constraints, the HMT helps identify markets in which a merger could realistically lead to higher prices or reduced competition. Only candidate markets that satisfy the HMT meet a necessary precondition for a merger to raise competitive concerns.

An example. Suppose two retailers of carbonated soft drinks in a particular city plan to merge. To analyze the merger, we must decide whether carbonated soft drinks alone form the relevant product market, or whether the market should include other beverages—such as bottled water, energy drinks, or sports drinks—that the merging firms argue are close substitutes.

Say that the prevailing price of a can of carbonated soft drinks is $1.00. Suppose further that it costs each seller $0.60 in *variable costs* to produce a can, so the seller

[1] United States v. Von's Grocery Store, 384 U.S. 270 (1966) (Stewart, J., dissenting).

[2] *Id.* at 301.

[3] U.S. Dep't of Justice, Merger Guidelines (rev. June 14, 1982) [1982 Merger Guidelines].

make a *gross margin* of $0.40 on each can it sells.[4] The price reflects competition among soft drink sellers and the pricing pressure from substitute products. In this example, we will also assume the products are undifferentiated and that all sellers charge the same price.[5]

The HMT asks: *If a monopolist controlled all carbonated soft drinks in this candidate market, could it profitably raise the price by 5% (to $1.05) and sustain that price for one year?*

The question is not trivial. Even a monopolist cannot raise prices without limit. If the monopolist charged $10,000 per can, no one would buy soft drinks and the monopolist would earn no revenue at all and hence no profits. Somewhere between the current price and that extreme lies a tipping point: a price beyond which further increases cause enough customers to switch away from soft drinks that total profit begins to fall. The HMT asks whether that tipping point is reached before a 5% increase. If so, then a SSNIP of 5% would not be profitable, and the market definition is too narrow. If not—if a 5% increase would increase profits—then the candidate market of carbonated soft drinks satisfies the HMT.

Now work through the test. When any firm raises its price, two effects occur simultaneously:

(1) the firm loses customers who are unwilling to pay the higher price (called *marginal customers*), while
(2) continuing to sell to customers who are willing to pay the higher price (the *inframarginal customers*).

For a hypothetical monopolist, the marginal customers are those customers who purchase products in the candidate market at the pre-SSNIP price but who divert to products outside of the candidate market at the higher, post-SSNIP price. The inframarginal customers are those who would continue to purchase products inside the candidate market even at the post-SSNIP price.

Now suppose the evidence indicates that raising the price from $1.00 to $1.05 causes 10 out of every 100 customers to stop buying carbonated soft drinks. The remaining 90 customers continue to buy at the higher price. Here is how the hypothetical monopolist's profits change:

(1) *Loss on foregone marginal sales*: loses $0.40 on each of the 10 lost sales, for a total gross loss of $0.40 × 10 = $4.00.
(2) *Gain on retained inframarginal sales*: earns $0.05 extra on each of the 90 retained sales, for a gross gain of $4.50 = $0.05 × 90.
(3) *Net change in profits*: Gain on retrained inframarginal sales minus loss on foregone marginal sales: $4.50 - $4.00 = $0.50

[4] *Variable cost* is the incremental cost of producing a unit of output and excludes any allocation of overhead and other fixed costs. The gross margin—the price minus variable cost—represents the contribution of each additional unit sold to total profit.

[5] This is often interchangeably called a *single price*, *homogeneous*, or *undifferentiated* market.

Because this net gain is positive, the hypothetical monopolist would find the 5% price increase profitable, and carbonated soft drinks pass the hypothetical monopolist test as a relevant product market.

If the numbers had come out the other way—if the lost profit from diverted sales had exceeded the gain from higher prices—the price increase would have been unprofitable, and carbonated soft drinks would have failed the HMT. In that case, we would add the next closest substitute—such as bottled water—and repeat the test. This iterative process continues until we identify a group of products over which a hypothetical monopolist could profitably impose a SSNIP. That grouping is treated as the relevant market for further antitrust analysis.

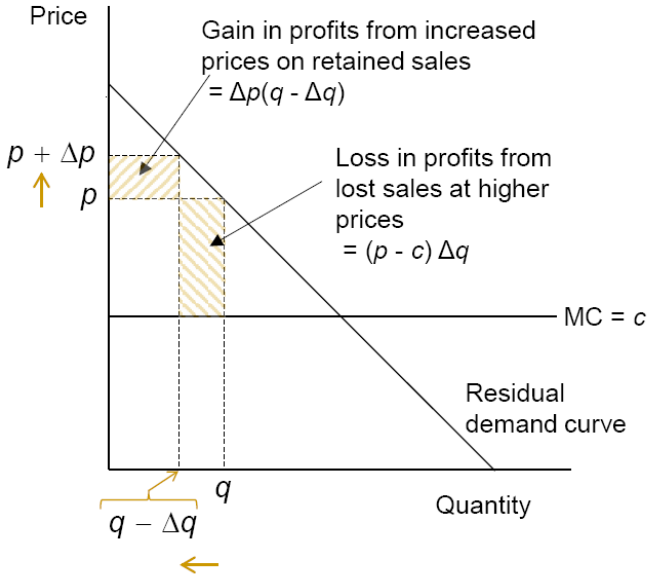
We can express the net profit change formula more compactly in algebraic terms:

$$\Delta\pi = [\$SSNIP \times (q - \Delta q)] - [\$m \times \Delta q\ ],$$

where:

$\Delta\pi$	Net change in profits
\$SSNIP	Dollar value of the SSNIP (also denoted Δp)
q	Total unit sales pre-SSNIP
Δq	Marginal unit sales lost by the \$SSNIP
$(q - \Delta q)$	Inframaginal unit sales retained with the \$SSNIP
$\$m$	Dollar margin (= price (p) – marginal cost (mc))

As we proceed through the course, you will find that it is easier to understand and apply some of the tools we will develop if we use a little algebra.



The *Philadelphia National Bank* Presumption

A NOTE ON *PHILADELPHIA NATIONAL BANK*

In *United States v. Philadelphia National Bank*,[1] one of the most important cases in antitrust law, the Supreme Court held that the plaintiff can make a prima facie showing of the requisite anticompetitive effect of a horizontal acquisition through an evidentiary presumption where the combined share of the merging firms is sufficiently high and the merger significantly increases market concentration:

> [A] merger which produces a firm controlling an undue percentage 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.[2]

The *Philadelphia National Bank* Court did not fix numerical figures for invoking this presumption. In *Philadelphia National Bank* itself, however, the Court found the presumption established when the merging firms combined held over 30% of a relevant market in which the combined market share of the largest two firms increased from 44% to 59%.[3]

On February 25, 1961, the Department of Justice filed a civil suit to enjoin the proposed merger of The Philadelphia National Bank ("PNB") and Girard Trust Corn Exchange Bank ("Girard"). The complaint charged that the acquisition may tend substantially to lessen competition in commercial bank services in the four-county Philadelphia metropolitan region in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act and sought to enjoin the transaction. PNB was a national bank with assets in excess of $1 billion and the second largest commercial bank in the four-county region. Girard was a state bank with assets of over $750 million and the third largest commercial bank in the area. PNB and Girard, which were both headquartered in Philadelphia, accounted for 21% and 16.1%, respectively, of the total commercial bank deposits in the four-county area.[4] If the merger was consummated, the resulting bank would become the largest in the area, with 37.1% of the area's total

1. 374 U.S. 321 (1963), *rev'g* 201 F. Supp. 348 (E.D. Pa. 1962). For modern commentary on *Philadelphia National Bank*, see, for example, *An Interview with Judge Richard Posner*, 80 ANTITRUST L.J. 205 (2015); Peter C. Carstensen, *The Philadelphia National Bank Presumption: Merger Analysis in an Unpredictable World*, 80 ANTITRUST L.J. 219 (2015); Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach,* 80 ANTITRUST L.J. 269 (2015); Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377 (2015); Daniel A. Crane, *Balancing Effects across Markets*, 80 ANTITRUST L.J. 397 (2015).

2. *Philadelphia Nat'l Bank*, 374 U.S. at 363.

3. *Id*. at 364.

4. *Philadelphia Nat'l Bank*, 201 F. Supp. at 366.

bank assets.[5] As a result of the merger, the two-firm concentration ratio in total bank assets would rise from 43.9% to 59%, and the four-firm concentration would rise from ___% to 77%.[6]

The government's case at trial was straightforward. The Justice Department relied principally on statistical market share evidence. The Department also introduced testimony by economists and bankers that, notwithstanding the extensive degree of federal and state regulation of the banking industry, there remained substantial areas where product availability, price and quality were determined by competitive forces; that concentration in commercial banking, which the proposed merger would increase, would reduce these competitive forces; that the "area of the country" in which the competitive effect of the merger would be felt primarily would be the area in which the merging parties had their offices and branches, that is, a four-county area around Philadelphia; and that the relevant "line of commerce" was commercial banking. PNB and Girard responded by introducing contrary evidence on these propositions, as well as evidence that the merger was justified because the resulting bank would be better able to compete with out-of-state (particularly New York) banks, would attract new business to Philadelphia, and would generally promote the economic development of the region.

Philadelphia National Bank Corporate Headquarters

After a trial on the merits, the district court found that commercial banking was a proper relevant product market, but that the four-county metropolitan area was not a relevant geographic market because of competition with other banks for bank business throughout the greater northeastern United States. The district court also found that, even if the four-county region was an appropriate "area of the country" for merger antitrust analysis, there was no reasonable probability that the challenged transaction would substantially lessen competition among commercial banks in that area. Finally, the court found that the merger would benefit the Philadelphia metropolitan area economically. Accordingly, the district court dismissed the complaint.

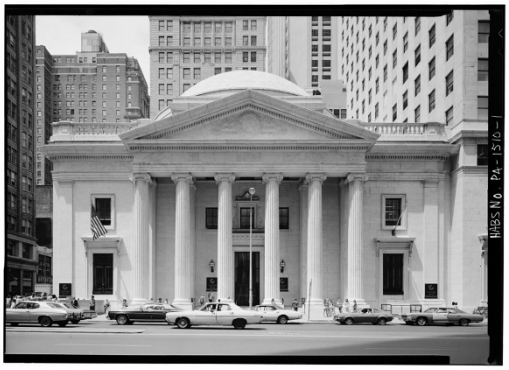
The government appealed directly to the Supreme Court under the Expediting Act. In a six-to-two decision, the Supreme Court reversed, holding that the merger would violate Section 7 of the Clayton Act, and remanded the case with instructions to the

5. *Id*. For some reason, the Supreme Court's opinion reports this share as 36%. *See* Philadelphia Nat'l Bank, 374 U.S. at 331.

6. *Id*. I have not yet been able to find or calculate the premerger four-firm concentration ratio.

district court to enter judgment enjoining the combination.[7] Justice William J. Brennan, Jr., wrote the opinion for the six-member majority.[8]

Product market definition presented "no difficulty" for the Court. With virtually no analysis, the Court agreed with the district court that "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking' composes a distinct line of commerce."[9] The Court devoted more attention to the question of geographic market definition. Here, the Court departed from the conclusion of the district court that the northeastern United States was the relevant area of the country. In an oft-quoted passage, the Court observed that "the proper question" to be asked is "not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."[10] This "area of effective competition" is determined as much by where existing purchasers can turn for supplies as by the trade area in which the parties operate.[11] The Court found that convenience of location is essential in banking, and consequently that inconvenience localizes competition in banking the same way that high transportation costs localize competition in other industries.[12] The Court then quickly leaped from the statement of these rules to the conclusion that the relevant geographic market was the four-county metropolitan area, where the "vast bulk" of both PNB's and Girard's business originated.



Girard Trust Corn Exchange Bank Main office

Having defined the product and geographic dimensions of the relevant market, the Court turned to the merger's expected effect on competition. The Court observed:

> Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7

7. The Court reserved the question of whether the combination also violated Section 1 of the Sherman Act.

8. Justice John Marshall Harlan, joined by Justice Potter Stewart, dissented. Justice Byron White did not participate.

9. *Philadelphia Nat'l Bank*, 374 U.S. at 356.

10. *Id*. at 357 (citing BETTY BOCK, MERGERS AND MARKETS 42 (1960)).

11. *Id*. at 359 (citing Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)).

12. *Id*. at 358-59 (citing Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 398 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958)).

> was intended to arrest anticompetitive tendencies in their "incipiency." Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration.[13]

Balancing these concerns, the Court concluded "in certain cases . . . elaborate proof of market structure, market behavior, or probable anticompetitive effects" was unnecessary and unwarranted.[14] Instead, given that the dominant theme motivating the Celler-Kefauver Act was an "intense congressional concern" over "a rising tide of economic concentration in the American economy,"[15] the Court held the requisite anticompetitive effect could be presumed from the changes in the market share distribution:

> Specifically, we think that a merger which produces a firm controlling an undue percentage 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.[16]

The Court noted that this presumption is "fully consonant with economic theory": "That '[c]ompetition is likely to be greatest when there are many sellers, none of which has a significant market share,' is a common ground among most economists, and was undoubtedly a premise of congressional reasoning about the antimerger statute."[17]

Without establishing a hard and fast threshold, the Court held that PNB and Girard's combined market share of "at least 30%" was "undue," and that an increase in the two-firm concentration ratio from 44% to 59% represented a "significant increase" in market concentration, so that the presumptive rule of illegality was

13. *Id*. at 362 (citations omitted).

14. *Id*. at 363.

15. *Id*.

16. *Id*. (citing United States v. Koppers Co., 202 F. Supp. 437 (W.D. Pa. 1962)).

17. *Id*. (internal citations and footnote omitted). To support the basic economic proposition, the Court cited JOE S. BAIN, BARRIERS TO NEW COMPETITION 27 (1956); CARL KAYSEN & DONALD TURNER, ANTITRUST POLICY 133 (1959); FRITZ MACHLUP, THE ECONOMICS OF SELLERS' COMPETITION 84-93, 333-36 (1952); Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 308-16, 328 (1960); Jesse M. Markham, *Merger Policy under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 521-22 (1957); Edward S. Mason, *Market Power and Business Conduct: Some Comments*, 46 AM. ECON. REV. 471 (1956); George Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955). *See Philadelphia Nat'l Bank*, 374 U.S. at 363 nn.38-39, 364 n.41.

triggered.[18] The Court observed in a footnote[19] that Carl Kaysen and Donald Turner recommended in their seminal work that a combined 20% share should be the threshold of prima facie unlawfulness,[20] George Stigler also would employ a 20% threshold,[21] Jesse Markham would use a 25% test,[22] and Derek Bok would look primarily to changes in market concentration of 7% or 8%.[23] The Supreme Court observed that since a 30% combined share presents a "clear" threat to competition it was unnecessary to specify a minimum threshold, and emphasized that mergers resulting in a firm with less than 30% could nonetheless violate Section 7.[24]

Although the *Philadelphia National Bank* Court stressed that a presumption of anticompetitive effect based on market shares was rebuttable, with the acquiescence if not encouragement, of the Supreme Court, the lower courts rapidly transformed that rather mechanical presumption into a conclusive evidentiary inference. As a result, for years market definition—from which the market shares and market concentrations would be derived—was the battleground on which antitrust challenges were fought, making *Philadelphia National Bank* the critical case for results, if not theory.

NOTES

1. Richard Posner, Brennan's law clerk during the 1962-63 term, reports that he wrote Brennan's opinion for the majority in *Philadelphia National Bank*.[25] Posner said that Brennan "wasn't very interested in the details of legal analysis, so we law clerks wrote the opinions and he would go over them."[26] While on the Harvard Law Review, Posner had been assigned to cite check a portion of a path-breaking article by Derek Bok entitled *Section 7 of the Clayton Act and the Merging of Law and Economics* in which Bok had argued for a simplified approach to Section 7 cases.[27] In *Philadelphia*

18. *Philadelphia Nat'l Bank*, 374 U.S. at 364 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

19. *Id*. at 364 n.41.

20. CARL KAYSEN & DONALD TURNER, ANTITRUST POLICY 133 (1959).

21. George Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955).

22. Jesse M. Markham, *Merger Policy under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 522 (1957).

23. Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 328-29 (1960). Actually, in his published article Bok recommended 5% as a threshold. *Id*.

24. *Philadelphia Nat'l Bank*, 374 U.S. at 364 n.41 ("Needless to say, the fact that a merger results in a less-than-30% market share, or in a less substantial increase in concentration than in the instant case, does not raise an inference that the merger is not violative of § 7.").

25, *See* Interview with Richard Posner, Securities and Exchange Commission Historical Society Oral History Project 2 (Jan. 25, 2011). A fuller account is provided in *An Interview with Judge Richard Posner*, 80 ANTITRUST L.J. 205, 218 (2015).

26. *Id*. at 2.

27. *See* Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960).

National Bank, Posner incorporated the idea of a simple prima facie showing of anticompetitive effect in what is now known as the *PNB* presumption.[28]

2. The *PNB* presumption, which was not suggested in the briefs of the parties, was based on the price-concentration hypothesis of the structure-conduct-performance paradigm, which at the time was the theory of dominant industrial organization. The idea was that the structure of the market determined the market's performance and that markets performed less efficiently and exhibited higher prices as they became more concentrated (at least past some threshold). In this light, the *PNB* presumption was (implicitly) an effort to stop mergers that would impair economic efficiency and result in higher prices.[29]

3. The *Philadelphia National Bank* Court, however, did not fix any minimum numerical thresholds for invoking the presumption. The Court only said that the combined market share and increase in market concentration in the case were sufficient to trigger the presumption, but held open the possibility that much lower numbers could also predicate the presumption. *Philadelphia National Bank* was decided in one of the most restrictive periods in U.S. antitrust history, and that prospect quickly came to pass.

