

MERGER ANTITRUST LAW

Unit 6: Ice Cream Merger

Class 14

Professor Dale Collins
Georgetown University Law Center
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Unilateral Effects

Horizontal Merger Guidelines



U.S. Department of Justice
and the
Federal Trade Commission

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6. Unilateral Effects

The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition. Such unilateral effects are most apparent in a merger to monopoly in a relevant market, but are by no means limited to that case. Whether cognizable efficiencies resulting from the merger are likely to reduce or reverse adverse unilateral effects is addressed in Section 10.

Several common types of unilateral effects are discussed in this section. Section 6.1 discusses unilateral price effects in markets with differentiated products. Section 6.2 discusses unilateral effects in markets where sellers negotiate with buyers or prices are determined through auctions. Section 6.3 discusses unilateral effects relating to reductions in output or capacity in markets for relatively homogeneous products. Section 6.4 discusses unilateral effects arising from diminished innovation or reduced product variety. These effects do not exhaust the types of possible unilateral effects; for example, exclusionary unilateral effects also can arise.

A merger may result in different unilateral effects along different dimensions of competition. For example, a merger may increase prices in the short term but not raise longer-term concerns about innovation, either because rivals will provide sufficient innovation competition or because the merger will generate cognizable research and development efficiencies. See Section 10.

6.1 Pricing of Differentiated Products

In differentiated product industries, some products can be very close substitutes and compete strongly with each other, while other products are more distant substitutes and compete less strongly. For example, one high-end product may compete much more directly with another high-end product than with any low-end product.

A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.

The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects. Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice. The Agencies consider any reasonably available and reliable information to evaluate the extent of direct competition between the products sold by the merging firms. This includes documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys. The types of evidence relied on often overlap substantially with the types of evidence of customer substitution relevant to the hypothetical monopolist test. See Section 4.1.1.

Substantial unilateral price elevation post-merger for a product formerly sold by one of the merging firms normally requires that a significant fraction of the customers purchasing that product view

products formerly sold by the other merging firm as their next-best choice. However, unless pre-merger margins between price and incremental cost are low, that significant fraction need not approach a majority. For this purpose, incremental cost is measured over the change in output that would be caused by the price change considered. A merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner.

Example 19: In Example 5, the merged entity controlling Products A and B would raise prices ten percent, given the product offerings and prices of other firms. In that example, one-third of the sales lost by Product A when its price alone is raised are diverted to Product B. Further analysis is required to account for repositioning, entry, and efficiencies.

In some cases, the Agencies may seek to quantify the extent of direct competition between a product sold by one merging firm and a second product sold by the other merging firm by estimating the diversion ratio from the first product to the second product. The diversion ratio is the fraction of unit sales lost by the first product due to an increase in its price that would be diverted to the second product. Diversion ratios between products sold by one merging firm and products sold by the other merging firm can be very informative for assessing unilateral price effects, with higher diversion ratios indicating a greater likelihood of such effects. Diversion ratios between products sold by merging firms and those sold by non-merging firms have at most secondary predictive value.

Adverse unilateral price effects can arise when the merger gives the merged entity an incentive to raise the price of a product previously sold by one merging firm and thereby divert sales to products previously sold by the other merging firm, boosting the profits on the latter products. Taking as given other prices and product offerings, that boost to profits is equal to the value to the merged firm of the sales diverted to those products. The value of sales diverted to a product is equal to the number of units diverted to that product multiplied by the margin between price and incremental cost on that product. In some cases, where sufficient information is available, the Agencies assess the value of diverted sales, which can serve as an indicator of the upward pricing pressure on the first product resulting from the merger. Diagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration. The Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products. If the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.¹¹

Where sufficient data are available, the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger. These models often include independent price responses by non-merging firms. They also can incorporate merger-specific efficiencies. These merger simulation methods need not rely on market definition. The Agencies do not treat merger simulation evidence as conclusive in itself, and they place more weight on whether their merger simulations consistently predict substantial price increases than on the precise prediction of any single simulation.

¹¹ For this purpose, the value of diverted sales is measured in proportion to the lost revenues attributable to the reduction in unit sales resulting from the price increase. Those lost revenues equal the reduction in the number of units sold of that product multiplied by that product's price.

A merger is unlikely to generate substantial unilateral price increases if non-merging parties offer very close substitutes for the products offered by the merging firms. In some cases, non-merging firms may be able to reposition their products to offer close substitutes for the products offered by the merging firms. Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency. See Section 9. The Agencies consider whether repositioning would be sufficient to deter or counteract what otherwise would be significant anticompetitive unilateral effects from a differentiated products merger.