4. In 1966, in one of the more infamous cases in antitrust law, the Supreme Court held that the acquisition by Von's Grocery of Shopping Bag Food Stores satisfied the *PNB* presumption.[30] The merging firms were the third and sixth largest grocery store chains in Los Angeles, although they had market shares of only 4.7% and 4.2%, respectively. While the merger produced the second largest firm in the Los Angeles retail grocery store market with a market share of 8.9%, the market was relatively unconcentrated with the largest four chains accounting for only 24.4% of total market

[28] After clerking for Justice Brennan, Posner served from 1963 to 1965 as an attorney-advisor to FTC Commissioner Philip Elman. For the next two years, Posner was an assistant to Solicitor General Thurgood Marshall. Posner joined the faculty of the Stanford Law School in 1968 as an associate professor and moved to the University of Chicago Law School as a professor in 1969. In 1981, Posner was nominated by President Ronald Reagan to be a judge on the Court of Appeals for the Seventh Circuit, where he served as chief judge from 1993 to 2000. Judge Posner retired from the federal bench on September 2, 2017. He is currently a Senior Lecturer in Law at the University of Chicago Law School.

[29] Recall from Unit 1 that in 1962 the Supreme Court in *Brown Shoe* had interpreted Section 7 in light of the legislative history of the Celler-Kefauver Amendments to be a guard against "the rising tide of economic concentration in the American economy," the loss of opportunity for small business when competing with large enterprises, and the spread of multistate enterprises and the loss of local control over industry. These are somewhat different concerns than the loss of economic efficiency and higher prices that concentrative mergers may cause under the price-concentration hypothesis. On the other hand, since the *PNB* presumption was—at least at the time of its creation—only a sufficient but not necessary means of proving a prima facie case of anticompetitive effect under Section 7, the fact that the *PNB* presumption was more narrowly based may not have been significant.

30. United States v. Von's Grocery Co., 384 U.S. 270 (1966). Richard Posner, who was then in the Solicitor General's office, successfully argued the case for the United States. For a more detailed summary of the case than the slides provide, see Seminal Cases of the 1960s, at 37 (in the supplemental materials).

sales premerger. In applying the presumption, the Court gave short shrift to the low concentration as measured by the four-firm concentration ratio. Instead, the Court relied heavily on the facts that the number of owners operating single stores in the Los Angeles retail grocery market had decreased from 5,365 in 1950 to 3,818 in 1961, while during roughly the same period the number of chains with two or more grocery stores increased from 96 to 150, and that both Von's and Shopping Bag were successful firms that had been growing largely through acquisitions. The Court reversed the district court's dismissal of the complaint and remanded the case to the district court with instructions to "order divestiture without delay."

5. The next month, the Court held that the combination of Pabst Brewing and Blatz Brewing triggered the *PNB* presumption with even lower market shares.[31] The merger combined the tenth and eighteenth largest brewers in the country, with national market shares of 3.02% and 1.47%, respectively, and produced the country's fifth largest brewer with a share of 4.49%.[32] Again, the market overall was unconcentrated but the number of breweries operating in the United States declined from 714 in 1934 to 229 in 1961 and the total number of different competitors selling beer had fallen from 206 in 1957 to 162 in 1961—a "steady trend toward economic concentration" in the words of the Court.[33]

6. Notably, although the *Philadelphia National Bank* presumption was expressly based on the theory that, at least beyond some threshold, increases in market concentration resulted in less efficiently performing markets and higher prices, the Court in *Von's Grocery* and *Pabst* did not cite any economic reasons to believe that the combinations in those cases changed the market structure in ways that would impair economic efficiency and result in higher prices. Rather, the Court appeared to condemn the mergers simply because they each involved successful firms in markets exhibiting a trend toward consolidation, even though the market shares of the merging parties and the level of market concentration were remarkably low. For the moment, at least, Posner's effort to shift the focus of merger antitrust law away from banning mergers that simply created large firms and increased market concentration and toward prohibiting mergers that increased prices and reduced economic efficiency failed.

7. Moreover, although *Philadelphia National Bank* itself regarded the presumption as rebuttable in principle, in application the presumption quickly became conclusive. Moreover, the courts were quite flexible in defining markets and had a strong tendency to accept the government's alleged markets. Given this flexibility in market definition and the low market shares the Court found sufficient in *Von's*

31. United States v. Pabst Brewing Co., 384 U.S. 546 (1966). For a more detailed summary of the case than the slides provide, see Seminal Cases of the 1960s, at 40.

32. *Id*. at 550-51. The Court also examined shares and market concentration in a three-state area of Wisconsin, Illinois, and Michigan, and the single state of Wisconsin alone. The shares and market concentration were higher in these areas, but as the Court found that the merger presented a Section 7 violation in each geographic area, the national market with the lowest shares and market concentration is the most significant precedentially.

33. *Id*. at 550.

Grocery and *Pabst* to predicate the presumption, the *PNB* presumption could be triggered in almost every government case. As a practical matter, horizontal acquisitions by large companies even of small competitors had become per se unlawful.

8. This changed dramatically in 1974, when the Supreme Court decided *General Dynamics*.[34] Not only did the Court return the *PNB* presumption to its rebuttable roots, the Court also brought a new emphasis to the importance of non-market share factors probative of the competitive consequences of horizontal acquisitions. Notwithstanding market shares of 15.1% and 8.1% in the relevant market and a rapidly declining number of industry participants—more than enough to invoke the rule of presumptive illegality under *Von's* and the other post-*Philadelphia National Bank* cases—the Court permitted one coal producer to acquire a controlling interest in another coal producer. The Court found that the acquired company's coal reserves were already committed by long-term contracts to electric utilities at predetermined prices. Lacking a supply of uncommitted coal that could be sold in the future at terms and conditions of the acquired firm's choosing, the Court found that acquired firm no longer was a significant independent competitive force which could affect prices and output in the marketplace. Accordingly, not only was the presumption of likely anticompetitive effect unreliable in this case, on the evidence before it the Court found no likelihood that the acquisition would substantially lessen competition in the future.

9. *General Dynamics* reflects a significant generational shift in the composition of the Court. Of the five members of the majority, not a single one other than Stewart was on the Court for any of the prior antitrust merger cases. On the other hand, with the exception of Marshall—who as the Solicitor General argued vigorously to block or dissolve the mergers in *Von's* and *Pabst*—all of the dissenting justices were present for all of the Court's merger antitrust decisions in the 1960s.

United States v. General Dynamics Corp. (1974)

	President	Sworn In	Replaced
Majority			
Potter Stewart (author)	Eisenhower	Oct. 14, 1958	Harold Burton
Warren E. Burger (C.J.)	Nixon	June 23, 1969	Earl Warren
Harry Blackmun	Nixon	June 9, 1970	Abe Fortas
Lewis F. Powell	Nixon	Jan. 7, 1972	Hugo Black
William Rehnquist	Nixon	Jan. 7, 1972	John M. Harlan
Minority			
William O. Douglas (author)	Roosevelt	Apr. 17, 1939	Louis Brandeis
William J. Brennan, Jr.	Eisenhower	Oct. 16, 1956	Sherman Minton
Byron White	Kennedy	Apr. 16, 1962	Charles E. Whittaker
Thurgood Marshall	Johnson	Oct. 2, 1967	Tom C. Clark

[34] United States v. General Dynamics Corp., 415 U.S. 486 (1974), *aff'g* 341 F. Supp. 534 (N.D. Ill. 1972) (Blue Book No. 1861).

10. Since *General Dynamics* lower courts increasingly have employed more detailed and flexible qualitative analysis (albeit with varying degrees of theoretical guidance) of the likely competitive effects of proposed horizontal mergers and acquisitions. While concentration statistics continue to be the primary basis on which to predict the future competitive effects of an acquisition, plaintiffs today bear more of a burden of demonstrating the probative value of these statistics. Courts have considered a wide variety of factors in assessing the ability of the simple market structure model to predict the likelihood that the acquisition in question will be anticompetitive, including the degree of concentration and the level of sophistication among buyers; volatility in the market share distribution (particularly any trend towards deconcentration); changing demand patterns; the degree of product heterogeneity within the relevant market; the extent of excess industry capacity; the existence of vigorous competition from smaller, but strong and growing, competitors; the ease of entry into the relevant market; volatility in supplier or new customer relationships; a history of innovation from different companies in the market; the financial health of either or both of the parties, the likelihood that the acquired firm will exit the market in the absence of an acquisition; any preacquisition anticompetitive conduct by the parties; and postacquisition continuation of price competition in the market.

Horizontal Merger Guidelines

U.S. Department of Justice

and the

Federal Trade Commission

Issued: August 19, 2010

e.g., customers in the region travelling outside it to purchase the relevant product. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

> *Example 13:* Customers require local sales and support. Suppliers have sales and service operations in many geographic areas and can discriminate based on customer location. The geographic market can be defined around the locations of customers.

> *Example 14:* Each merging firm has a single manufacturing plant and delivers the relevant product to customers in City X and in City Y. The relevant product is expensive to transport. The merging firms' plants are by far the closest to City X, but no closer to City Y than are numerous rival plants. This fact pattern suggests that customers in City X may be harmed by the merger even if customers in City Y are not. For that reason, the Agencies consider a relevant geographic market defined around customers in City X. Such a market could be defined even if the region around the merging firms' plants would not be a relevant geographic market defined based on the location of sellers because a hypothetical monopolist controlling all plants in that region would find a SSNIP imposed on all of its customers unprofitable due to the loss of sales to customers in City Y.

When the geographic market is defined based on customer locations, sales made to those customers are counted, regardless of the location of the supplier making those sales.

> *Example 15:* Customers in the United States must use products approved by U.S. regulators. Foreign customers use products not approved by U.S. regulators. The relevant product market consists of products approved by U.S. regulators. The geographic market is defined around U.S. customers. Any sales made to U.S. customers by foreign suppliers are included in the market, and those foreign suppliers are participants in the U.S. market even though located outside it.

5. Market Participants, Market Shares, and Market Concentration

The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects. The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.

Market shares can directly influence firms' competitive incentives. For example, if a price reduction to gain new customers would also apply to a firm's existing customers, a firm with a large market share may be more reluctant to implement a price reduction than one with a small share. Likewise, a firm with a large market share may not feel pressure to reduce price even if a smaller rival does. Market shares also can reflect firms' capabilities. For example, a firm with a large market share may be able to expand output rapidly by a larger absolute amount than can a small firm. Similarly, a large market share tends to indicate low costs, an attractive product, or both.

5.1 Market Participants

All firms that currently earn revenues in the relevant market are considered market participants. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.

Firms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP, without incurring

significant sunk costs, are also considered market participants. These firms are termed "rapid entrants." Sunk costs are entry or exit costs that cannot be recovered outside the relevant market. Entry that would take place more slowly in response to adverse competitive effects, or that requires firms to incur significant sunk costs, is considered in Section 9.

Firms that produce the relevant product but do not sell it in the relevant geographic market may be rapid entrants. Other things equal, such firms are most likely to be rapid entrants if they are close to the geographic market.

> *Example 16:* Farm A grows tomatoes halfway between Cities X and Y. Currently, it ships its tomatoes to City X because prices there are two percent higher. Previously it has varied the destination of its shipments in response to small price variations. Farm A would likely be a rapid entrant participant in a market for tomatoes in City Y.
>
> *Example 17:* Firm B has bid multiple times to supply milk to School District S, and actually supplies milk to schools in some adjacent areas. It has never won a bid in School District S, but is well qualified to serve that district and has often nearly won. Firm B would be counted as a rapid entrant in a market for school milk in School District S.

More generally, if the relevant market is defined around targeted customers, firms that produce relevant products but do not sell them to those customers may be rapid entrants if they can easily and rapidly begin selling to the targeted customers.

Firms that clearly possess the necessary assets to supply into the relevant market rapidly may also be rapid entrants. In markets for relatively homogeneous goods where a supplier's ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available "swing" capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant.[8] However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm's possession of idle or swing capacity alone does not make that firm a rapid entrant.

5.2 Market Shares

The Agencies normally calculate market shares for all firms that currently produce products in the relevant market, subject to the availability of data. The Agencies also calculate market shares for other market participants if this can be done to reliably reflect their competitive significance.

Market concentration and market share data are normally based on historical evidence. However, recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. The Agencies consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agencies may conclude that that firm's historical market share

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[8] If this type of supply side substitution is nearly universal among the firms selling one or more of a group of products, the Agencies may use an aggregate description of markets for those products as a matter of convenience.

overstates its future competitive significance. The Agencies may project historical market shares into the foreseeable future when this can be done reliably.

The Agencies measure market shares based on the best available indicator of firms' future competitive significance in the relevant market. This may depend upon the type of competitive effect being considered, and on the availability of data. Typically, annual data are used, but where individual transactions are large and infrequent so annual data may be unrepresentative, the Agencies may measure market shares over a longer period of time.

In most contexts, the Agencies measure each firm's market share based on its actual or projected revenues in the relevant market. Revenues in the relevant market tend to be the best measure of attractiveness to customers, since they reflect the real-world ability of firms to surmount all of the obstacles necessary to offer products on terms and conditions that are attractive to customers. In cases where one unit of a low-priced product can substitute for one unit of a higher-priced product, unit sales may measure competitive significance better than revenues. For example, a new, much less expensive product may have great competitive significance if it substantially erodes the revenues earned by older, higher-priced products, even if it earns relatively few revenues. In cases where customers sign long-term contracts, face switching costs, or tend to re-evaluate their suppliers only occasionally, revenues earned from recently acquired customers may better reflect the competitive significance of suppliers than do total revenues.

In markets for homogeneous products, a firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in the relevant market in response to a price increase or output reduction by others in that market. As a result, a firm's competitive significance may depend upon its level of readily available capacity to serve the relevant market if that capacity is efficient enough to make such expansion profitable. In such markets, capacities or reserves may better reflect the future competitive significance of suppliers than revenues, and the Agencies may calculate market shares using those measures. Market participants that are not current producers may then be assigned positive market shares, but only if a measure of their competitive significance properly comparable to that of current producers is available. When market shares are measured based on firms' readily available capacities, the Agencies do not include capacity that is committed or so profitably employed outside the relevant market, or so high-cost, that it would not likely be used to respond to a SSNIP in the relevant market.

> *Example 18:* The geographic market is defined around customers in the United States. Firm X produces the relevant product outside the United States, and most of its sales are made to customers outside the United States. In most contexts, Firm X's market share will be based on its sales to U.S. customers, not its total sales or total capacity. However, if the relevant product is homogeneous, and if Firm X would significantly expand sales to U.S. customers rapidly and without incurring significant sunk costs in response to a SSNIP, the Agencies may base Firm X's market share on its readily available capacity to serve U.S. customers.

When the Agencies define markets serving targeted customers, these same principles are used to measure market shares, as they apply to those customers. In most contexts, each firm's market share is based on its actual or projected revenues from the targeted customers. However, the Agencies may instead measure market shares based on revenues from a broader group of customers if doing so would more accurately reflect the competitive significance of different suppliers in the relevant market. Revenues earned from a broader group of customers may also be used when better data are thereby available.

5.3 Market Concentration

Market concentration is often one useful indicator of likely competitive effects of a merger. In evaluating market concentration, the Agencies consider both the post-merger level of market concentration and the change in concentration resulting from a merger. Market shares may not fully reflect the competitive significance of firms in the market or the impact of a merger. They are used in conjunction with other evidence of competitive effects. See Sections 6 and 7.

In analyzing mergers between an incumbent and a recent or potential entrant, to the extent the Agencies use the change in concentration to evaluate competitive effects, they will do so using projected market shares. A merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others.

The Agencies give more weight to market concentration when market shares have been stable over time, especially in the face of historical changes in relative prices or costs. If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger. By contrast, even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings. However, if competition by one of the merging firms has significantly contributed to these fluctuations, perhaps because it has acted as a maverick, the Agencies will consider whether the merger will enhance market power by combining that firm with one of its significant rivals.

The Agencies may measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure revenues in the relevant market. The Agencies also may consider the combined market share of the merging firms as an indicator of the extent to which others in the market may not be able readily to replace competition between the merging firms that is lost through the merger.

The Agencies often calculate the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual firms' market shares,[9] and thus gives proportionately greater weight to the larger market shares. When using the HHI, the Agencies

[9] For example, a market consisting of four firms with market shares of thirty percent, thirty percent, twenty percent, and twenty percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about firms with small shares is not critical because such firms do not affect the HHI significantly.

consider both the post-merger level of the HHI and the increase in the HHI resulting from the merger. The increase in the HHI is equal to twice the product of the market shares of the merging firms.[10]

Based on their experience, the Agencies generally classify markets into three types:

- Unconcentrated Markets: HHI below 1500
- Moderately Concentrated Markets: HHI between 1500 and 2500
- Highly Concentrated Markets: HHI above 2500

The Agencies employ the following general standards for the relevant markets they have defined:

- *Small Change in Concentration:* Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Unconcentrated Markets:* Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Moderately Concentrated Markets:* Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
- *Highly Concentrated Markets:* Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

The purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration. The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies' potential competitive concerns and the greater is the likelihood that the Agencies will request additional information to conduct their analysis.

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[10] For example, the merger of firms with shares of five percent and ten percent of the market would increase the HHI by 100 ($5 \times 10 \times 2 = 100$).

Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

Issued: December 18, 2023

1. Overview

These Merger Guidelines identify the procedures and enforcement practices the Department of Justice and the Federal Trade Commission (the "Agencies") most often use to investigate whether mergers violate the antitrust laws. The Agencies enforce the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; and Sections 3, 7, and 8 of the Clayton Act,[1] 15 U.S.C. §§ 14, 18, 19.[2] Congress has charged the Agencies with administering these statutes as part of a national policy to promote open and fair competition, including by preventing mergers and acquisitions that would violate these laws. "Federal antitrust law is a central safeguard for the Nation's free market structures" that ensures "the preservation of economic freedom and our free-enterprise system."[3] It rests on the premise that "[t]he unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[4]

Section 7 of the Clayton Act ("Section 7") 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." Competition is a process of rivalry that incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, among many other benefits. Mergers that substantially lessen competition or tend to create a monopoly increase, extend, or entrench market power and deprive the public of these benefits. Mergers can lessen competition when they diminish competitive constraints, reduce the number or attractiveness of alternatives available to trading partners, or reduce the intensity with which market participants compete.

Section 7 was designed to arrest anticompetitive tendencies in their incipiency.[5] The Clayton Act therefore requires the Agencies to assess whether mergers present risk to competition. The Supreme Court has explained that "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition'" or to tend to create a monopoly.[6] Accordingly, the Agencies do not attempt to

[1] As amended under the Celler-Kefauver Antimerger Act of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (1950), and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

[2] Although these Guidelines focus primarily on Section 7 of the Clayton Act, the Agencies consider whether any of these statutes may be violated by a merger. The various provisions of the Sherman, Clayton, and FTC Acts each have separate standards, and one may be violated when the others are not.

[3] *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 502 (2015).

[4] *NCAA v. Board of Regents*, 468 U.S. 85, 104 n.27 (1984) (quoting *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4-5 (1958)); *see also NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021) (quoting *Board of Regents*, 468 U.S. at 104 n.27).

[5] *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 nn.32-33 (1962); *see also United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (Section 7 "halt[s] incipient monopolies and trade restraints outside the scope of the Sherman Act." (quoting *Brown Shoe*, 370 U.S. at 318 n.32)); *Saint Alphonsus Medical Center-Nampa v. St. Luke's*, 778 F.3d 775, 783 (9th Cir. 2015) (Section 7 "intended to arrest anticompetitive tendencies in their incipiency." (quoting *Brown Shoe*, 370 U.S. at 322)); *Polypore Intern., Inc. v. FTC*, 686 F.3d 1208, 1213-14 (11th Cir. 2012) (same). Some other aspects of *Brown Shoe* have been subsequently revisited.

[6] *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe*, 370 U.S. at 323).

predict the future or calculate precise effects of a merger with certainty. Rather, the Agencies examine the totality of the evidence available to assess the risk the merger presents.

Competition presents itself in myriad ways. To assess the risk of harm to competition in a dynamic and complex economy, the Agencies begin the analysis of a proposed merger by asking: how do firms in this industry compete, and does the merger threaten to substantially lessen competition or to tend to create a monopoly?

The Merger Guidelines set forth several different analytical frameworks (referred to herein as "Guidelines") to assist the Agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action. These frameworks account for industry-specific market realities and use a variety of indicators and tools, ranging from market structure to direct evidence of the effect on competition, to examine whether the proposed merger may harm competition.

How to Use These Guidelines: When companies propose a merger that raises concerns under one or more Guidelines, the Agencies closely examine the evidence to determine if the facts are sufficient to infer that the effect of the merger may be to substantially lessen competition or to tend to create a monopoly (sometimes referred to as a "prima facie case").[7] **Section 2** describes how the Agencies apply these Guidelines. Specifically, Guidelines 1-6 describe distinct frameworks the Agencies use to identify that a merger raises prima facie concerns, and Guidelines 7-11 explain how to apply those frameworks in several specific settings. In all of these situations, the Agencies will also examine relevant evidence to determine if it disproves or rebuts the prima facie case and shows that the merger does not in fact threaten to substantially lessen competition or tend to create a monopoly. **Section 3** identifies rebuttal evidence that the Agencies consider, and that merging parties can present, to rebut an inference of potential harm under these frameworks.[8] **Section 4** sets forth a non-exhaustive discussion of analytical, economic, and evidentiary tools the Agencies use to evaluate facts, understand the risk of harm to competition, and define relevant markets.

These Guidelines are not mutually exclusive, as a single transaction can have multiple effects or raise concerns in multiple ways. To promote efficient review, for any given transaction the Agencies may limit their analysis to any one Guideline or subset of Guidelines that most readily demonstrates the risks to competition from the transaction.

Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market. Market concentration is often a useful indicator of a merger's likely effects on competition. The Agencies therefore presume, unless sufficiently disproved or rebutted, that a merger between competitors that significantly increases concentration and creates or further consolidates a highly concentrated market may substantially lessen competition.

Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms. The Agencies examine whether competition between the merging parties is substantial since their merger will necessarily eliminate any competition between them.

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[7] *See, e.g.*, *United States v. AT&T, Inc.*, 916 F.3d at 1032 (explaining that a *prima facie* case can demonstrate a "reasonable probability" of harm to competition either through "statistics about the change in market concentration" or a "fact-specific" showing (quoting *Brown Shoe*, 370 U.S. at 323 n.39)); *United States v. Baker Hughes*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).

[8] These Guidelines pertain only to the Agencies' consideration of whether a merger or acquisition may substantially lessen competition or tend to create a monopoly. The consideration of remedies appropriate for mergers that pose that risk is beyond the Merger Guidelines' scope. The Agencies review proposals to revise a merger in order to alleviate competitive concerns consistent with applicable law regarding remedies.

Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination. The Agencies examine whether a merger increases the risk of anticompetitive coordination. A market that is highly concentrated or has seen prior anticompetitive coordination is inherently vulnerable and the Agencies will infer, subject to rebuttal evidence, that the merger may substantially lessen competition. In a market that is not highly concentrated, the Agencies investigate whether facts suggest a greater risk of coordination than market structure alone would suggest.

Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market. The Agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant.

Guideline 5: Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals Use to Compete. When a merger creates a firm that can limit access to products or services that its rivals use to compete, the Agencies examine the extent to which the merger creates a risk that the merged firm will limit rivals' access, gain or increase access to competitively sensitive information, or deter rivals from investing in the market.

Guideline 6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position. The Agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce, thereby tending to create a monopoly. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

Guideline 7: When an Industry Undergoes a Trend Toward Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly. A trend toward consolidation can be an important factor in understanding the risks to competition presented by a merger. The Agencies consider this evidence carefully when applying the frameworks in Guidelines 1-6.

Guideline 8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series. If an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy when applying the frameworks in Guidelines 1-6.

Guideline 9: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform. Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems. The Agencies consider the distinctive characteristics of multi-sided platforms when applying the frameworks in Guidelines 1-6.

Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers. The Agencies apply the frameworks in Guidelines 1-6 to assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly.

Guideline 11: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition. The Agencies apply the frameworks in Guidelines 1-6 to assess if an acquisition of partial control or common ownership may substantially lessen competition.

* * *

This edition of the Merger Guidelines consolidates, revises, and replaces the various versions of Merger Guidelines previously issued by the Agencies. The revision builds on the learning and experience reflected in those prior Guidelines and successive revisions. These Guidelines reflect the collected experience of the Agencies over many years of merger review in a changing economy and have been refined through an extensive public consultation process.

As a statement of the Agencies' law enforcement procedures and practices, the Merger Guidelines create no independent rights or obligations, do not affect the rights or obligations of private parties, and do not limit the discretion of the Agencies, including their staff, in any way. Although the Merger Guidelines identify the factors and frameworks the Agencies consider when investigating mergers, the Agencies' enforcement decisions will necessarily continue to require prosecutorial discretion and judgment. Because the specific standards set forth in these Merger Guidelines will be applied to a broad range of factual circumstances, the Agencies will apply them reasonably and flexibly to the specific facts and circumstances of each merger.

Similarly, the factors contemplated in these Merger Guidelines neither dictate nor exhaust the range of theories or evidence that the Agencies may introduce in merger litigation. Instead, they set forth various methods of analysis that may be applicable depending on the availability and/or reliability of information related to a given market or transaction. Given the variety of industries, market participants, and acquisitions that the Agencies encounter, merger analysis does not consist of uniform application of a single methodology. The Agencies assess any relevant and meaningful evidence to evaluate whether the effect of a merger may be substantially to lessen competition or to tend to create a monopoly. Merger review is ultimately a fact-specific exercise. The Agencies follow the facts and the law in analyzing mergers as they do in other areas of law enforcement.

These Merger Guidelines include references to applicable legal precedent. References to court decisions do not necessarily suggest that the Agencies would analyze the facts in those cases identically today. While the Agencies adapt their analytical tools as they evolve and advance, legal holdings reflecting the Supreme Court's interpretation of a statute apply unless subsequently modified. These Merger Guidelines therefore reference applicable propositions of law to explain core principles that the Agencies apply in a manner consistent with modern analytical tools and market realities. References herein do not constrain the Agencies' interpretation of the law in particular cases, as the Agencies will apply their discretion with respect to the applicable law in each case in light of the full range of precedent pertinent to the issues raised by each enforcement action.

2. Applying the Merger Guidelines

This section discusses the frameworks the Agencies use to assess whether a merger may substantially lessen competition or tend to create a monopoly.

2.1. Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market.

Market concentration and the change in concentration due to the merger are often useful indicators of a merger's risk of substantially lessening competition. In highly concentrated markets, a merger that eliminates a significant competitor creates significant risk that the merger may substantially lessen competition or tend to create a monopoly. As a result, a significant increase in concentration in a highly concentrated market can indicate that a merger may substantially lessen competition, depriving the public of the benefits of competition.

The Supreme Court has endorsed this view and 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 [rebuttal] evidence."[9] In the Agencies' experience, this legal presumption provides a highly administrable and useful tool for identifying mergers that may substantially lessen competition.

An analysis of concentration involves calculating pre-merger market shares of products[10] within a relevant market (see Section 4.3 for a discussion of market definition and Section 4.4 for more details on computing market shares). The Agencies assess whether the merger creates or further consolidates a highly concentrated market and whether the increase in concentration is sufficient to indicate that the merger may substantially lessen competition or tend to create a monopoly.[11]

The Agencies generally measure concentration levels using the Herfindahl-Hirschman Index ("HHI").[12] The HHI is defined as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm. Markets with an HHI greater than 1,800 are highly concentrated, and a change of more than 100 points is a significant increase.[13] A merger that creates or further consolidates a highly

[9] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963); *see, e.g.*, *FTC v. v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 172-73 (3d Cir. 2022); *United States v. AT&T, Inc.*, 916 F.3d at 1032.

[10] These Guidelines use the term "products" to encompass anything that is traded between firms and their suppliers, customers, or business partners, including physical goods, services, or access to assets. Products can be as narrow as an individual brand, a specific version of a product, or a product that includes specific ancillary services such as the right to return it without cause or delivery to the customer's location.

[11] Typically, a merger eliminates a competitor by bringing two market participants under common control. Similar concerns arise if the merger threatens to cause the exit of a current market participant, such as a leveraged buyout that puts the target firm at significant risk of failure.

[12] The Agencies may instead measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure shares in the relevant market.

[13] For illustration, the HHI for a market of five equal firms is 2,000 ($5 \times 20^2 = 2{,}000$) and for six equal firms is 1,667 ($6 \times 16.67^2 = 1667$).

concentrated market that involves an increase in the HHI of more than 100 points[14] is presumed to substantially lessen competition or tend to create a monopoly.[15] The Agencies also may examine the market share of the merged firm: a merger that creates a firm with a share over thirty percent is also presumed to substantially lessen competition or tend to create a monopoly if it also involves an increase in HHI of more than 100 points.[16]

Indicator	Threshold for Structural Presumption
Post-merger HHI	Market HHI greater than 1,800 AND Change in HHI greater than 100
Merged Firm's Market Share	Share greater than 30% AND Change in HHI greater than 100

When exceeded, these concentration metrics indicate that a merger's effect may be to eliminate substantial competition between the merging parties and may be to increase coordination among the remaining competitors after the merger. This presumption of illegality can be rebutted or disproved. The higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it.

2.2. Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms.

A merger eliminates competition between the merging firms by bringing them under joint control.[17] If evidence demonstrates substantial competition between the merging parties prior to the

[14] The change in HHI from a merger of firms with shares a and b is equal to $2ab$. For example, in a merger between a firm with 20% market share and a firm with 5% market share, the change in HHI is 2 x 20 x 5 = 200.

[15] The first merger guidelines to reference an HHI threshold were the merger guidelines issued in 1982. These guidelines referred to mergers with HHI above 1,000 as concentrated markets, with HHI between 1,000 and 1,800 as "moderately concentrated" and above 1,800 as "highly concentrated," while they referred to an increase in HHI of 100 as a "significant increase." Each subsequent iteration until 2010 maintained those thresholds. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines § 1.51 (1997); Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines § 1.51 (1992); U.S. Dep't of Justice, Merger Guidelines § 3(A) (1982). During this time, courts routinely cited to the guidelines and these HHI thresholds in decisions. *See, e.g.*, *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 431 (5th Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 (11th Cir. 1991). Although the Agencies raised the thresholds for the 2010 guidelines, based on experience and evidence developed since, the Agencies consider the original HHI thresholds to better reflect both the law and the risks of competitive harm suggested by market structure and have therefore returned to those thresholds.

[16] *Phila. Nat'l Bank*, 374 U.S. at 364-65 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

[17] The competitive harm from the elimination of competition between the merging firms, without considering the risk of coordination, is sometimes referred to as unilateral effects. The elimination of competition between the merging firms can also lessen competition with and among other competitors. When the elimination of competition between the merging firms

Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

Issued: December 18, 2023

4.3.D.7. Market Definition When There is Harm to Innovation

When considering harm to competition in innovation, market definition may follow the same approaches that are used to analyze other dimensions of competition. In the case where a merger may substantially lessen competition by decreasing incentives to innovate, the Agencies may define relevant antitrust markets around the products that would result from that innovation if successful, even if those products do not yet exist.[91] In some cases, the Agencies may analyze different relevant markets when considering innovation than when considering other dimensions of competition.

4.3.D.8 Market Definition for Input Markets and Labor Markets

The same market definition tools and principles discussed above can be used for input markets and labor markets, where labor is a particular type of input. In input markets, firms compete with each other to attract suppliers, including workers. Therefore, input suppliers are analogous to customers in the discussions above about market definition. In defining relevant markets, the Agencies focus on the alternatives available to input suppliers. An antitrust input market consists of a group of products and a geographic area defined by the location of the buyers or input suppliers. Just as buyers of a product may consider products to be differentiated according to the brand or the identity of the seller, suppliers of a product or service may consider different buyers to be differentiated. For example, if the suppliers are contractors, they may have distinct preferences about who they provide services to, due to different working conditions, location, reliability of buyers in terms of paying invoices on time, or the propensity of the buyer to make unexpected changes to specifications.

The HMT considers whether a hypothetical monopsonist likely would undertake a SSNIPT, such as a reduction in price paid for inputs, or imposing less favorable terms on suppliers. (See Section 4.2.C for more discussion about competition in settings where terms are set through auctions and negotiations, as is common for input markets.)

When defining a market for labor the Agencies will consider the job opportunities available to workers who supply a relevant type of labor service, where worker choice among jobs or between geographic areas is the analog of consumer choices among products and regions when defining a product market. The Agencies may consider workers' willingness to switch in response to changes to wages or other aspects of working conditions, such as changes to benefits or other non-wage compensation, or adoption of less flexible scheduling. Depending on the occupation, alternative job opportunities might include the same occupation with alternative employers, or alternative occupations. Geographic market definition may involve considering workers' willingness or ability to commute, including the availability of public transportation. The product and geographic market definition may involve assessing whether workers may be targeted for less favorable wages or other terms of employment according to factors such as education, experience, certifications, or work locations. The Agencies may define cluster markets for different jobs when firms employ workers in a variety of jobs characterized by similar competitive conditions (see Section 4.3.D.4).

4.4. Calculating Market Shares and Concentration

This subsection further describes how the Agencies calculate market shares and concentration metrics.

[91] *See Illumina*, slip op. at 12 (affirming a relevant market defined around "what . . . developers reasonably sought to achieve, not what they currently had to offer").

As discussed above, the Agencies may use evidence about market shares and market concentration as part of their analysis. These structural measures can provide insight into the market power of firms as well as into the extent to which they compete. Although any market that is properly identified using the methods in Section 4.3 is valid, the extent to which structural measures calculated in that market are probative in any given context depends on a number of considerations. The following market considerations affect the extent to which structural measures are probative in any given context.[92]

First, structural measures may be probative if the market used to estimate them includes the products that are the focus of the competitive concern that the structural inquiry intends to address. For example, the concentration measures discussed in Guideline 1 will be most probative about whether the merger eliminates substantial competition between the merging parties when calculated on a market that includes at least one competing product from each merging firm.

Second, the market used to estimate shares should be broad enough that it contains sufficient additional products so that a loss of competition among all the suppliers of the products in the market would lead to significantly worse terms for at least some customers of at least one product. Markets identified using the various tools in Section 4.3 can satisfy this condition—for example, all markets that satisfy the HMT do so.