6.2 Bargaining and Auctions

In many industries, especially those involving intermediate goods and services, buyers and sellers negotiate to determine prices and other terms of trade. In that process, buyers commonly negotiate with more than one seller, and may play sellers off against one another. Some highly structured forms of such competition are known as auctions. Negotiations often combine aspects of an auction with aspects of one-on-one negotiation, although pure auctions are sometimes used in government procurement and elsewhere.

A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger. The Agencies analyze unilateral effects of this type using similar approaches to those described in Section 6.1.

Anticompetitive unilateral effects in these settings are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business. These effects also are likely to be greater, the greater advantage the runner-up merging firm has over other suppliers in meeting customers' needs. These effects also tend to be greater, the more profitable were the pre-merger winning bids. All of these factors are likely to be small if there are many equally placed bidders.

The mechanisms of these anticompetitive unilateral effects, and the indicia of their likelihood, differ somewhat according to the bargaining practices used, the auction format, and the sellers' information about one another's costs and about buyers' preferences. For example, when the merging sellers are likely to know which buyers they are best and second best placed to serve, any anticompetitive unilateral effects are apt to be targeted at those buyers; when sellers are less well informed, such effects are more apt to be spread over a broader class of buyers.

6.3 Capacity and Output for Homogeneous Products

In markets involving relatively undifferentiated products, the Agencies may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price. A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities. A firm may also divert the use of capacity away from one relevant market and into another so as to raise the price in the former market. The competitive analyses of these alternative modes of output suppression may differ.

A unilateral output suppression strategy is more likely to be profitable when (1) the merged firm's market share is relatively high; (2) the share of the merged firm's output already committed for sale at prices unaffected by the output suppression is relatively low; (3) the margin on the suppressed output is relatively low; (4) the supply responses of rivals are relatively small; and (5) the market elasticity of demand is relatively low.

A merger may provide the merged firm a larger base of sales on which to benefit from the resulting price rise, or it may eliminate a competitor that otherwise could have expanded its output in response to the price rise.

Example 20: Firms A and B both produce an industrial commodity and propose to merge. The demand for this commodity is insensitive to price. Firm A is the market leader. Firm B produces substantial output, but its operating margins are low because it operates high-cost plants. The other suppliers are operating very near capacity. The merged firm has an incentive to reduce output at the high-cost plants, perhaps shutting down some of that capacity, thus driving up the price it receives on the remainder of its output. The merger harms customers, notwithstanding that the merged firm shifts some output from high-cost plants to low-cost plants.

In some cases, a merger between a firm with a substantial share of the sales in the market and a firm with significant excess capacity to serve that market can make an output suppression strategy profitable.¹² This can occur even if the firm with the excess capacity has a relatively small share of sales, if that firm's ability to expand, and thus keep price from rising, has been making an output suppression strategy unprofitable for the firm with the larger market share.

6.4 Innovation and Product Variety

Competition often spurs firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.

The first of these effects is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm. The second, longer-run effect is most likely to occur if at least one of the merging firms has capabilities that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm. The Agencies therefore also consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction.

The Agencies evaluate the extent to which successful innovation by one merging firm is likely to take sales from the other, and the extent to which post-merger incentives for future innovation will be lower than those that would prevail in the absence of the merger. The Agencies also consider whether the merger is likely to enable innovation that would not otherwise take place, by bringing together

¹² Such a merger also can cause adverse coordinated effects, especially if the acquired firm with excess capacity was disrupting effective coordination.

complementary capabilities that cannot be otherwise combined or for some other merger-specific reason. See Section 10.

The Agencies also consider whether a merger is likely to give the merged firm an incentive to cease offering one of the relevant products sold by the merging parties. Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.

If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product. If there is evidence of such an effect, the Agencies may inquire whether the reduction in variety is largely due to a loss of competitive incentives attributable to the merger. An anticompetitive incentive to eliminate a product as a result of the merger is greater and more likely, the larger is the share of profits from that product coming at the expense of profits from products sold by the merger partner. Where a merger substantially reduces competition by bringing two close substitute products under common ownership, and one of those products is eliminated, the merger will often also lead to a price increase on the remaining product, but that is not a necessary condition for anticompetitive effect.