Third, the competitive significance of the parties may be understated by their share when calculated on a market that is broader than needed to satisfy the considerations above, particularly when the market includes products that are more distant substitutes, either in the product or geographic dimension, for those produced by the parties.

4.4.A. Market Participants

All firms that currently supply products (or consume products, when buyers merge) in a relevant market are considered participants in that market. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently supplying products in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.

Firms that are not currently active in a relevant market, but that very likely would rapidly enter with direct competitive impact in the event of a small but significant change in competitive conditions, without incurring significant sunk costs, are also considered market participants. These firms are termed "rapid entrants." Sunk costs are entry or exit costs that cannot be recovered outside a relevant market. Entry that would take place more slowly in response to a change in competitive conditions, or that requires firms to incur significant sunk costs, is considered in Section 3.2.

Firms that are active in the relevant product market but not in the relevant geographic market may be rapid entrants. Other things equal, such firms are most likely to be rapid entrants if they are already active in geographies that are close to the geographic market. Factors such as transportation

[92] For simplicity, the discussion in the text focuses on the case where concerns arise that involve competition among the suppliers of products; analogous considerations may also arise for suppliers of services, or when concerns arise about competition among buyers of a product or service, or when analyzing market shares in certain specific settings (see Section 4.3.D).

costs are important; or for services or digital goods, other factors may be important, such as language or regulation.

In markets for relatively homogeneous goods where a supplier's ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available "swing" capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant. However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm's possession of idle or swing capacity alone does not make that firm a rapid entrant.

4.4.B. Market Shares

The Agencies normally calculate product market shares for all firms that currently supply products (or consume products, when buyers merge) in a relevant market, subject to the availability of data. The Agencies measure each firm's market share using metrics that are informative about the market realities of competition in the particular market and firms' future competitive significance. When interpreting shares based on historical data, the Agencies may consider whether significant recent or reasonably foreseeable changes to market conditions suggest that a firm's shares overstate or understate its future competitive significance.

How market shares are calculated may further depend on the characteristics of a particular market, and on the availability of data. Moreover, multiple metrics may be informative in any particular case. For example:

- Revenues in a relevant market often provide a readily available basis on which to compute shares and are often a good measure of attractiveness to customers.
- Unit sales may provide a useful measure of competitive significance in cases where one unit of a low-priced product can serve as a close substitute for one unit of a higher-priced product. For example, a new, much less expensive product may have great competitive significance if it substantially erodes the revenues earned by older, higher-priced products, even if it earns relatively low revenues.
- Revenues earned from recently acquired customers (or paid to recently acquired buyers, in the case of merging buyers) may provide a useful measure of competitive significance of firms in cases where trading partners sign long-term contracts, face switching costs, or tend to re-evaluate their relationships only occasionally.
- Measures based on capacities or reserves may be used to calculate market shares in markets for homogeneous products where a firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in a relevant market in response to a price increase or output reduction by others in that market (or to rapidly expand its purchasing in the case of merging buyers).
- Non-price indicators, such as number of users or frequency of use, may be useful indicators in markets where price forms a relatively small or no part of the exchange of value.

FTC v. SANFORD HEALTH
No. 1:17-CV-133, at 21-24 (D.N.D. Dec. 15, 2017),
***aff'd*, 926 F.3d 959 (8th Cir. June 13, 2019)**
(excepts on the *PNB* presumption[1])

ALICE R. SENECHAL, United States Magistrate Judge

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FINDINGS OF FACT

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VII. Market Shares, Market Concentration, and Presumptive Competitive Harm

69. A merger that significantly increases market shares and market concentration is presumed to be unlawful under Section 7 of the Clayton Act. *Phila. Nat'l Bank*, 374 U.S. at 363. Market concentration, in the antitrust context, can be measured through the Herfindahl-Hirschman Index (HHI). "The HHI is calculated by summing the squares of the individual firms' market shares, and thus gives proportionately greater weight to the larger market shares." Horizontal Merger Guidelines § 5.3 (footnote omitted). The Guidelines provide for consideration of both the post-merger HHI and the increase in HHI (defined as twice the product of the market shares of the merging firms) which results from the merger. Under the Guidelines, an HHI above 2500 demonstrates a highly concentrated market, and a merger resulting in an HHI increase of over 200 is presumed likely to enhance market power. Id.

70. Dr. Sacher calculated the following HHIs and changes in HHIs:

Service Line	Premerger HHI	Postmerger HHI	Change in HHI
Adult PCPs	3891	7422	3531
Pediatricans	5333	9726	4393
OB/GYN	6211	7363	1152
General Surgery	5362	9964	4602

(PX 6000, p. 150). The defendants did not challenge the HHI calculations. In each of the four physician service lines, existing services in the Bismarck-Mandan area are currently highly concentrated and would be even more highly concentrated if the proposed transaction were consummated.

71. The defendants presented no evidence countering Dr. Sacher's conclusion that the proposed transaction would significantly increase market concentration in each of the four physician service lines. The post-merger HHIs demonstrate a highly concentrated market in each of the four physician service lines. The change in HHI in each of the four service lines exceeds the Merger Guidelines' threshold for presumption that the proposed transaction is likely to enhance market power.

[1] Reported at 2017 WL 10810016, at *12.

72. Based on the HHI evidence of market concentration, the proposed transaction is presumptively unlawful in each of the four physician service lines. *See Penn State Hershey*, 838 F.3d at 346-47; *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (7th Cir. 2014).

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CONCLUSIONS OF LAW

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25. A merger that significantly increases market shares and market concentration is presumed to be unlawful under Section 7. *Phila. Nat'l Bank*, 374 U.S. at 363.

26. In each of the four physician service lines, as measured by the HHI, existing services in the Bismarck-Mandan area are currently highly concentrated and would be even more highly concentrated if the merger were consummated. The changes in HHI in each of the four physician service lines are well above the Merger Guidelines' threshold for presumption that the proposed transaction is likely to enhance market power.

27. Based on the HHI evidence of market concentration, the proposed transaction is presumptively unlawful in each of the four physician service lines. *See Penn State Hershey*, 838 F.3d at 346-47; *ProMedica*, 749 F.3d at 568.

FTC v. IQVIA HOLDINGS INC.,
710 F. Supp. 3d 329, 377-82 (S.D.N.Y. 2024)
(excerpt on the *PNB* presumption[23])

[EDGARDO] RAMOS, United States District Judge

[On July 18, 2023, the FTC filed a Section 13(b) complaint challenging the acquisition by IQVIA Holdings Inc. (IQVIA), the world's largest health care data provider, of Propel Media, Inc. (PMI). The FTC alleged that the acquisition would substantially lessen competition by combining two of the top three providers of programmatic advertising for health care products, namely prescription drugs and other health care products, to doctors and other health care professionals ("HCP programmatic advertising"), resulting in increased prices, reduced choice, and diminished innovation. Programmatic advertising is the automated, data-driven purchase of digital ad space, using algorithms and real-time bidding to target audiences across multiple websites, social media, and apps. IQVIA's Lasso Marketing and PMI's DeepIntent are two of the top three providers of HCP programmatic advertising. The FTC argued that this form of advertising was not reasonably interchangeable with social media or endemic healthcare website advertising, which offered more limited reach, fixed inventory, and less flexibility. Defendants argued for a broader market including these other channels, claiming advertisers viewed them as viable substitutes. Applying the *Brown Shoe* factors and weighing both qualitative and quantitative evidence, the Court agreed with the FTC that HCP programmatic advertising is a distinct product market. Having determined the relevant market, the Court turned to the FTC's evidence on the merger's prima facie anticompetitive effect.]

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3. Effects on Competition

Because the FTC has met its burden to define a relevant market, the next step is evaluating the effects of the proposed transaction on competition within that market. *E.g.*, [*FTC v.*] *Peabody* [*Energy Corp.*], 492 F. Supp. 3d [865,] at 902 [(E.D. Mo. Oct. 5, 2020)]; [*FTC v.*] *Sysco* [*Corp.*], 113 F. Supp. 3d [1,] at 52 [(D.D.C. 2015)]. If the FTC can make out a prima facie case that the acquisition "will result in a significant market share and an undue increase in concentration within [the relevant market], a presumption is established that it will substantially lessen competition." [*FTC v.*] *Swedish Match,* 131 F. Supp. 2d [151,]at 166 [(D.D.C. 2000)]; *see also, e.g.*, *Peabody*, 492 F. Supp. 3d at 902.

The FTC relies on two arguments to show that IQVIA's acquisition of DeepIntent will substantially impair competition in the market for HCP programmatic advertising. First, the FTC looks to post-merger market shares and market concentration. It argues

23 Record citations, internal cross-references, and footnotes omitted.

that the merged firm's market share will exceed the 30% threshold that triggers a presumption of anticompetitive effects. The FTC also contends that the Herfindahl-Hirschman Index (HHI), a tool commonly used to measure changes in market concentration, supports a finding that the merger will harm competition. Second, the FTC relies on the elimination of substantial direct competition between DeepIntent and Lasso, pointing to both qualitative and quantitative evidence to support that conclusion. Defendants raise numerous objections to these theories.

It is worth repeating that the Court's task at this stage "is to determine whether the FTC 'has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.'" *Peabody*, 492 F. Supp. 3d at 907 (quoting [*FTC v. H.J.*] *Heinz* [*Co*.], 246 F.3d [708,] at 714-5 [(D.C. Cir. 2001)]). The Court finds that the FTC has met its burden. The FTC's market share and HHI calculations—set out in the reports and testimony of Dr. Hatzitaskos—establish a presumption that the proposed acquisition will harm competition in the market for HCP programmatic advertising. And that presumption is reinforced by ample evidence that the transaction would eliminate substantial head-to-head competition between DeepIntent and Lasso.

a. Market Shares and Market Concentration

First, the FTC argues that the post-merger market share of DeepIntent and Lasso would exceed both the 30% threshold first set out in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), and the relevant threshold for market concentration based on the HHI. At the outset, Defendants respond that the 30% threshold set out in *Philadelphia National Bank* has since been repudiated. Furthermore, they contend that there are significant errors in Dr. Hatzitaskos's market share calculations. The corrected figures, according to Defendants and Dr. Israel, fall short of both the 30% mark and the HHI threshold. The Court is not persuaded by Defendants' arguments.

i. The 30% Threshold

In *Philadelphia National Bank*, the Supreme Court addressed the standard under section 7 of the Clayton Act for determining whether a merger may substantially lessen competition in the relevant market. *See* 374 U.S. at 362. The Court explained:

> This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think 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.

Id. at 363. The Court observed that this test "lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of

Congress' design in [section] 7 to prevent undue concentration." *Id*. In that case, the merger would have resulted in a single bank's controlling 30% of the relevant market. *Id*. at 364. The Court held: "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat." *Id*.

Defendants contest the present-day validity of the 30% threshold. They suggest that intervening case law has "cut ... back sharply" on *Philadelphia National Bank*. Id. (omission in original) (quoting [*United States v.*] *Baker Hughes*, [*Inc*.,] 908 F.2d [981,] at 990 [(D.C. Cir. 1990)]). As a matter of economics, moreover, Dr. Israel testified that "nothing says above or below 30 percent tells you anything in particular." And Defendants assert that the Merger Guidelines focus solely on HHI without discussing the 30% threshold.

Still, the Court is hard-pressed to conclude that the *Philadelphia National Bank* presumption has been repudiated. Second Circuit precedent appears to directly contradict that conclusion. In *United States v. Waste Management*, 743 F.2d 976 (2d Cir. 1984), for example, the post-merger market share was 48.8%. *Id*. at 981. That figure, the Court held, was "sufficient to establish prima facie illegality under [*Philadelphia National Bank*] and its progeny." *Id*. A few years later, the Second Circuit observed that a post-merger market share of 32.3% was "above the 30% held by the Supreme Court to trigger a presumption of illegality in *Philadelphia Nat'l Bank*." *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 260 (2d Cir. 1989). That market share was "certainly sufficient to satisfy appellees' burden of showing likelihood of success on the merits." *Id*. More recently, courts have continued to invoke the 30% threshold as sufficient to establish a presumption of anticompetitive effects. *See, e.g.*, [*New York v.*] *Deutsche Telekom* [*AG*], 439 F. Supp. 3d [179,] at 205 [(S.D.N.Y. 2020)] ("By one measure, a merger will be presumptively anticompetitive if the merged firm would have more than a 30 percent market share."); [*United States v.*] *Energy Solutions*, [*Inc*.,] 265 F. Supp. 3d [415,] at 441 [(D. Del. 2017)] ("While there is no bright-line rule as to the minimum percentage that qualifies as undue, the Supreme Court has held that a post-merger market share of 30% triggered the presumption of anticompetitive effects."); *see also* [*United States v.*] *Bertelsmann*, [*SE & Co. KGaA*,] 646 F. Supp. 3d [1,] at 37 [(D.D.C. 2022)] (post-merger market share of 49% was "far above the levels deemed too high in other cases"). In light of the above, the Court cannot agree with Defendants' suggestion that the 30% threshold is no longer valid.[24]

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[24] To be sure, market shares alone are not dispositive. *See, e.g.*, *Deutsche Telekom*, 439 F. Supp. 3d at 206 (noting that "market shares and HHIs establish only a presumption, rather than conclusive proof of a transaction's likely competitive impact"). But the case law indicates that objections to the competitive picture provided by market shares are more properly considered at the rebuttal phase of the burden-shifting framework. *See Baker Hughes*, 908 F.2d at 991 ("In the aftermath of General Dynamics and its progeny, a defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition."); s*ee also* [*United States v.*] *Waste Mgmt*., [*Inc*.,] 743 F.2d [976,] at 981 [(2d Cir. 1984)] (explaining that under *Philadelphia National Bank*, "a merger resulting in a large market share

Here, Dr. Hatzitaskos calculated that the proposed merger would result in IQVIA's controlling 46% of the market. According to the FTC, Dr. Israel estimated that the combined firm's post-merger revenue share would be 30.6%.[25] 25 As discussed below, Defendants object to Dr. Hatzitaskos's calculations on multiple grounds. But for the reasons just explained, the 30% threshold remains valid as a matter of law. Therefore, the FTC has established a presumption of anticompetitive effects if either expert's figure is accurate.

ii. The HHI Threshold

Setting the 30% threshold aside, the FTC argues that the market concentration would also be excessive under the HHI. *Id*. at 16. "The HHI is calculated by summing the squares of the individual firms' market shares." [*FTC v*.] *Penn State* [*Hershy Med. Ctr.*], 838 F.3d [327,] at 346 [(3d Cir. 2016)]. For instance, in a market with two firms each controlling 50% of the market, the HHI would be 5,000; by contrast, if one hundred firms each controlled 1% of the market, the HHI would be just 100. *Bertelsmann*, 646 F. Supp. 3d at 49 & n.35. "The HHI takes into account the relative size and distribution of the firms in a market, increasing both as the number of firms in the market decreases and as the disparity in size among those firms increases." *Staples*, 970 F. Supp. at 1081 n.12.

Consistent with the Merger Guidelines, courts consider "both the post-merger HHI number and the increase in the HHI resulting from the merger." *Penn State*, 838 F.3d at 347. If the post-merger market has an HHI above 2,500, then it is classified as "highly concentrated." *Id*. A merger that increases the HHI by more than 200 points is "presumed to be likely to enhance market power." *Id*. (quoting Merger Guidelines § 5.3). "The Government can establish a prima facie case simply by showing a high market concentration based on HHI numbers." *Id*.; *see also Saint Alphonsus* [*Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys.*], 778 F.3d [775,] at 788 [(9th Cir. 2015)] ("The extremely high HHI on its own establishes the prima facie case."); *Heinz*, 246 F.3d at 716 ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive.").

In this case, Dr. Hatzitaskos calculated a post-merger HHI of 3,635 and an increase of 997. Both of those figures, if correct, would be well above the relevant threshold for the FTC to establish its prima facie case. *See, e.g.*, *Heinz*, 246 F.3d at 716 (HHI increase of 510 points "creates, by a wide margin, a presumption that the merger will

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is presumptively illegal, rebuttable only by a demonstration that the merger will not have anticompetitive effects").

[25] The Court notes that Dr. Israel qualified this calculation. Specifically, he asserted that Dr. Hatzitaskos erred by miscalculating revenues for several firms within his market and excluding other firms altogether. Dr. Israel thus explained that his approach was "necessarily conservative" because it omitted firms such as Doximity that, in his view, should have been included in the market but for whom he did not have any basis to estimate their revenues. *Id*. at 134. Nevertheless, the Court concludes that Dr. Israel's qualifications are largely irrelevant because the Court has accepted the FTC's proposed market definition. In other words, the Court has found that Doximity, Medscape, and other alternative channels are not reasonably interchangeable substitutes for HCP programmatic advertising, and thus their exclusion from Dr. Israel's estimated revenue shares is not dispositive.

lessen competition in the [relevant] market"). So if Dr. Hatzitaskos's calculations are reliable, then the FTC has met its burden to establish a prima facie case based on the HHI as well as the 30% threshold.