Example 21: Firm A sells a high-end product at a premium price. Firm B sells a mid-range product at a lower price, serving customers who are more price sensitive. Several other firms have low-end products. Firms A and B together have a large share of the relevant market. Firm A proposes to acquire Firm B and discontinue Firm B's product. Firm A expects to retain most of Firm B's customers. Firm A may not find it profitable to raise the price of its high-end product after the merger, because doing so would reduce its ability to retain Firm B's more price-sensitive customers. The Agencies may conclude that the withdrawal of Firm B's product results from a loss of competition and materially harms customers.

7. Coordinated Effects

A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm's incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals.

Coordinated interaction includes a range of conduct. Coordinated interaction can involve the explicit negotiation of a common understanding of how firms will compete or refrain from competing. Such conduct typically would itself violate the antitrust laws. Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction. Coordinated interaction alternatively can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by



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concentrated market that involves an increase in the HHI of more than 100 points¹⁴ 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 $2 \times 20 \times 5 = 200$.

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, that ordinarily suggests that the merger may substantially lessen competition.¹⁸ Although a change in market structure can also indicate risk of competitive harm (see Guideline 1), an analysis of the existing competition between the merging firms can demonstrate that a merger threatens competitive harm independent from an analysis of market shares.

Competition often involves firms trying to win business by offering lower prices, new or better products and services, more attractive features, higher wages, improved benefits, or better terms relating to various additional dimensions of competition. This can include competition to research and develop products or services, and the elimination of such competition may result in harm even if such products or services are not yet commercially available. The more the merging parties have shaped one another's behavior, or have affected one another's sales, profits, valuation, or other drivers of behavior, the more significant the competition between them.

The Agencies examine a variety of indicators to identify substantial competition. For example:

Strategic Deliberations or Decisions. The Agencies may analyze the extent of competition between the merging firms by examining evidence relating to strategic deliberations or decisions in the regular course of business. For example, in some markets, the firms may monitor each other's pricing, marketing campaigns, facility locations, improvements, products, capacity, output, input costs, and/or innovation plans. This can provide evidence of competition between the merging firms, especially when they react by taking steps to preserve or enhance the competitiveness or profitability of their own products or services.

Prior Merger, Entry, and Exit Events. The Agencies may look to historical events to assess the presence and substantiality of direct competition between the merging firms. For example, the Agencies may examine the competitive impact of recent relevant mergers, entry, expansion, or exit events.

Customer Substitution. Customers' willingness to switch between different firms' products is an important part of the competitive process. Firms are closer competitors the more that customers are willing to switch between their products. The Agencies use a variety of tools, detailed in Section 4.2, to assess customer substitution.

Impact of Competitive Actions on Rivals. When one firm takes competitive actions to attract customers, this can benefit the firm at the expense of its rivals. The Agencies may gauge the extent of competition between the merging firms by considering the impact that competitive actions by one of the merging firms has on the other merging firm. The impact of a firm's competitive actions on a rival is generally greater when customers consider the firm's products and the rival's products to be closer substitutes, so that a firm's competitive action results in greater lost sales for the rival, and when the profitability of the rival's lost sales is greater.

Impact of Eliminating Competition Between the Firms. In some instances, evidence may be available to assess the impact of competition from one firm on the other's actions, such as firm choices

leads them to compete less aggressively with one another, other firms in the market can in turn compete less aggressively, decreasing the overall intensity of competition.

¹⁸ See also *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 669-70 (1964) (per curiam) (“[I]t [is] clear that the elimination of significant competition between [merging parties] constitutes an unreasonable restraint of trade in violation of § 1 of the Sherman Act. . . . It [can be] enough that the two . . . compete[], that their competition [is] not insubstantial and that the combination [would] put an end to it.”); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568-70 (6th Cir. 2014), *cert. denied*, 575 U.S. 996 (2015).

about price, quality, wages, or another dimension of competition. Section 4.2 describes a variety of approaches to measuring such impacts.

Additional Evidence, Tools, and Metrics. The Agencies may use additional evidence, tools, and metrics to assess the loss of competition between the firms. Depending on the realities of the market, different evidence, tools, or metrics may be appropriate.

Section 4.2 provides additional detail about the approaches that the Agencies use to assess competition between or among firms.

2.3. Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination.

The Agencies determine that a merger may substantially lessen competition when it meaningfully increases the risk of coordination among the remaining firms in a relevant market or makes existing coordination more stable or effective.¹⁹ Firms can coordinate across any or all dimensions of competition, such as price, product features, customers, wages, benefits, or geography. Coordination among rivals lessens competition whether it occurs explicitly—through collusive agreements between competitors not to compete or to compete less—or tacitly, through observation and response to rivals. Because tacit coordination often cannot be addressed under Section 1 of the Sherman Act, the Agencies vigorously enforce Section 7 of the Clayton Act to prevent market structures conducive to such coordination.

Tacit coordination can lessen competition even when it does not rise to the level of an agreement and would not itself violate the law. For example, in a concentrated market a firm may forego or soften an aggressive competitive action because it anticipates rivals responding in kind. This harmful behavior is more common the more concentrated markets become, as it is easier to predict the reactions of rivals when there are fewer of them.

To assess the extent to which a merger may increase the likelihood, stability, or effectiveness of coordination, the Agencies often consider three primary factors and several secondary factors. The Agencies may consider additional factors depending on the market.

2.3.A. Primary Factors

The Agencies may conclude that post-merger market conditions are susceptible to coordinated interaction and that the merger materially increases the risk of coordination if any of the three primary factors are present.

Highly Concentrated Market. By reducing the number of firms in a market, a merger increases the risk of coordination. The fewer the number of competitively meaningful rivals prior to the merger, the greater the likelihood that merging two competitors will facilitate coordination. Markets that are highly concentrated after a merger that significantly increases concentration (see Guideline 1) are presumptively susceptible to coordination. If merging parties assert that a highly concentrated market is not susceptible to coordination, the Agencies will assess this rebuttal evidence using the framework

¹⁹ See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229-30 (1993) (“In the § 7 context, it has long been settled that excessive concentration, and the oligopolistic price coordination it portends, may be the injury to competition the Act prohibits.”).

UNITED STATES V. BAZAARVOICE, INC.
No. 13-CV-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014)
(excerpt on unilateral effects¹)

WILLIAM H. ORRICK, United States District Judge

[On June 12, 2012, Bazaarvoice acquired PowerReviews for \$168.2 million in a non-HSR reportable transaction.² Six months later, on January 10, 2013, the DOJ filed an civil antitrust action alleging the acquisition violated Section 7 and seeking an injunction to require Bazaarvoice to divest PowerReviews. According to the government, Bazaarvoice was the primary supplier of consumer-generated product rating and review (R&R) platforms used by online retailers and other businesses to organize and display customer-generated ratings for their products, and PowerReviews was its primary competitor. In January 2014, following a three-week trial, Judge Orrick found that the merger violated Section 7 because it eliminated Bazaarvoice’s only meaningful competitor in the product rating and review platform market.]

. . .

**C. It is probable that the transaction will substantially
lessen competition and result in higher prices**

- i. Economic Testimony Supports the Conclusion That the Transaction Will Lead to Substantially Higher Prices for Many Bazaarvoice and PowerReviews Customers

266. The merger of Bazaarvoice and PowerReviews is likely to result in significant anticompetitive unilateral effects. A “unilateral” effect is one that arises solely through the altered behavior of Bazaarvoice without the necessity of coordinated behavior with other R & R platform suppliers.

267. Economic theory predicts that the merger will result in significant unilateral effects for customers that viewed Bazaarvoice and PowerReviews as the most attractive suppliers of R&R platforms and for whom the third-best supplier has a distinctly inferior product compared to the weaker of the two merged parties. This theoretical prediction was supported by evidence at trial, including in the win/loss data in Bazaarvoice’s Salesforce database and in the data compiled from “how the deal was done” emails created by Bazaarvoice sales people (HTDWD). While both data sets may be incomplete, as Bazaarvoice charges, there was no policy within Bazaarvoice of only recording certain competitors in the data or taking other action which would create a bias in the data. The Court finds that it is reliable.

¹ Record citations, internal cross-references, and footnotes omitted.

² PowerReviews had less than \$12 million in revenues in the year before the transaction, which was below the HSR Act’s “size of parties” threshold in effect at the time.

268. The win/loss data in Bazaarvoice’s Salesforce database tracks instances in which Bazaarvoice won or lost business. Although [former Bazaarvoice Chief Revenue Officer Michael] Osborne testified that the Salesforce database was not “dependable,” he admitted that the data contained in the database was accurate enough to update the management and the Board of Directors about the sales pipeline.

269. Dr. [Carl] Shapiro [the DOJ’s expert economist] examined 480 R&R platform sales opportunities in North America identified in the Bazaarvoice Salesforce database that were created between August 2005 and July 2012 and that contained information about competitors. Dr. Shapiro concluded that PowerReviews was identified as a competitive alternative in 75 percent of the opportunities. The next closest alternative, in-house solutions, appears in 18 percent of the opportunities. No other alternative appears in more than three percent of the opportunities.