[*Defendants' arguments omitted—All rejected by the Court*]

NOTES

1. The IQVIA court offered a textbook application of the three standard ways of invoking *Philadelphia National Bank* to establish a prima facie case of likely anticompetitive effects under Section 7 in a horizontal merger case: (1) applying the *PNB* 30% threshold for the merged firm, which the court found satisfied based on the FTC's expert's accepted calculation of a 46 percent postmerger share and even on the defendants' expert's figure of 30.6 percent; (2) applying the *PNB* structural presumption using the HHI thresholds in the then-operative 2010 Merger Guidelines—2,500 points for a highly concentrated market and a 200-point increase as presumptively anticompetitive—which the court found exceeded by the FTC's expert's calculation of a postmerger HHI of 3,635 and a delta of 997 points; and (3) citing precedent finding Section 7 violations where HHI statistics were at or below those calculated in *IQVIA*. These methods are formally independent, although most courts apply at least methods 2 and 3 in tandem.

2. The 30% market share threshold from *Philadelphia National Bank*—long recognized in Second Circuit precedent[26]—has not been universally cited and, until recently, was seldom used by agencies or courts as an independent test of prima facie anticompetitive harm in horizontal merger cases. Modern practice has focused more on HHI thresholds, and earlier Merger Guidelines omitted the 30% combined share threshold. In recent years, the agencies have sought to revive the 30% threshold as an independent method of proving a prima facie anticompetitive effect, and the agencies expressly include it in the 2023 Merger Guidelines, provided the postmerger share increase ("delta") is at least 100 points. Recent cases, including and Tapestry (59%),[27] *IQVIA* (46% share; 30.6% by defendants' expert) [28] *Bertelsmann* (49%) [29]

[26] *See* Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 260 (2d Cir. 1989) ("A post-acquisition Minorco would give Anglo and the Oppenheimer family control of 32.3% of that market. That percentage is above the 30% held by the Supreme Court to trigger a presumption of illegality in *Philadelphia Nat'l Bank*. It is certainly sufficient to satisfy appellees' burden of showing likelihood of success on the merits."); United States v. Waste Mgmt., Inc., 743 F.2d 976, 981 (2d Cir. 1984) ("Under [*PNB*'s] rationale, a merger resulting in a large market share is presumptively illegal, rebuttable only by a demonstration that the merger will not have anticompetitive effects.).

[27] FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 457-58 (S.D.N.Y. 2024) ("Post-merger, the Defendants' combined approximately 59% market share is well over 30 percent and thus creates a presumption of anticompetitive effects.").

[28] FTC v. IQVIA Holdings, Inc., 710 F. Supp. 3d 329, 378-79 (S.D.N.Y. 2024).

[29] United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 37 (D.D.C. 2022) (post-merger market share of 49% was "far above the levels deemed too high in other cases").

EnergySolutions (30%),[30] and *Deutsche Telekom* (30%+),[31] have cited the 30% merged-firm threshold as part of their analysis of the plaintiff's prima facie case in horizontal mergers, but always in conjunction with an HHI analysis and citation of supporting case law.

3. The FTC filed its *IQVIA* Section 13(b) complaint in the Southern District of New York.[32] Since late in the first term of the Trump administration, both the DOJ and FTC have sought to diversify away from the District of Columbia, a shift likely motivated by a desire to avoid D.D.C. precedent and judges. For decades, most government antitrust cases were brought in that district, producing a bench with substantial experience in trying and deciding merger cases and developing a body of precedent grounded in detailed economic analysis of competitive effects. That precedent, in turn, tended to be more lenient than the structurally oriented Supreme Court decisions of the 1950s and 1960s. In the Biden administration especially, the agencies have increasingly filed merger challenges in other districts—often drawing judges with little antitrust experience—believing they may be more receptive to the older structural precedent, which has not been formally abrogated.

4. Judge Edgardo Ramos, born in Ponce, Puerto Rico in 1960, moved to Newark, New Jersey as a child. He earned his B.A. from Yale University in 1982 and his J.D. from Harvard Law School in 1987. After law school, he worked in private practice at Simpson Thacher & Bartlett (1987-1992) before serving as an Assistant U.S. Attorney in the Eastern District of New York (1992-2002), where he prosecuted white-collar fraud, narcotics trafficking, labor racketeering, public corruption, and money laundering cases, and served as deputy chief of the Narcotics section. After returning to private practice as a partner at Day Pitney LLP (2002-2011), specializing in white-collar defense and internal investigations, President Barack Obama nominated him to the U.S. District Court for the Southern District of New York on May 4, 2011. The Senate confirmed him unanimously by a vote of 89-0 on December 5, 2011, and he

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30 United States v. Energy Solutions, Inc., 265 F. Supp. 3d 415, 441 (D. Del. 2017) ("While there is no bright-line rule as to the minimum percentage that qualifies as undue, the Supreme Court has held that a post-merger market share of 30% triggered the presumption of anticompetitive effects.").

31 New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 205 (S.D.N.Y. 2020) ("By one measure, a merger will be presumptively anticompetitive if the merged firm would have more than a 30 percent market share.").

32 The FTC's complaint alleged that venue "is proper in the Southern District of New York under 28 U.S.C. § 1391(c)(3), as well as under 28 U.S.C. § 1391(c)(2) and 15 U.S.C. § 53(b)." Under Section 1391(c)(2), venue is proper where a corporate defendant resides, meaning any district in which it is subject to personal jurisdiction; Section 1391(c)(3) provides venue where any defendant "may be found" if no other district is available under the general venue statute. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), independently provides that "[a]ny suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28." These requirements are satisfied because DeepIntent, Inc.—the Propel Media subsidiary that created the principal competitive overlap with IQVIA's Lasso platform—is headquartered in New York, New York, establishing corporate residence and presence within the Southern District of New York.

received his commission the following day. *IQVIA* was his first merger antitrust case. However, he had previously presided over another complex antitrust litigation, *In re SSA Bonds Antitrust Litigation*,[33] from 2016 through 2022, where he dismissed investors' claims against major banks accused of bond market manipulation before being forced to recuse himself in January 2022 after discovering he had owned stock in defendant banks Citigroup and Credit Suisse while the case was pending.

5. Dr. Kostis Hatzitaskos, the FTC's testifying economic expert, is Senior Vice President and co-head of Cornerstone Research's antitrust and competition practice. He earned his B.Sc. in 2001 from the University of Warwick in the United Kingdom and his M.A. in statistics in 2004 and Ph.D. in economics in 2007 from the University of California, Berkeley. Dr. Hatzitaskos leads merger review teams for merging parties and government agencies in investigations. In Westlaw, he only appears as a testifying witness in *IQVIA*.

6. Dr. Mark Israel, IQVIA's testifying economic expert, has served as an economic expert in more than 100 matters across the United States, Canada, and Europe, providing live testimony more than 50 times on complex antitrust litigations and merger review proceedings. In April 2025, he joined Econic Partners as a founding partner after nearly 20 years as President and Member of the Global Executive Committee at Compass Lexecon. He earned his B.A. in Economics from Illinois Wesleyan University, his M.Sc. in Economics from the University of Wisconsin-Madison, and his Ph.D. in Economics from Stanford University in 2001. Dr. Israel previously served as an Associate Professor at Northwestern University's Kellogg School of Management before transitioning to economic consulting. His research has been published in leading, peer-reviewed scholarly and applied journals including The American Economics Review, The Rand Journal of Economics, The Review of Industrial Organization, The Journal of Competition Law and Economics, and The Review of Network Economics. We will see Dr. Israel in multiple case studies throughout the course.

[33] No. 16-cv-3711 (S.D.N.Y. 2016).

FTC v. H.J. HEINZ CO.
246 F.3d 708 (D.C. CIR. 2001)
(excerpt on the *PNB* presumption)

KAREN LECRAFT HENDERSON, Circuit Judge.

[On July 14, 2000, the FTC filed a Section 13(b) complaint to preliminarily enjoin the merger of H.J. Heinz Company and Beech-Nut, the second and third largest manufacturers of jarred baby food in the United States. The merger would create a duopoly in jarred baby food, with Gerber twice the size of the merged firm. The FTC argued that the transaction would substantially lessen competition in a market where virtually all supermarkets stock at most two brands of baby food, and where Heinz and Beech-Nut were locked in intense competition at the wholesale level for the coveted "second shelf" position behind Gerber. The district court defined the relevant product market as jarred baby food and the geographic market as the United States—a definition that neither party challenged on appeal. Having established the relevant market as a highly concentrated three-firm industry, the Court of Appeals turned to whether the FTC had established a prima facie case that the merger would substantially lessen competition.]

. . .

1. Likelihood of Success

To determine likelihood of success on the merits we measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the Heinz/Beech-Nut merger "may be substantially to lessen competition, or to tend to create a monopoly" in violation of section 7 of the Clayton Act. 15 U.S.C. § 18. This court and others have suggested that the standard for likelihood of success on the merits is met if the FTC "has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978) (Appendix to Statement of MacKinnon & Robb, JJ.);[6] [*FTC v.*] *Staples*, [Inc.[970 F. Supp. [1066,] at 1071 [(D.D.C. 1997) (*Staples I*)]; [*FTC v.*] *Warner Communications*, 742 F.2d [1168,] at 1162 [(9th Cir. 1984)] (quoting [*FTC v.*] *National Tea* [*Co.*], 603 F.2d [694,] at 698 [(8th Cir. 1979)]); *see* [*FTC v.*] *University Health*, [*Inc*.,] 938 F.2d [1206,] at 1218 [(11th Cir. 1991)]. This specific standard was articulated by the court below, *see* [*FTC v.*] *H.J. Heinz* [*Co*.], 116 F. Supp. 2d [190,] at 194 [(D.D.C. 2000)—lower court opinion], and it is a standard to which the appellees have not objected.

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6 In *Beatrice Foods*, two members of the court, writing separately from a denial of en banc review, included the quoted language from an unpublished judgment and memorandum issued earlier in the litigation.

In *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982–83 (D.C. Cir. 1990), we explained the analytical approach by which the government establishes a section 7 violation. First the government must show that the merger would produce "a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market." [*United States v.*] *Philadelphia Nat'l Bank*, 374 U.S. [321,] at 363 [(1963)]. Such a showing establishes a "presumption" that the merger will substantially lessen competition. *See Baker Hughes*, 908 F.2d at 982. To rebut the presumption, the defendants must produce 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. *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 [(1975)].[7] "If the defendant successfully rebuts the presumption [of illegality], the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Baker Hughes Inc.*, 908 F.2d at 983; *see also Kaiser Aluminum* [*& Chem. Corp. v. FTC]*, 652 F.2d [1324,] at 1340 & n.12 [(7th Cir. 1981)]. Although *Baker Hughes* was decided at the merits stage as opposed to the preliminary injunctive relief stage, we can nonetheless use its analytical approach in evaluating the Commission's showing of likelihood of success. Accordingly, we look at the FTC's prima facie case and the defendants' rebuttal evidence.

a. Prima Facie Case

Merger law "rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986).[8] Increases in concentration above certain levels are thought to "raise[ ] a likelihood of 'interdependent anticompetitive conduct.'" *Id.* (quoting [*United States v.*] *General Dynamics* [*Corp.*], 415 U.S. [486,] at 497 [(1974)]); *see FTC v. Elders Grain*, 868 F.2d 901, 905 (7th Cir. 1989). Market concentration, or the lack thereof, is often measured by the Herfindahl–Hirschmann Index (HHI). *See Staples*, 970 F. Supp. at 1081 n.12.[9]

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7 To rebut the defendants may rely on ``[n]onstatistical evidence which casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences" such as ``ease of entry into the market, the trend of the market either toward or away from concentration, and the continuation of active price competition." *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1341 (7th Cir.1981). In addition, the defendants may demonstrate unique economic circumstances that undermine the predictive value of the government's statistics. See *United States v. General Dynamics Corp.*, 415 U.S. 486, 506 (1974) (fundamental changes in structure of coal market made market concentration statistics inaccurate predictors of anticompetitive effect); *see also University Health*, 938 F.2d at 1218.

8 A "horizontal merger" involves firms selling the same or similar products in a common geographical market.

9 "The FTC and the Department of Justice, as well as most economists, consider the measure superior to such cruder measures as the four-or eight-firm concentration ratios which merely sum up the market shares of the largest four or eight firms." *PPG*, 798 F.2d at 1503. The Department of Justice and the FTC rely on the HHI in evaluating proposed horizontal mergers. *See* United States

Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive. *See Baker Hughes*, 908 F.2d at 982-83 & n.3; *PPG*, 798 F.2d at 1503. The district court found that the pre-merger HHI "score for the baby food industry is 4775"—indicative of a highly concentrated industry.[10] *H.J. Heinz*, 116 F. Supp. 2d at 196; *see PPG*, 798 F.2d at 1503; *Horizontal Merger Guidelines*, *supra*, § 1.51. The merger of Heinz and Beech-Nut will increase the HHI by 510 points. This creates, by a wide margin, a presumption that the merger will lessen competition in the domestic jarred baby food market. *See* Horizontal Merger Guidelines, *supra*, § 1.51 (stating that HHI increase of more than 100 points, where post-merger HHI exceeds 1800, is "presumed . . . likely to create or enhance market power or facilitate its exercise"); *see also Baker Hughes*, 908 F.2d at 982-83 & n.3; *PPG*, 798 F.2d at 1503.[11] Here, the FTC's market concentration statistics[12] are

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Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* §§ 1.5, 1.51 (1992), as revised (1997). The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. For example, a market with ten firms having market shares of 20%, 17%, 13%, 12%, 10%, 10%, 8%, 5%, 3% and 2% has an HHI of 1304 (202 + 172 + 132 + 122 + 102 + 102 + 82 + 52 + 32 + 22). If the firms with 13% and 5% market shares were to merge, the HHI would increase by 130 points, expressed by the formula 2ab, which is derived from $(a + b)^2$ or $a^2 + 2ab + b^2$. Under the Merger Guidelines a market with a postmerger HHI above 1800 is considered "highly concentrated" and mergers that increase the HHI in such a market by over 50 points "potentially raise significant competitive concerns." *Id*. at § 1.51. Mergers "producing an increase in the HHI of more than 100 points [in such markets] are [presumed] likely to create or enhance market power or facilitate its exercise." *Id*. Although the Merger Guidelines are not binding on the court, they provide "a useful illustration of the application of the HHI." *PPG*, 798 F.2d at 1503 n.4.

[10] To determine the HHI score the district court first had to define the relevant market. The court defined the product market as jarred baby food and the geographic market as the United States. *H.J. Heinz*, 116 F. Supp. 2d at 195. The parties do not challenge the court's definition.

[11] The FTC argues that this finding alone—that it is certain to establish a prima facie case—entitles it to preliminary injunctive relief under *PPG*. We disagree with the Commission's reading of *PPG*. In *PPG*, the Commission appealed the district court's denial of its request for a preliminary injunction to prevent PPG Industries, the world's largest producer of glass aircraft transparencies, from acquiring Swedlow, Inc., the world's largest manufacturer of acrylic aircraft transparencies. 798 F.2d at 1502. After defining the relevant market and determining market share, the district court found that the merger would significantly increase the concentration in an already highly concentrated market. It also "found high market-entry barriers that would prolong high market concentration." *Id*. at 1503. On appeal, this court stated: "There is no doubt that the pre-and postacquisition HHI's and market shares found in this case entitle the Commission to some preliminary relief." *Id*. This statement came, however, in the context of a case in which the appellants offered no rebuttal (other than the observation of rapid and continuing technological changes in the industry) to the presumption generated by the market concentration data on which the FTC based its prima facie showing. *Id*. at 1506. The court then noted the rule established in *Weyerhaeuser* that the FTC is entitled to a "presumption in favor of a preliminary injunction when [it] establishes a strong likelihood of success on the merits." *Id*. at 1507.

[12] The Supreme Court has cautioned that statistics reflecting market share and concentration, while of great significance, are not conclusive indicators of anticompetitive effects. *See General Dynamics*, 415 U.S. at 498; *Brown Shoe* [*Co. v. United States*], 370 U.S. [294,] at 322 n.38 [(1962)] ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for

bolstered by the indisputable fact that the merger will eliminate competition between the two merging parties at the wholesale level, where they are currently the only competitors for what the district court described as the " second position on the supermarket shelves." *H.J. Heinz*, 116 F. Supp. 2d at 196. Heinz's own documents recognize the wholesale competition and anticipate that the merger will end it. Indeed, those documents disclose that Heinz considered three options to end the vigorous wholesale competition with Beech-Nut: two involved innovative measures while the third entailed the acquisition of Beech-Nut. Heinz chose the third, and least pro-competitive, of the options.

Finally, the anticompetitive effect of the merger is further enhanced by high barriers to market entry.[13] The district court found that there had been no significant entries in the baby food market in decades and that new entry was "difficult and improbable." *H.J. Heinz*, 116 F. Supp. 2d at 196. This finding largely eliminates the possibility that the reduced competition caused by the merger will be ameliorated by new competition from outsiders and further strengthens the FTC's case. *See University Health*, 938 F.2d at 1219 & n.26.

As far as we can determine, no court has ever approved a merger to duopoly under similar circumstances.

[*Rebuttal arguments omitted*]

judging the probable anticompetitive effect of the merger."). In *General Dynamics* the Supreme Court held that the market share statistics the government used to seek divestiture of the merged firm were insufficient because, in failing to take into account the acquired firm's long-term contractual commitments (coal contracts), the statistics overestimated the acquired firm's ability to compete in the relevant market in the future. *General Dynamics*, 415 U.S. at 500-504.