270. The results are similar when the analysis is limited to customers in the IR500 [the leading 500 internet retailers]. As shown by the chart below, Dr. Shapiro concludes that PowerReviews was identified as a competitive alternative solution in 83 percent of the opportunities. The next closest alternative, in-house solutions, appears in 15 percent of the opportunities. No other competitive alternative appears in more than three percent of the opportunities.

Frequency of Competitors in Bazaarvoice Win/Loss Opportunities

IR500, Core R & R Products Only

Competitor	Opps	Frequency
PowerReviews	121	83%
Internal Build	22	15%
Pluck	4	3%
Viewpoints	4	3%
Reevoo	1	1%
Lithium	0	0%
Expo	0	0%
Jive	0	0%
Zuberance	0	0%
“Other”	2	1%
<i>Total Opportunities</i>	<i>146</i>	

271. The Bazaarvoice HTDWD email dataset produces similar results. Bazaarvoice salespeople were generally expected to send a How the Deal Was Done (“HTDWD”) email to a specific group email list at the company at the close of each transaction explaining how the transaction was accomplished. It is a useful data set to help evaluate the competition faced by Bazaarvoice.

272. Although Bazaarvoice had no formal process to ensure the HTDWD emails were complete or accurate, Bazaarvoice did not instruct its employees to skew the reports to overstate engagements involving PowerReviews. There was no bias and the

fact that it, like most data, is incomplete does not render the analysis unreliable, especially when it is consistent with the other evidence.

273. As shown in the following chart, Dr. Shapiro examined 143 Bazaarvoice HTDWD emails sent between September 2008 and July 2012 in which a competitor was identified and concluded that PowerReviews accounted for 80 percent of the references to competitors in these emails. The next closest alternative identified was in-house solutions, which accounted for 12 percent of the competitive references. No other competitive alternative appears in more than three percent of the emails.

Competitor Counts in Bazaarvoice “How the Deal was Done” Documents

Ratings and Reviews Deals Only

Competitor	Opps	Frequency
PowerReviews	114	80%
In-house	17	12%
Pluck	4	3%
Shopzilla	2	1%
Viewpoints	2	1%
Buzz Metrics	1	1%
Gigya	1	1%
Reevoo	1	1%
Trip Advisor	1	1%
<i>Total Competitor Counts</i>	<i>143</i>	

274. Dr. Shapiro identified three types of customers “that are most likely to be vulnerable and harmed” by the merger. These three groups are Bazaarvoice customers, PowerReviews legacy customers, and customers who place a high value on syndication.

275. Dr. Shapiro concludes that the unilateral price effects of the Bazaarvoice/PowerReviews merger will be most pronounced for their existing customers when those customers’ current contracts come up for renewal. These customers have already revealed their preference for a commercial R & R platform and because of the merger they have lost the ability to play Bazaarvoice and PowerReviews off one another to get a lower price.

276. One mechanism Bazaarvoice could employ to unilaterally raise prices would be to eliminate the PowerReviews product from a customer’s choice set and migrate legacy customers from the PowerReviews enterprise platform to the higher-priced Bazaarvoice product. While the customer may get additional features, these would not be features that the customer would otherwise choose if PowerReviews’s lower-priced alternative were still an option.

277. Bazaarvoice planned to migrate the largest PowerReviews customers to the higher-priced Bazaarvoice platform. In proposing an acquisition of PowerReviews in April 2011, Bazaarvoice’s co-founder Brant Barton described this as one “Pro” in

favor of the deal: “[w]e could migrate their Tier 1 customers to our platform....” In addition, a May 2012 Bazaarvoice presentation points out that average revenue from IR500 customers at PowerReviews in terms of annualized cumulative billings is 83% below Bazaarvoice’s, adding:

[The merger p]rovides us with the opportunity to increase revenue from [PowerReviews’] existing clients via migration to the Bazaarvoice platform a [sic] higher price points in return for greater features and functionality that [sic] those of [PowerReviews]. . . .

278. As a result of the acquisition, Bazaarvoice gained the ability to unilaterally charge higher prices for its new customers who do not consider in-house (or fringe competitor solutions) to be a viable option, as compared to its pre-merger new customers. In many instances, Bazaarvoice can effectively price discriminate against such customers because it collects detailed information about a customer’s requirements and budget constraints during the sales process. The more effectively Bazaarvoice can engage in targeted “price discrimination” based on customer attributes, the greater the unilateral competitive effects.