[13] Barriers to entry are important in evaluating whether market concentration statistics accurately reflect the pre- and likely postmerger competitive picture. *Cf. Baker Hughes*, 908 F.2d at 987. If entry barriers are low, the threat of outside entry can significantly alter the anticompetitive effects of the merger by deterring the remaining entities from colluding or exercising market power. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532-33 (1973); *Baker Hughes*, 908 F.2d at 987 ("In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time."); *Horizontal Merger Guidelines, supra*, § 3.0 ("A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels."). Low barriers to entry enable a potential competitor to deter anticompetitive behavior by firms within the market simply by its ability to enter the market. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967) (``It is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market."). Existing firms know that if they collude or exercise market power to charge supracompetitive prices, entry by firms currently not competing in the market becomes likely, thereby increasing the pressure on them to act competitively. *See Baker Hughes*, 908 F.2d at 988; *Byars v. Bluff City News Co.*, 609 F.2d 843, 851 n.19 (6th Cir. 1979).

NOTES

1. The D.C. Circuit's 2001 *Heinz* opinion is historically significant for creating a "sliding scale" between the first two elements of *Baker Hughes*. Although the court held that the FTC could establish its prima facie case of anticompetitive effect through the *Philadelphia National Bank* (PNB) structural presumption alone, it also made clear that the strength of the prima facie case depends on the totality of the government's Step 1 showing. By coupling the *PNB* presumption with strong non-structural evidence—direct, premerger head-to-head competition between Heinz and Beech-Nut and high barriers to entry—the court held that the FTC had presented an unusually powerful prima facie case, which in turn raised the amount, quality, and persuasiveness of rebuttal evidence the defendants needed to produce at Step 2 to satisfy their burden of production and create a genuine factual dispute. This "sliding scale," although not formally labeled as such, illustrates how the interaction between Steps 1 and 2 in *Baker Hughes* can work in practice: the more compelling and multifaceted the government's initial evidence, the heavier the defendants' practical burden of rebuttal. *Heinz* has been repeatedly cited in merger litigation and agency practice to show how structural and direct-effects evidence can be combined to strengthen the prima facie case, enabling courts to rule for the government on the merits when the defendants' rebuttal—whether based on claimed efficiencies, innovation defenses, or alternative market definitions—lacks the strength, specificity, or credibility necessary to overcome a strong and well-supported initial showing.

2. The district court originally denied the FTC's request for a preliminary injunction and dismissed the case.[1] The court found that, although the FTC established a prima facie case showing the merger would increase concentration in an already highly concentrated market, the defendants successfully rebutted this presumption by demonstrating that the merger would likely enhance rather than harm competition. The court found that Heinz and Beech-Nut were not significant competitors against each other—they rarely appeared in the same supermarkets, did not price against each other, and showed no statistically significant cross-elasticity of demand. Instead, both companies were struggling independently against Gerber's dominant 65% market share. The court was persuaded by defendants' evidence that the merger would create substantial efficiencies, including a 43% reduction in production costs by consolidating operations at Heinz's more modern Pittsburgh facility, and would enable the combined entity to achieve 90% market coverage, finally providing sufficient distribution reach to launch innovative products and mount a credible challenge to Gerber's dominance. The court found that combining two weak competitors would create a stronger rival capable of challenging the market leader and concluded it was "more probable than not that consummation of the Heinz/Beech-Nut merger will actually increase competition in jarred baby food in the United States." *Id*. at 200.

3. On appeal, the D.C. Circuit reversed and remanded. The court found that the district court had made several clearly erroneous factual findings, most notably its

[1] FTC v. H.J. Heinz Co., 116 F. Supp. 2d 190 (D.D.C. 2000), *rev'd and remanded*, 246 F.3d 708 (D.C. Cir. 2001)

conclusion that Heinz and Beech-Nut did not significantly compete with each other before the merger. Substantial record evidence showed that the two firms competed directly and depressed each other's prices in overlapping markets. The Court of Appeals also identified critical legal errors, particularly the district court's dismissal of wholesale competition—the intense battle for "second-shelf" position—unless the FTC could prove consumer impact with "certainty," a standard the appellate court noted had never been required and was inconsistent with antitrust law's focus on probabilities rather than certainties. In addition, the appellate court held that the district court had improperly analyzed the defendants' efficiency claims by failing to determine whether the alleged efficiencies were "merger-specific" (i.e., achievable only through the merger rather than internal investment), by not considering whether Heinz could improve its recipes through its own product development, and by accepting flawed cost-saving calculations that examined only a portion of variable costs rather than overall efficiency gains. The court also rejected the merging parties' innovation defense, finding that the expert testimony supporting the need for 70% market coverage was based on statistically insignificant data and measured revenue rather than profitability. Finally, the court faulted the district court for applying an unduly demanding legal standard that required proof the merger would harm competition, rather than the correct standard of whether the FTC had raised "serious, substantial, difficult and doubtful" questions warranting full investigation.

4. On remand, the district court dismissed the complaint as moot.[2] As the district court noted, "Notwithstanding the skepticism of the Court of Appeals that an injunction would 'kill this merger,' H.J. Heinz, Co. announced publicly within hours of the Court of Appeals' decision that it had abandoned its plans to acquire Beech-Nut Foods."[3] The district court concluded:

> The voluntary cessation of allegedly illegal conduct renders a motion for an injunction moot if it is "absolutely clear" that the conduct sought to be enjoined could not reasonably be expected to recur. In this case, a publicly held company has publicly abandoned merger plans after a unanimous appellate opinion as to which it did not seek further review. The government agency that opposed the merger has moved to dismiss the proceedings against it. If Heinz and Beech-Nut were to rekindle their interest in one another at some later time, they would have to go through FTC pre-merger clearance procedures. It is hard to see how it could be any clearer that the Heinz-Beech-Nut merger cannot reasonably be expected to recur.
>
> The claims of the FTC in this action are thus moot. The FTC has no warrant, in any event, to seek an injunction maintaining the "status quo," when the status quo does not include merger plans. The motion for entry

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2 FTC v. H.J. Heinz Co., 164 F. Supp. 2d 659 (D.D.C.), *on remand from* 246 F.3d 708 (D.C. Cir. 2001).

3 *Id*. at 659 (internal citation to the Court of Appeals opinion omitted).

of a preliminary injunction will be denied, and the case will be dismissed.[4]

[4] *Id*. at 660 (internatl citations omitted).

UNITED STATES V. JETBLUE AIRWAYS CORP.
712 F. SUPP. 3d 109, 150-51 (D. MASS. 2024)
(excerpt on the *PNB* presumption)

[WILLIAM G.] YOUNG, Judge of the United States

[On March 7, 2023, the Department of Justice and several state attorneys general challenged JetBlue's proposed $3.8 billion acquisition of Spirit Airlines. JetBlue, founded in 1999, operates as a "hybrid" carrier, combining low-cost operations with service and amenities closer to those of the legacy airlines, and competes on both price and quality by targeting cost-conscious travelers willing to pay a modest premium for greater comfort, free in-flight entertainment, and more generous legroom. Spirit, by contrast, is the largest ultra-low-cost carrier (ULCC) in the United States, pursuing a business model built on rock-bottom base fares, high seat density, unbundled pricing for ancillary services, and rapid fleet utilization, and its presence in a market often exerts downward pressure on fares charged by all carriers. The government alleged that the merger would eliminate head-to-head competition between the two airlines in numerous origin-and-destination city-pair markets across the country. Because airline competition is highly route-specific, the court adopted a market definition approach that treated each route or "city pair" as a distinct relevant geographic market and evaluated the likely effects of the transaction on both price and service in light of the differentiated competitive roles played by JetBlue and Spirit.]

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D. Prima Facie Case

1. Presumption of Illegality

The Government argues that the proposed acquisition at bar is "presumptively illegal" because it results in "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." [*United States v.*] *Philadelphia Nat'l Bank*, 374 U.S. [321,] at 363 [(1963)]; *see also United States v. Continental Can Co.*, 378 U.S. 441, 458 (1964) ("Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effects may be dispensed with in view of [Section] 7's design to prevent undue concentration."). As previously stated, the proposed acquisition would result in a combined firm market share of either over 2,500 HHI, or an increase in HHI of over 200, in multiple relevant markets. An HHI over 2,500, or an increase in HHI of over 200, is considered "highly concentrated" and has been presumed illegal. [*United States v.*] *Aetna* [*Inc.*], 240 F. Supp. 3d [1,] at 42 [(D.D.C. 2017)]; *see also ProMedica Health System, Inc. v. F.T.C.*, 749 F.3d 559, 568 (6th Cir. 2014) (noting that a 1,078-point increase to 4,391 and a 1,323-point increase to 6,854 "blew through [the presumption] barriers in spectacular fashion"); [*FTC v. H.J.*] *Heinz* [*Co.*],

246 F.3d [708,] at 716-17 [(D.C. Cir. 2001)] (510-point increase from 4,775 created a presumption of illegality "by a wide margin"); *F.T.C. v. Sysco Corp.*, 113 F. Supp. 3d 1, 61 (D.D.C. 2015) (economic and other evidence "has shown that a merged Sysco-USF will significantly increase concentrations" and that the Government "therefore has made its prima facie case and established a rebuttable presumption that the merger will lessen competition in the local markets"); [*United States v.*] *H & R Block*, [*Inc*.,] 833 F. Supp. 2d [36,] at 71-72 [(D.D.C. 2011)] (enjoining a transaction that would have given the combined firm only a 28.4 percent market share because the transaction would have resulted in an increase in the HHI of more than 200 and a post-acquisition HHI that would have exceeded 2,500).

The Government identifies 183 relevant routes, each of which is its own relevant market, in which this presumption applies.[50] The Court finds that this presumption, spurred by the Department of Justice's own Horizontal Merger Guidelines, does not, on its own, sustain a prima facie case. "[P]resumptions are not self-executing." *Deutsche Telekom*, 439 F. Supp. 3d at 206. The Court, therefore, moves on to the direct evidence of anticompetitive effects presented by the Government. *See Saint Alphonsus*, 778 F.3d at 785-86 ("[P]laintiffs in [Section] 7 cases generally present other evidence as part of their prima facie case.").

. . .

NOTES

1. Judge Young surprisingly states in his opinion that "presumptions are not self-executing." This statement seems to suggest that, when market concentration figures exceed the thresholds recognized in *PNB*, its later application by the lower courts, and the Merger Guidelines, a court should not automatically treat the presumption as sufficient to carry the government's burden under Step 1 of *Baker Hughes* without additional supporting evidence. This construction represents an extreme narrowing of the *PNB* presumption's role—essentially requiring non-structural evidence (e.g., direct proof of likely price increases, output reductions, or other competitive harm) before the prima facie case can be established. In *Heinz*, the D.C. Circuit held that strong non-structural evidence—such as head-to-head competition and high barriers to entry—could make the government's prima facie case stronger and more difficult to rebut. *JetBlue* appears to push this to the extreme: in the absence of such non-structural evidence, the structural presumption is treated as weak or even insufficient to satisfy the government's initial burden.[1]

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[50] The 183 routes can be broken down into: 51 nonstop overlap routes, 15 mixed overlap routes, and 117 connect overlap routes. The Government does not, nor could it, identify any routes on which the presumption applies in the "Spirit-only" category. Of these 51 nonstop routes, 35 have met the presumption of illegality consistently over the last 3 years.

[1] An alternative interpretation—unsupported directly by the opinion's language but not inconsistent with it—is that Judge Young concluded the merging parties had adduced sufficient evidence at Step 2 of Baker Hughes to create a genuine issue of fact as to anticompetitive effect, and was saying only that the DOJ could not rely solely on the *PNB* presumption to carry its ultimate

2. Judge Young accurately cites Judge Victor Marrero's opinion in *Deutsche Telekom*[2] as saying that presumptions are not self-executing.[3] But Judge Marrero did not say that the *PNB* presumption could not, by itself, make out a plaintiff's prima facie case of anticompetitive harm in a horizontal merger case. To the contrary, Judge Marrero explicitly recognized that a combined market share of 30% or more for the merged firm or a postmerger HHI of 2500 or more with a delta of 200 or more was sufficient to establish the plaintiff's prima facie case of anticompetitive harm and did so in the case.[4]

3. In any event, the government did not rely solely on structural evidence. Judge Young found direct evidence of anticompetitive effects across three dimensions of competition sufficient to make out the DOJ's prima facie case.

First, the merger would eliminate substantial head-to-head competition between JetBlue and Spirit on 99 nonstop overlap routes. The evidence showed that when Spirit entered these markets, JetBlue's fares and revenue fell by more than 10%, and Spirit's presence often triggered industry-wide fare wars that benefited all consumers. This rivalry was particularly significant because JetBlue's business model, though low-cost, differed significantly from Spirit's aggressive pricing strategy, high seat density, and unbundled fare model, forcing JetBlue to compete through enhanced amenities to persuade consumers to pay somewhat higher prices rather than switch to Spirit's ultra-low-fare, no-frills product.

Second, the acquisition would eliminate Spirit's broader market disciplinary role as the largest U.S. ultra-low-cost carrier—the "Spirit Effect"—which systematically reduced rival airlines' prices by 7-11% across all markets Spirit entered and spurred industry-wide innovations like basic economy fares.

Third, the merger would eliminate a unique consumer choice by removing Spirit's consistently lower-priced service that specifically serves price-sensitive travelers who "must rely on Spirit" to afford air travel and cannot substitute higher-priced alternatives. The court further found that barriers to entry and expansion—particularly slot and gate constraints at congested airports, combined with the ULCC business model's unique cost structure—made rapid entry by other airlines unlikely and would prevent replacement of Spirit's lost capacity or fare-lowering impact post-merger. Internal analyses demonstrated that elimination of this rivalry would likely reduce the competitive discipline currently restraining JetBlue's fares and lead to higher prices for consumers, providing a direct-effects narrative that supported the structural evidence of high concentration in affected city-pair markets.

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burden of persuasion at Step 3. If that is correct, the remark about the non-self-executing nature of rebuttable presumptions is perhaps misleading in its framing, but not wrong as a matter of law.

2 New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

3 *Id*. at 206.

4 *Id*. ("By either measure, Plaintiff States have satisfied their prima facie burden."). Judge Young appears to have misspoken about the HHI thresholds: The test is conjunctive, requiring both a post-merger HHI over 2,500 and an increase over 200, not disjunctive as his use of "or" indicates.

4. After the federal district court permanently enjoined the JetBlue/Spirit merger on January 16, 2024, both airlines moved quickly to appeal the decision while recognizing the increasingly challenging timeline for completing the transaction. On January 19, 2024, three days after the adverse ruling, JetBlue and Spirit jointly filed a notice of appeal.[5] Ten days later, on January 29, 2024, the merging parties filed a motion requesting expedited consideration of their appeal, arguing that without acceleration, "the appeal is unlikely to be decided before the July 24, 2024 outside closing date of the merger agreement."[6] The airlines sought a briefing schedule leading to oral argument in May 2024, but the First Circuit set arguments for June. With the outside closing date approaching, both companies concluded that even a successful appeal would not allow sufficient time to obtain regulatory approval. On March 1, 2024, approximately three months before the scheduled argument, they mutually agreed to terminate their merger agreement.[7] Under the merger agreement, JetBlue paid Spirit a $69 million antitrust reverse breakup fee on March 5, 2024, in addition to approximately $425 million in total prepayments that Spirit shareholders had already received through monthly payments of $0.10 per share from January 2023 through February 2024. Following the termination, the appeal became moot, and the First Circuit approved the airlines' voluntary dismissal on March 5, 2024.[8]

5. Subsequent developments in Spirit's business model add an unusual retrospective dimension to evaluating the court's findings. Following the termination of the JetBlue merger agreement in March 2024, Spirit Airlines continued to face severe financial challenges. The carrier had not recorded a full-year profit since 2019 and carried approximately $3.3 billion in long-term debt, including $1.27 billion maturing in 2025. Operational difficulties compounded these pressures, most notably a Pratt & Whitney engine recall that grounded dozens of Airbus A320neo aircraft and reduced available capacity. Spirit reported losses exceeding $335 million in the first half of 2024, with total annual losses reaching $1.2 billion—more than twice those of the previous year. Aircraft utilization fell by more than 10 percent to roughly nine hours per day, limiting revenue generation and flexibility. With debt maturities approaching and operational capacity constrained, management determined that a comprehensive financial restructuring was necessary. On November 18, 2024, Spirit filed for Chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the

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5 Notably, in its one-sentence press release on the filing, Spirit noted that it acting "consistent with the requirements of the merger agreement." Press Release, Spirit Airlines, JetBlue and Spirit File Notice of Appeal (Jan. 19, 2024). This is a very curious statement. To me, it indicates that Spirit was having second thoughts about continuing with the deal, but joined the appeal to comply with the merger agreement's requirement that it use its "reasonable best efforts" to close the transaction, at least until the July 24, 2024, "drop-dead date" when it could unilaterally terminate the agreement without cause. We will examine contractual obligations in Unit 3.

6 JetBlue Airways Corporation and Spirit Airlines, Inc.'s Motion To Expedite Consideration of the Appeal at 1, 7 United States v. JetBlue Airways Corp., No. 24-1092 (1st Cir. Jan. 23, 2024).

7 Press Release, JetBlue Airways Corp., JetBlue Announces Termination of Merger Agreement with Spirit (Mar. 4, 2024); Press Release, Spirit Airlines, Spirit Announces Termination of Merger Agreement with JetBlue (Mar. 4, 2024).

8 Judgment, United States v. JetBlue Airways Corp., No. 24-1092 (1st Cir. Mar. 5, 2024).

Southern District of New York, the first major U.S. airline bankruptcy since American Airlines, more than a decade earlier.

Spirit emerged from bankruptcy on March 12, 2025, after completing a streamlined restructuring that equitized approximately $795 million of funded debt and secured $350 million in new equity investment from existing bondholders. As part of its turnaround plan, branded "Project Bravo," the airline shifted from its traditional ultra-low-cost carrier model toward a hybrid approach intended to compete in the $200–$400 fare segment. The revised business model includes bundled fare options, premium seating, free Wi-Fi for loyalty program members, and complimentary snacks and beverages for all passengers, while maintaining a cost structure below that of legacy carriers. Additional planned improvements include extra-legroom seating, in-seat power outlets, larger overhead bins, and simplified boarding procedures. The strategy is designed to capture premium leisure travelers and reduce vulnerability to competitive pressure from legacy carriers' basic economy products, which had directly targeted Spirit's historical no-frills offering.

6. Although subsequent events proved that some of Judge Young's factual assumptions—most notably Spirit's continued viability as a ULCC—were overly optimistic, his opinion still contains ample findings that would support a Section 7 violation. The record established compelling direct evidence of head-to-head competition between JetBlue and Spirit on dozens of nonstop overlap routes, including data showing that JetBlue's fares dropped when Spirit entered and that Spirit's entry often triggered industry-wide fare reductions. This dynamic does not depend entirely on Spirit's ULCC business model; even as a higher-service LCC, Spirit could remain one of JetBlue's closest competitors in these markets, and its elimination through merger would predictably lessen price competition. In addition, Judge Young found that the merger would reduce meaningful product differentiation and consumer choice, particularly in markets with few carriers, where independent networks, brands, and pricing strategies give travelers more options. Thus, even discounting findings tied to the long-term durability of the "Spirit Effect," the remaining evidence in the opinion supports the conclusion that many consumers would still be better off with JetBlue and Spirit competing independently rather than as a single combined firm.

Defenses: Power Buyers

Horizontal Merger Guidelines

U.S. Department of Justice

and the

Federal Trade Commission

Issued: August 19, 2010

8. Powerful Buyers

Powerful buyers are often able to negotiate favorable terms with their suppliers. Such terms may reflect the lower costs of serving these buyers, but they also can reflect price discrimination in their favor.

The Agencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices. This can occur, for example, if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry, or if the conduct or presence of large buyers undermines coordinated effects. However, the Agencies do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger. Even buyers that can negotiate favorable terms may be harmed by an increase in market power. The Agencies examine the choices available to powerful buyers and how those choices likely would change due to the merger. Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.

> *Example 22:* Customer C has been able to negotiate lower pre-merger prices than other customers by threatening to shift its large volume of purchases from one merging firm to the other. No other suppliers are as well placed to meet Customer C's needs for volume and reliability. The merger is likely to harm Customer C. In this situation, the Agencies could identify a price discrimination market consisting of Customer C and similarly placed customers. The merger threatens to end previous price discrimination in their favor.

Furthermore, even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers.

> *Example 23:* In Example 22, if Customer C instead obtained the lower pre-merger prices based on a credible threat to supply its own needs, or to sponsor new entry, Customer C might not be harmed. However, even in this case, other customers may still be harmed.

9. Entry

FTC v. WILH. WILHELMSEN HOLDING ASA
341 F. SUPP. 3D 27, 70-71 (D.D.C. 2018)
(excerpt[1])

TANYA S. CHUTKAN, District Judge

The Federal Trade Commission ("FTC") has moved for a preliminary injunction to block a proposed merger between defendants Wilhelmsen Maritime Services AS ("WMS"), Wilhelmsen Ship Services ("WSS") (collectively "Wilhelmsen"), and The Resolute Fund II, L.P., Drew Marine Intermediate II B.V., and Drew Marine Group, Inc. (collectively "Drew"), two large providers of marine water treatment chemicals and related services. The FTC objects to the merger on the grounds that Defendants are each other's closest and only realistic competition for supplying these chemicals and services on a global scale, and the merger threatens to reduce or eliminate tangible consumer benefits resulting from market competition. Having considered the evidence presented through live testimony, as well as extensive pleadings, exhibits, and other submissions, the court hereby GRANTS the motion for preliminary injunction.

[The court found, for the purpose of deciding whether to enter a preliminary injunction, that the supply of marine water treatment (MWT) products and services, including boiler water treatment (BWT) chemicals, cooling water treatment (CWT) chemicals, and associated products and services, to global fleets, constituted a relevant antitrust market and that, within this market, the FTC had established a prima facie case of anticompetitive effect. In response, the merging parties advanced entry, power buyer, and efficiencies defenses.]

. . .

b. *Power Buyers*

1. LEGAL STANDARD

Courts have also noted that the existence of power buyers—sophisticated customers who retain strategies post-merger that "may constrain the ability of the merging parties to raise prices," Merger Guidelines § 8—is a factor that can serve to "rebut a prima facie case of anti-competitiveness." *Cardinal Health*, 12 F.Supp.2d at 59. However, "[t]he ability of large buyers to keep prices down ... depends on the alternatives these large buyers have available to them." *Sysco*, 113 F.Supp.3d at 48. Where mergers reduce alternatives—i.e., prevent the use of certain competitive strategies—"the power buyers' ability to constrain price and avoid price discrimination can be correspondingly diminished." *Id*. (citing Merger Guidelines § 8). Thus, the mere presence of power buyers "does not necessarily mean that a merger will not result in anti-competitive effects." *Cardinal Health*, 12 F.Supp.2d at 59. In assessing a power

1. Record citations omitted

buyer argument, the court should "examine the choices available to powerful buyers and how those choices likely would change due to the merger," keeping in mind that "[n]ormally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer." Merger Guidelines § 8. Finally, although the consideration of non-entry factors—including the existence of power buyers—is "relevant, and can even be dispositive, in a section 7 rebuttal analysis," *Baker Hughes*, 908 F.2d at 987, courts have not typically held "that power buyers alone enable a defendant to overcome the government's presumption of anticompetitiveness." *Cardinal Health,* 12 F.Supp.2d at 58; *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 440 (5th Cir. 2008) ("[C]ourts have not considered the 'sophisticated customer' defense as itself independently adequate to rebut a prima facie case.").

2. ANALYSIS

Defendants argue that the FTC's Global Fleets construct focuses on the largest shipping companies—those most likely to have the power to constrain the merger's anticompetitive effects. In support of this contention, Defendants point out that customers tend to purchase other goods from suppliers, which permits them to discipline attempted BWT [boiler water treatment chemicals] and CWT [cooling water treatment chemicals] price increases by switching or credibly threatening to switch purchases of these other products to other suppliers or by negotiating price decreases on other products. Defendants further argue that customers could adapt purchases to another supplier's distribution network or shift part of their fleet to another competitor, since many vessels in Global Fleets do not avail themselves of all of Defendants' networks—instead visiting a subset of available ports and picking up MWT from an even smaller subset. Defendants also contend that Global Fleets could stockpile larger quantities of MWT products in order to shift purchases to major ports with lower costs, and that customers can partner with suppliers to sponsor entry or expansion to new ports.

The court is unpersuaded by Defendants' power buyer argument. The evidence is mixed—at best—regarding the effectiveness of each of the Defendants' suggested strategies. Although at least one witness suggested that customers could shift purchases of other products in more competitive markets to other suppliers, there is, as Dr. [Avid] Nevo [the FTC's expert economist] noted, little empirical basis for the notion that this strategy—already available to large customers—would yield any additional benefits beyond those customers currently enjoy. Similarly, while testimony suggested that customers may be able to stockpile product and concentrate purchases in ports where products are cheaper, that same testimony suggests that storage space is often limited and that customers already do so. Defendants have not identified any new strategy or alternative likely to emerge post-merger—instead, they have focused on strategies that are already part of the competitive landscape and which show no promise of becoming more effective. On the other hand, the FTC has shown that the merger will result in the loss of a proven strategy—the ability to leverage one large, global supplier against another—that appears to be the most effective price constraint

in the consolidated MWT market. In other words, the FTC has established a reasonable probability that as a result of the merger, sophisticated buyers will have one less alternative strategy through which they can exercise power, and Defendants have not identified any equally or more effective buyer options to counteract that loss. Thus, the reduction of buyer alternatives means that "power buyers' ability to constrain price and avoid price discrimination can be correspondingly diminished," *Sysco*, 113 F.Supp.3d at 48, and evidence of buyer power is insufficient to rebut the FTC's prima facie case.

A NOTE ON THE POWER BUYERS DEFENSE

In some markets, large buyers may exist that, because of their bargaining power, are able to protect themselves from the anticompetitive effects that otherwise would result from a merger. These buyers, for example, may be a disruptive force that precludes effective coordinated interaction among incumbent upstream firms or they may have sufficient bargaining power to block the unilateral exercise of market power by the combined firm.

The courts and the merger guidelines recognize that the bargaining power or firms can play a significant role in assessing the competitive effects of a merger and may act, either alone or in conjunction with other defenses, to rebut a prima facie case of anticompetitive effect.[1] While in a particular case a power buyer defense may not be sufficient to rebut the prima facie case, that defense in conjunction with other defenses may be sufficient.[2]

Simply because a buyer is powerful does not mean that it is able to discipline the collective or unilateral exercise of market power by suppliers postmerger to protect itself.[3] The question here is two-fold: can the putative power buyer protect itself at all, and, if so, can it protect itself sufficiently to completely eliminate the anticompetitive effect of the merger on it?[4] Moreover, even a particular buyer can protect itself from the exercise of market power, its action may not protect other, less powerful buyers and only result in a regime of price discrimination where some buyers get hurt and

1. *See* Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 440 (5th Cir. 2008); FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 70 (D.D.C. 2018); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 58 (D.D.C. 1998); U.S. Dep't of Justice & Fed. Trade Comm'n, DOJ/FTC Horizontal Merger Guidelines § 8 (rev. 2010).

2. *See, e.g.*, United States v. Baker Hughes, 908 F.2d 981 (D.C.Cir.1990) (finding the existence of power buyers along with the ease of entry was sufficient to rebut a prima facie case of anticompetitive effect); United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 675, 679 (D. Minn. 1990) (finding the lack of entry barriers, the potential entry by distant dairies, the power of the fluid milk buyers in the area, the possibility of vertical integration, and efficiencies rebutted a prima facie case of anticompetitive effect).

3. *See, e.g.*, *Wilhelmsen*, 341 F. Supp. 3d at 70; FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 58 (D.D.C. 1998).

4. *See Wilhelmsen*, 341 F. Supp. 3d at 70.

others do not.[5] The 2010 Merger Guidelines recognize the defense and these limiting principles:

> The Agencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices . . . . However, the Agencies do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger. Even buyers that can negotiate favorable terms may be harmed by an increase in market power. The Agencies examine the choices available to powerful buyers and how those choices likely would change due to the merger. Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.... Furthermore, even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers.[6]

It is important in raising a power buyer defense to present both an explanation and evidence of the mechanics of how the power buyer will constrain the exercise of market power postmerger against itself and how other customers, if any, in the market will be protected.

Self-protection. The first requirement for a power buyer defense is that the putative power buyer be able to protect itself from any anticompetitive effect resulting from the merger. In the absence of a clear mechanism—and the incentive to use it—courts and the enforcement agencies will reject a power buyer defense.[7]

5. *See* FTC Cardinal Health, Inc., 12 F. Supp. 2d 34, 61 (D.D.C. 1998) (rejecting power buyer defense in a two mergers of mergers of wholesale prescription drug distributors where, although large pharmacy chains had significant bargaining power and likely could protect themselves, the market also contained independent pharmacies and the smaller hospitals that could not protect themselves); United States v. United Tote, 768 F. Supp. 1064, 1085 (D. Del.1991) ("Even if the Court were to accept United Tote's argument that the owners of these large, sophisticated facilities would be able to protect themselves from any anti-competitive price increase, this would still leave at least one hundred nine facilities unprotected in the small market segment alone.").

6. U.S. Dep't of Justice & Fed. Trade Comm'n, DOJ/FTC Horizontal Merger Guidelines § 8 (rev. 2010). For cases recognizing the existence of the defense and applying Section 8 of the guidelines, see FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 315 (D.D.C. 2020); FTC v. v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 70 (D.D.C. 2018); FTC v. Sanford Health, Sanford Bismarck, No. 1:17-CV-133, 2017 WL 10810016, at *16 (D.N.D. Dec. 15, 2017), *aff'd*, 926 F.3d 959 (8th Cir. 2019); United States v. Anthem, Inc., 236 F. Supp. 3d 171, 221 (D.D.C. 2017); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 48 (D.D.C. 2015).

7. *See* Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 439-40 (5th Cir. 2008) (discussing types of power buyer defense mechanisms); AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 575 (7th Cir. 1999); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 58 (D.D.C. 1998); but cf. FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 315, 317 (D.D.C. 2020) (denying a preliminary injunction where, among other factors, "the hydrogen peroxide industry is marked by sophisticated and powerful customers that are well equipped to defeat coordination" and "there is no reason to suspect that suppliers will not continue to participate in a blind bidding system for long-term and large contracts to win the business of sophisticated buyers" but not further explaining the mechanism).

The courts have identified three self-protection mechanisms to prevent the exercise of market power against the putative power buyer, although proving these mechanisms actually operate in a particular case has been problematic:

1. *Share shifting*. When buyers are large relative to the overall market, upstream firms have substantial excess capacity to service new business, marginal costs are low relative to fixed costs, and the costs to the buyers of switching from one supplier to another are low, then price competition for the patronage of these buyers usually is intensive even when the market is highly concentrated. In these circumstances, the upstream firms already have covered their fixed costs, so that—in light of the relatively low marginal costs—the revenues earned on incremental business are almost all profit. Conversely, the loss of one of these buyers to another firm will cost the original supplier heavily, since almost all of the lost revenue is lost profit. As a result, under this theory changes in concentration short of a merger to monopoly are unlikely to disturb price competition in such markets, at least in the absence of explicit collusion.[8] Courts can be skeptical, however, and find that the bargaining power of the putative power buyers declines as the number of the firms with the excess capacity are few in number and become fewer as a result of the merger.[9]

2. *Sponsoring entry*. In markets in which the primary impediment to entry is the risk of not being able to secure enough business to load a minimum efficient scale plant, buyers (who may at collectively though a buying group) that are large relative to the market can protect themselves, at least in the long-run, by inducing entry by third parties by agreeing to purchase enough output to load the new plant. When the time to enter is short and the sunk costs are low, the threat of inducing entry is likely to be a credible one and the threat alone may be sufficient to dissuade the merged firm to raising prices to these buyers. In

8. For cases recognizing a share-shifting argument, see, for example, FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1055 (8th Cir. 1999); *Wilhelmsen*, 341 F. Supp. 3d at 70-71; and presumably FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 317 (D.D.C. 2020).

9. *See* United States v. Anthem, Inc., 236 F. Supp. 3d 171, 221 (D.D.C. 2017) (rejecting defense where, notwithstanding the substantial sophisticated of large national companies, the "loss of one competitor from the four major carriers alters the RFP and negotiating dynamic, even with strong advocates on the other side" and "[t]his loss of leverage undermines the defense contention that customers will be able to wield their seasoned human resource managers and consultants to counteract the anticompetitive effects of the merger"); *see also* Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 440 (5th Cir. 2008) (rejecting share-shifting as defense where the market has had only two dominant players, PDM and CB&I [the merging companies], so buyers cannot now swing back and forth between competitors to lower bids post-acquisition); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 48 (D.D.C. 2015) (finding that large customers premerger have been able "to keep prices down by leveraging the defendant companies against one another," the merger will eliminate that ability); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 8 (rev. 2010) ("Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.")

such situations, markets are likely to remain competitive even with significant increases in concentration in upstream markets caused by mergers.[10]

3. *Vertical integration*. Vertical integration is a special case of inducing entry. Here, rather than inducing a third party to enter the upstream market, the downstream buyers (who again may act collectively) may vertically integrate into the upstream market of the merged firm. Essentially the same conditions apply for the defense as for inducing entry.[11]

Even when there is an arguable mechanism, the defense is likely to fail for lack of sufficient evidence if (1) the putative buyer does not support the defense, or (2) there is evidence of historical episodes where the putative power buyer (or a similarly situated firm) has not been able to prevent a merged firm from raising prices to it.[12] This was the situation in *Sanford Heath*, where (1) a representative from blue Cross (the putative power buyer) testified that that postmerger Sanford Heath would be able to force Blue Cross to choose between paying a higher price or exiting the market, and (2) there was evidence that Blue Cross in the past had been forced to pay higher prices to a near-monopolist in another part of North Dakota.

Protection of others. Whenever a power buyer defense is employed, the parties should pay careful attention to the possibility that, although the large firms in the market may be able to protect themselves, the smaller ones may not. The enforcement agencies and the courts will examine closely the possibility that the upstream firms can isolate the smaller firms and discriminate against them while acting competitively toward the larger firms. If some buyers are able to protect themselves from the

10. *See* Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 440 (5th Cir. 2008) (rejecting sponsored entry where "[n]o buyer can assure that a new entrant has 'adequate volume and returns' for meaningful entry into the market); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 59 (D.D.C. 1998) (finding large pharmacy chains have ability to sponsor entry into drug wholesale distribution to protect themselves but rejecting power buyer defense because of unprotected smaller pharmacies and hospitals); United States v. Baker Hughes Inc., 731 F. Supp. 3, 11 (D.D.C.) (finding the "sophistication" of large customers significant in being able to deter price increases, presumably although not explicitly because they could induce entry by Canadian suppliers) , *aff'd*, 908 F.2d 981, 986 (D.C. Cir. 1990); *see also* FTC v. Sanford Health, Sanford Bismarck, No. 1:17-CV-133, 2017 WL 10810016, at *29 (D.N.D. Dec. 15, 2017) (recognizing mechanism but finding it unsupported by the record), *aff'd*, 926 F.3d 959 (8th Cir. 2019).