279. Customers for whom syndication is particularly important, especially brand customers, are also likely to be harmed by the merger. For brand customers looking for a syndication network with significant retail customers, PowerReviews was the closest and only credible alternative to Bazaarvoice. After the merger, these customers have no alternative R&R platform with a significant syndication network and therefore these customers have lost significant bargaining leverage. This applies both to new customers as well as legacy customers who now have access to a larger syndication network, as “Bazaarvoice will seek to capture that value in the price they charge. The customers’ return will depend on what their bargaining leverage is, and that’s been weakened.”

280. Other commercial suppliers of R & R platforms are not sufficiently close substitutes to Bazaarvoice’s platform to prevent a significant post-merger price increase. In April 2011, Barton discussed the absence of competitive alternatives for customers, concluding that Bazaarvoice would “retain an extremely high percentage of [PowerReviews] customers,” because available alternatives for disgruntled customers were “scarce” and “low-quality.” After the acquisition, a customer made the same point to Luedtke: “from a retailers stand point I have to say I am a little concerned that there is now only one option for customer reviews.” Similarly, BBBeyond came to the conclusion that there were only two options for them in 2009, Bazaarvoice and PowerReviews, and came to the same conclusion in 2012.

. . .

NOTES

1. After the court found the acquisition violated Section 7, Bazaarvoice and the DOJ negotiated a consent decree to govern the divestiture.³ Under the terms of the agreement, Bazaarvoice will divest all of the assets it acquired in the acquisition of PowerReviews almost two years earlier plus assets acquired after the transaction obtained for use with the PowerReviews assets. In addition, Bazaarvoice must provide a four-year license, at cost, to the divestiture buyer to allow it to sell customers Bazaarvoice’s syndication services—one of the most distinguishing features of the Bazaarvoice platform and a key to Bazaarvoice’s success.⁴ Bazaarvoice must also waive any potential breach-of-contract claims against its customers to allow them to switch providers without penalty as well as any trade secret restrictions for its employees hired by the divestiture buyer.

³ [Stipulation and \[Proposed\] Order](#), United States v. Bazaarvoice, Inc., No. 13-CV-00133-WHO (N.D. Cal. Apr. 24, 2014) (including [Exhibit A—Plaintiff’s Second Amended \[Proposed\] Final Judgment](#)).

⁴ “Syndication Services” are products and services currently provided by Bazaarvoice that provide the ability to share product ratings and reviews and related content between two or more customers.

UNITED STATES V. ANTHEM, INC.
236 F. Supp. 3d 171, 178-79, 215-20 (D.D.C. 2017)
(excerpt on unilateral effects¹⁹)

AMY BERMAN JACKSON, J.

Anthem and Cigna, the nation’s second and third largest medical health insurance carriers, have agreed to merge. They propose to create the single largest seller of medical healthcare coverage to large commercial accounts, in a market in which there are only four national carriers still standing. The United States Department of Justice, eleven states, and the District of Columbia have sued to stop the merger, and they have carried their burden to demonstrate that the proposed combination is likely to have a substantial effect on competition in what is already a highly concentrated market. Therefore, the Court will not permit the merger to go forward.

Judgment will be entered in favor of the plaintiffs on their first claim, and the merger will be enjoined due to its likely impact on the market for the sale of health insurance to “national accounts”—customers with more than 5000 employees, usually spread over at least two states—within the fourteen states where Anthem operates as the Blue Cross Blue Shield licensee. So the Court does not need to go on to decide the question of whether the combination will also affect competition in the sale to national accounts within the larger geographic market consisting of the entire United States. The Court also does not need to rule on the allegations in plaintiffs’ second claim that the merger will harm competition downstream in a different product market: the sale of health insurance to “large group” employers of more than 100 employees in thirty-five separate local regions within the Anthem states. But the evidence has shown that the proposed acquisition will have an anticompetitive effect on the sale of health insurance to large groups in at least one of those markets: Richmond, Virginia. Finally, given the ruling against the merger, the Court need not reach the allegations in the complaint that the merger will also harm competition upstream in the market for the purchase of healthcare services from hospitals and physicians in the same 35 locations.

...