11. *See* United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 674, 675, 679 (D. Minn. 1990) (finding capability to vertically integrate); *see also* Sanford Health, 2017 WL 10810016, at *29 (recognizing mechanism but finding it unsupported by the record); United States v. Energy Sols., Inc., 265 F. Supp. 3d 415, 442 (D. Del. 2017) (same).

12. *See Chicago Bridge*, 534 F.3d at 440 (rejecting defense where premerger "[i]nstances of CB&I pressuring customers to offer sole-source contracts by withdrawing its bid and CB&I's success at obtaining sole-source contracts undermine any argument that buyers have the ability to pressure CB&I in contract negotiations").

otherwise anticompetitive effects of a merger but others are not, the defense will fail.[13] This was the case, for example, in *Sanford Health*, where although Blue Cross was a very large firm with a statewide share of the commercial health insurance market of between 55% and 65%, that still left between 35% and 45% of the commercial insurers unprotected from the merger.[14]

Acceptance by courts. To date, courts have been very reluctant to find existence of "power buyers" sufficient by itself to rebut a *prima facie* case of anticompetitive effect,[15] but several courts have noted "power buyers" as one of several factors in a successful rebuttal.[16] The DOJ and FTC are probably more willing to accept the defense, but they will be demanding both in the articulation of precisely why the defense should apply in the case, in the evidence from the customers who are said to be able to exercise this power, and in the ability of all firms in the market to protect themselves.

13. *See* FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 59 (D.D.C. 1998); FTC v. Tenet Healthcare Corp., 17 F. Supp. 2d 937, 941 (E.D. Mo. 1998), *rev'd on other grounds*, 186 F.3d 1045 (8th Cir. 1999); United States v. United Tote, Inc., 768 F. Supp. 1064, 1085 (D. Del. 1991).

14. FTC v. Sanford Health, Sanford Bismarck, No. 1:17-CV-133, 2017 WL 10810016, at *16 (D.N.D. Dec. 15, 2017), *aff'd*, 926 F.3d 959 (8th Cir. 2019).

15. A counterexample may be United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 679 (D. Minn. 1990), where the court denied the government's motion for a preliminary injunction where 90 percent of the market consisted of large customers able to protect themselves individually and that smaller customer could unite through a buying group to protect themselves.

16. *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981, 98687 (D.C. Cir. 1990); United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400, 1422 (S.D. Iowa 1991) (accepting a power buyers defense where the market for high fructose corn syrup "is populated by very large and sophisticated purchasers and there is a continuing trend toward increasing concentration on the buying side, as large bottlers purchase formerly independent bottling franchises or bring them under their sweetener purchasing wings, and as smaller concerns band together in buying cooperatives to increase their purchasing leverage"). For a case in which the defense was rejected as insufficient on the merits, see FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 5861 (D.D.C. 1998).

Defenses: Entry/Expansion/Repositioning

U.S. Dep't of Justice & Fed. Trade Comm'n, 2010 Horizontal Merger Guidelines § 9 (rev. Aug. 19, 2010) (Entry)

9. Entry

The analysis of competitive effects in Sections 6 and 7 focuses on current participants in the relevant market. That analysis may also include some forms of entry. Firms that would rapidly and easily enter the market in response to a SSNIP are market participants and may be assigned market shares. See Sections 5.1 and 5.2. Firms that have, prior to the merger, committed to entering the market also will normally be treated as market participants. See Section 5.1. This section concerns entry or adjustments to pre-existing entry plans that are induced by the merger.

As part of their full assessment of competitive effects, the Agencies consider entry into the relevant market. The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.

The Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence. Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult. Market values of incumbent firms greatly exceeding the replacement costs of their tangible assets may indicate that these firms have valuable intangible assets, which may be difficult or time consuming for an entrant to replicate.

A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger. Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.

The Agencies examine the timeliness, likelihood, and sufficiency of the entry efforts an entrant might practically employ. An entry effort is defined by the actions the firm must undertake to produce and sell in the market. Various elements of the entry effort will be considered. These elements can include: planning, design, and management; permitting, licensing, or other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements. Recent examples of entry, whether successful or unsuccessful, generally provide the starting point for identifying the elements of practical entry efforts. They also can be informative regarding the scale necessary for an entrant to be successful, the presence or absence of entry barriers, the factors that influence the timing of entry, the costs and risk associated with entry, and the sales opportunities realistically available to entrants.

If the assets necessary for an effective and profitable entry effort are widely available, the Agencies will not necessarily attempt to identify which firms might enter. Where an identifiable set of firms appears to have necessary assets that others lack, or to have particularly strong incentives to enter, the Agencies focus their entry analysis on those firms. Firms operating in adjacent or complementary markets, or large customers themselves, may be best placed to enter. However, the Agencies will not presume that a powerful firm in an adjacent market or a large customer will enter the relevant market unless there is reliable evidence supporting that conclusion.

In assessing whether entry will be timely, likely, and sufficient, the Agencies recognize that precise and detailed information may be difficult or impossible to obtain. The Agencies consider reasonably available and reliable evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency.

9.1 Timeliness

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

Even if the prospect of entry does not deter the competitive effects of concern, post-merger entry may counteract them. This requires that the impact of entrants in the relevant market be rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry.

The Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices.

9.2 Likelihood

Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exits. Profitability depends upon (a) the output level the entrant is likely to obtain, accounting for the obstacles facing new entrants; (b) the price the entrant would likely obtain in the post-merger market, accounting for the impact of that entry itself on prices; and (c) the cost per unit the entrant would likely incur, which may depend upon the scale at which the entrant would operate.

9.3 Sufficiency

Even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern. For example, in a differentiated product industry, entry may be insufficient because the products offered by entrants are not close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable. Entry may also be insufficient due to constraints that limit entrants' competitive effectiveness, such as limitations on the capabilities of the firms best placed to enter or reputational barriers to rapid expansion by new entrants. Entry by a single firm that will replicate at least the scale and strength of one of the merging firms is sufficient. Entry by one or more firms operating at a smaller scale may be sufficient if such firms are not at a significant competitive disadvantage.

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Although merging parties sometimes argue that a poor or weakening position should serve as a defense even when it does not meet these elements, the Supreme Court has "confine[d] the failing company doctrine to its present narrow scope."[63] The Agencies evaluate evidence of a failing firm consistent with this prevailing law.[64]

3.2. Entry and Repositioning

Merging parties sometimes raise a rebuttal argument that a reduction in competition resulting from the merger would induce entry or repositioning[65] into the relevant market, preventing the merger from substantially lessening competition or tending to create a monopoly in the first place. This argument posits that a merger may, by substantially lessening competition, make the market more profitable for the merged firm and any remaining competitors, and that this increased profitability may induce new entry. To evaluate this rebuttal evidence, the Agencies assess whether entry induced by the merger would be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."[66]

Timeliness. To show that no substantial lessening of competition is threatened by a merger, entry must be rapid enough to replace lost competition before any effect from the loss of competition due to the merger may occur. Entry in most industries takes a significant amount of time and is therefore insufficient to counteract any substantial lessening of competition that is threatened by a merger. Moreover, the entry must be durable: an entrant that does not plan to sustain its investment or that may exit the market would not ensure long-term preservation of competition.

Likelihood. Entry induced by lost competition must be so likely that no substantial lessening of competition is threatened by the merger. Firms make entry decisions based on the market conditions they expect once they participate in the market. If the new entry is sufficient to counteract the merger's effect on competition, the Agencies analyze why the merger would induce entry that was not planned in pre-merger competitive conditions.

The Agencies also assess whether the merger may increase entry barriers. For example, the merging firms may have a greater ability to discourage or block new entry when combined than they would have as separate firms. Mergers may enable or incentivize unilateral or coordinated exclusionary

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Liquidation value is the highest value the assets could command outside the market. If a reasonable alternative offer was rejected, the parties cannot claim that the business is failing.

[63] *Citizen Publ'g*, 394 U.S. at 139.

[64] The Agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless: (1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill; and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its assets in the relevant market and pose a less severe danger to competition than does the proposed acquisition. Because firms can allocate costs, revenues, and intra-company transactions among their subsidiaries and divisions, the Agencies require evidence that is not solely based on management plans that could have been prepared for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market.

[65] Repositioning is a supply-side response that is evaluated like entry. If repositioning requires movement of assets from other markets, the Agencies will consider the costs and competitive effects of doing so. Repositioning that would reduce competition in the markets from which products or services are moved is not a cognizable rebuttal for a lessening of competition in the relevant market.

[66] *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019).

strategies that make entry more difficult. Entry can be particularly challenging when a firm must enter at multiple levels of the market at sufficient scale to compete effectively.

Sufficiency. Even where timely and likely, the prospect of entry may not effectively prevent a merger from threatening a substantial lessening of competition. Entry may be insufficient due to a wide variety of constraints that limit an entrant's effectiveness as a competitor. Entry must at least replicate the scale, strength, and durability of one of the merging parties to be considered sufficient. The Agencies typically do not credit entry that depends on lessening competition in other markets.

As part of their analysis, the Agencies will consider the economic realities at play. For example, lack of successful entry in the past will likely suggest that entry may be slow or difficult. Recent examples of entry, whether successful or unsuccessful, provide the starting point for identifying the elements of practical entry barriers and the features of the industry that facilitate or interfere with entry. The Agencies will also consider whether the parties' entry arguments are consistent with the rationale for the merger or imply that the merger itself would be unprofitable.

3.3. Procompetitive Efficiencies

The Supreme Court has held that "possible economies [from a merger] cannot be used as a defense to illegality."[67] Competition usually spurs firms to achieve efficiencies internally, and firms also often work together using contracts short of a merger to combine complementary assets without the full anticompetitive consequences of a merger.

Merging parties sometimes raise a rebuttal argument that, notwithstanding other evidence that competition may be lessened, evidence of procompetitive efficiencies shows that no substantial lessening of competition is in fact threatened by the merger. This argument asserts that the merger would not substantially lessen competition in any relevant market in the first place.[68] When assessing this argument, the Agencies will not credit vague or speculative claims, nor will they credit benefits outside the relevant market that would not prevent a lessening of competition in the relevant market. Rather, the Agencies examine whether the evidence[69] presented by the merging parties shows each of the following:

Merger Specificity. The merger will produce substantial competitive benefits that could not be achieved without the merger under review.[70] Alternative ways of achieving the claimed benefits are considered in making this determination. Alternative arrangements could include organic growth of one of the merging firms, contracts between them, mergers with others, or a partial merger involving only those assets that give rise to the procompetitive efficiencies.

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[67] *Phila. Nat'l Bank*, 374 U.S. at 371; *Procter & Gamble Co.*, 386 U.S. at 580 ("Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.").

[68] *United States v. Anthem*, 855 F.3d 345, 353-55 (D.C. Cir. 2017) (although efficiencies not a "defense" to antitrust liability, evidence sometimes used "to rebut a prima facie case"); *Saint Alphonsus Medical Center-Nampa*, 778 F.3d at 791 ("The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate.").

[69] In general, evidence related to efficiencies developed prior to the merger challenge is much more probative than evidence developed during the Agencies' investigation or litigation.

[70] If inter-firm collaborations are achievable by contract, they are not merger specific. The Agencies will credit the merger specificity of efficiencies only in the presence of evidence that a contract to achieve the asserted efficiencies would not be practical. *See Anthem*, 855 F.3d at 357.

Defenses: Efficiencies

U.S. Dep t of Justice & Fed. Trade Comm n, 2010 Horizontal Merger Guidelines § 10 (rev. Aug. 19, 2010) (Efficiencies)

10. Efficiencies

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets. In a unilateral effects context, incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to elevate price. Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price. In a

coordinated effects context, incremental cost reductions may make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm. Even when efficiencies generated through a merger enhance a firm's ability to compete, however, a merger may have other effects that may lessen competition and make the merger anticompetitive.

The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies.[13] Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination. The Agencies do not insist upon a less restrictive alternative that is merely theoretical.

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process. By contrast, efficiency claims substantiated by analogous past experience are those most likely to be credited.

Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.

The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.[14] To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price

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[13] The Agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing. If a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency.

[14] The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.

increases in that market.[15] In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.

In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly. Just as adverse competitive effects can arise along multiple dimensions of conduct, such as pricing and new product development, so too can efficiencies operate along multiple dimensions. Similarly, purported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value.

The Agencies have found that certain types of efficiencies are more likely to be cognizable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the incremental cost of production, are more likely to be susceptible to verification and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost, are less likely to be merger-specific or substantial, or may not be cognizable for other reasons.

When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing. The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation. Research and development cost savings may be substantial and yet not be cognizable efficiencies because they are difficult to verify or result from anticompetitive reductions in innovative activities.

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[15] The Agencies normally give the most weight to the results of this analysis over the short term. The Agencies also may consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict. Efficiencies relating to costs that are fixed in the short term are unlikely to benefit customers in the short term, but can benefit customers in the longer run, e.g., if they make new product introduction less expensive.

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strategies that make entry more difficult. Entry can be particularly challenging when a firm must enter at multiple levels of the market at sufficient scale to compete effectively.

Sufficiency. Even where timely and likely, the prospect of entry may not effectively prevent a merger from threatening a substantial lessening of competition. Entry may be insufficient due to a wide variety of constraints that limit an entrant's effectiveness as a competitor. Entry must at least replicate the scale, strength, and durability of one of the merging parties to be considered sufficient. The Agencies typically do not credit entry that depends on lessening competition in other markets.

As part of their analysis, the Agencies will consider the economic realities at play. For example, lack of successful entry in the past will likely suggest that entry may be slow or difficult. Recent examples of entry, whether successful or unsuccessful, provide the starting point for identifying the elements of practical entry barriers and the features of the industry that facilitate or interfere with entry. The Agencies will also consider whether the parties' entry arguments are consistent with the rationale for the merger or imply that the merger itself would be unprofitable.

3.3. Procompetitive Efficiencies

The Supreme Court has held that "possible economies [from a merger] cannot be used as a defense to illegality."[67] Competition usually spurs firms to achieve efficiencies internally, and firms also often work together using contracts short of a merger to combine complementary assets without the full anticompetitive consequences of a merger.

Merging parties sometimes raise a rebuttal argument that, notwithstanding other evidence that competition may be lessened, evidence of procompetitive efficiencies shows that no substantial lessening of competition is in fact threatened by the merger. This argument asserts that the merger would not substantially lessen competition in any relevant market in the first place.[68] When assessing this argument, the Agencies will not credit vague or speculative claims, nor will they credit benefits outside the relevant market that would not prevent a lessening of competition in the relevant market. Rather, the Agencies examine whether the evidence[69] presented by the merging parties shows each of the following:

Merger Specificity. The merger will produce substantial competitive benefits that could not be achieved without the merger under review.[70] Alternative ways of achieving the claimed benefits are considered in making this determination. Alternative arrangements could include organic growth of one of the merging firms, contracts between them, mergers with others, or a partial merger involving only those assets that give rise to the procompetitive efficiencies.

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[67] *Phila. Nat'l Bank*, 374 U.S. at 371; *Procter & Gamble Co.*, 386 U.S. at 580 ("Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.").

[68] *United States v. Anthem*, 855 F.3d 345, 353-55 (D.C. Cir. 2017) (although efficiencies not a "defense" to antitrust liability, evidence sometimes used "to rebut a prima facie case"); *Saint Alphonsus Medical Center-Nampa*, 778 F.3d at 791 ("The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate.").

[69] In general, evidence related to efficiencies developed prior to the merger challenge is much more probative than evidence developed during the Agencies' investigation or litigation.

[70] If inter-firm collaborations are achievable by contract, they are not merger specific. The Agencies will credit the merger specificity of efficiencies only in the presence of evidence that a contract to achieve the asserted efficiencies would not be practical. *See Anthem*, 855 F.3d at 357.

Verifiability. These benefits are verifiable, and have been verified, using reliable methodology and evidence not dependent on the subjective predictions of the merging parties or their agents. Procompetitive efficiencies are often speculative and difficult to verify and quantify, and efficiencies projected by the merging firms often are not realized. If reliable methodology for verifying efficiencies does not exist or is otherwise not presented by the merging parties, the Agencies are unable to credit those efficiencies.

Prevents a Reduction in Competition. To the extent efficiencies merely benefit the merging firms, they are not cognizable. The merging parties must demonstrate through credible evidence that, within a short period of time, the benefits will prevent the risk of a substantial lessening of competition in the relevant market.

Not Anticompetitive. Any benefits claimed by the merging parties are cognizable only if they do not result from the anticompetitive worsening of terms for the merged firm's trading partners.[71]

Procompetitive efficiencies that satisfy each of these criteria are called cognizable efficiencies. To successfully rebut evidence that a merger may substantially lessen competition, cognizable efficiencies must be of a nature, magnitude, and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market. Cognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly.

[71] The Agencies will not credit efficiencies if they reflect or require a decrease in competition in a separate market. For example, if input costs are expected to decrease, the cost savings will not be treated as an efficiency if they reflect an increase in monopsony power.