III. Plaintiffs have carried their burden to establish that the merger is likely to harm competition.

The Supreme Court has adopted a “totality-of-the-circumstances approach to the statutes, weighing a variety of factors to determine the effects of particular transactions on competition.” *Baker Hughes*, 908 F.2d at 984. These factors may include: ease of entry in the marketplace, the significance of market shares and concentration; the likelihood of express collusion or tacit coordination; prevalent marketing and sales

¹⁹ Citations to briefs and the evidentiary record and to footnotes omitted.

methods; the absence of a trend toward concentration; industry structure; any weakness of the data underlying the prima facie case; elasticity of industry demand, product differentiation; and the prospect of efficiencies from the merger. *Id.*

Courts examine two types of effects that may arise from mergers: coordinated effects and unilateral effects. Coordinated effects refer to markets with few competitors, in which firms may “coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels.” *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014), *quoting H & R Block*, 833 F.Supp.2d at 77. An example of this would be parallel pricing by two gas stations located across the street from each other in a remote small town. *Id.* at 568–69. Unilateral effects refers to a merger’s elimination of competition between the two merging companies, which “may alone constitute a substantial lessening of competition.” *Id. quoting* [2010] Guidelines § 6. “The most obvious example of this phenomenon is a ‘merger to monopoly’—e.g., where a market has only two firms, which then merge into one—but unilateral effects ‘are by no means limited to that case.’ ” *Id. quoting* Guidelines § 6.

Relevant evidence of a merger’s potential unilateral effects include the merging companies’ ordinary course of business documents, testimony of industry participants, and the history of head-to-head competition between the two merging parties. *See, e.g., Staples II [FTC v. Staples, Inc.]*, , 190 F. Supp. 3d [100] at 131-33 [(D.D.C. 2016)]; *H & R Block*, 833 F. Supp. 2d at 73-75, 81-82; *Heinz [FTC v. H.J. Heinz Co.]*, 246 F.3d [708] at 717-18 [(D.C. Cir. 2001)]; *Swedish Match [FTC v. Swedish Match]*, 131 F. Supp. 2d [151] at 169-70 [(D.D.C. 2000)].

The Court finds that the merger will have the anticompetitive effects of eliminating direct competition between the two firms, reducing the number of national carriers from four to three, and diminishing innovation, and that new entrants and other market conditions identified by the defense are not sufficient to forestall price increases and ameliorate these effects.

A. The merger will have the unilateral effect of eliminating the existing head-to-head competition between Anthem and Cigna.

The Horizontal Merger Guidelines advise that “[u]nilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice.” Guidelines § 6.1. But “mergers that eliminate head-to-head competition between close competitors often result in a lessening of competition.” *Staples II*, 190 F. Supp. 3d at 131; *Staples I [FTC v. Staples, Inc.]*, 970 F. Supp. [1066] at 1083 [(D.D.C. 1997)] (holding that “the elimination of a particularly aggressive competitor in a highly concentrated market [is] a factor which is certainly an important consideration when analyzing possible anti-competitive effects”). And this is true even where the merging parties are not the only two, or even the two largest, competitors in the market. *Aetna [United States v. Aetna Inc.]*, 240 F. Supp. 3d 1, at __ (D.D.C. 2017); *see also Sysco*, 113 F. Supp. 3d at 62; *Heinz*, 246 F.3d at 717-19; *H & R Block*, 833 F. Supp. 2d at 83-84.

Given this standard, Anthem's insistence that United, not Cigna, is its "closest" competitor, is beside the point. The acquired firm need not be the other's closest competitor to have an anticompetitive effect; the merging parties only need to be close competitors. *Staples II*, 190 F. Supp. 3d at 131; *see also* Guidelines § 6.1 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition.").

The evidence in this case, including Anthem records and testimony from Anthem witnesses, firmly establishes that United, Cigna, Aetna, and the Blues compete against each other for national accounts, and that together, they dominate the market.

But insurance products are not sold off-the-shelf to every customer for a single price; health benefits coverage sold to national accounts is a "differentiated product," and the carriers compete by submitting bids to individual customers. Therefore, both sides engaged in economic analyses to ascertain what the level of direct competition between Anthem and Cigna has been within the tightly packed national accounts environment. *See* Guidelines § 6.1 (in differentiated product industries, "the extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects").

Dr. [David] Dranove [the DOJ's expert] conducted a diversion analysis, which is used in markets with differentiated products, to examine the level of competition between merging companies. He explained that customers buying group health insurance are "trying to play the top bidders against each other," economists consider the procurement process for group health insurance to be what the Guidelines and economists refer to as an "auction," and this means that this merger will affect competition most significantly when Anthem and Cigna are both among the top bidders.

For that reason, Dr. Dranove analyzed the company's internal data to first isolate the occasions when the two companies had been the top two bidders for any national account's business and then determine how often each won or lost against the other in that situation. He then compared the data to the market shares he had calculated for the *prima facie* case.

Dr. Dranove looked first at situations when the merging companies lost business to each other. He determined that the market shares for national accounts in the Anthem territories indicate that Anthem should win 44% of the contracts where Cigna is the incumbent and loses. But Cigna's internal win/loss data showed that Anthem wins those contracts more than the market shares predicted: Anthem won 60% of those solicitations. Dranove Tr. 952–53 (using Cigna's Salesforce.com win/loss data from 2011 to 2017).

Similarly, the market shares indicated that Cigna should win "about 10 percent" of the contracts when Anthem is the incumbent and loses. Dranove Tr. 953–54; PDX 5. But Anthem's internal win/loss data showed that Cigna won "about 17 percent" of those sales. Dranove Tr. 953–54 (using Anthem's iAvenue win/loss data).

Looking at situations when the merging companies won business away from each other, Dr. Dranove testified that market shares predict that Cigna should have won business from Anthem 44% of the time. But Cigna's data showed that when Cigna

wins an account, it does so about 54% of the time from Anthem. Dranove Tr. 954–55 (using Cigna Salesforce.com win data from 2011 to 2017). And looking at Anthem’s wins, its market share for national accounts would give rise to the prediction that 11% of the wins would be in situations where Cigna was the incumbent and lost. But Anthem’s data showed that when Anthem won a contract from an incumbent, Cigna was the incumbent almost 35% of the time. Dranove Tr. 954–55 (using Anthem’s Salesforce data from 2015 to 2017). In sum, the data showed that Anthem and Cigna are winning business from and losing business to each other more than their market shares would predict.

Given these results, Dr. Dranove concluded that his HHI calculations—which are dramatic in and of themselves—actually understate the competitive significance of the merger, because the underlying market shares understate the closeness of competition between the merging firms.

Not surprisingly, Anthem’s expert conducted a diversion analysis that reached the opposite conclusion: the level of competition between the merging parties for national accounts is smaller than their market shares imply. To calculate his diversion ratios, Dr. [Mark] Israel matched Anthem’s and Cigna’s bid information from 2015 and 2016 to identify instances in which both companies bid. Using each company’s win/loss bid data and customer lists, he calculated how often Anthem and Cigna lost a solicitation that the other company won.

Dr. Israel testified that if Anthem and Cigna were particularly close competitors, then when they both bid for an account, Anthem would be expected to lose more frequently to Cigna than the rate implied by Cigna’s overall market share and, similarly, Cigna should lose more frequently to Anthem than the rate implied by Anthem’s overall market share. But his diversion ratio calculations found that they lost to each other less frequently than the market shares would suggest.

Dr. Israel’s diversion analysis also examined each company’s pricing patterns to discover whether one reacted to the presence of the other as a competitor by offering more competitive ASO bids. He concluded that Anthem’s presence or absence as a competitor on a given bid had no statistically detectable effect on Cigna’s bids, and that the same was true for Anthem’s bids with respect to Cigna’s presence. So, he found that the loss of direct competition between the two would have little or no effect on the merged company’s bids.

In addition, Dr. Israel searched Anthem’s data to cull out the competitive situations in which Anthem must have viewed Cigna as a particularly weak competitor because Cigna’s discounts were six to eight percentage points lower than Anthem’s. He explained that if Cigna were a close competitor, Anthem would be expected to raise its price when Cigna’s discounts were not competitive to its own. But he found that Cigna’s competitiveness on the discount factor had no statistically significant effect on Anthem’s bid.¹⁹⁹

¹⁹⁹ This analysis does not take into account the fact that even with its discount advantage, Anthem has been forced to fend off Cigna not by lowering its ASO fees, but by offering trend guarantees or making other concessions.

Each witness went to great lengths to discredit the other's economic evaluation of the intensity of the direct competition between the two companies. As noted above, Dr. Dranove compared the RFP [request for proposal] bidding situation to the economic model of an auction, *see, e.g.*, Dranove Tr. 943 (“[I]t’s the competition between the two top bidders that ultimately drives the price.”), while Dr. Israel favored the model of a negotiation. Dr. Dranove maintained that Dr. Israel’s negotiation model unrealistically assumed that customers would be armed with perfect knowledge about the carriers’ actual costs and profit margins when responding to a bid, and that they would know “exactly how much the insurance company is willing to sell the product for.”²⁰⁰ According to Dr. Dranove, incorporating this assumption into the merger simulation meant that Dr. Israel’s calculation “dramatically reduce[d] the amount of harm resulting from the price increases.” Dr. Dranove also criticized Dr. Israel for failing to factor in incumbency, and the role that would play in the outcome of any solicitation. Dranove Tr. 2281–82, 2284–85, 2415–16 (“There’s a final two bidders in every single RFP What’s relevant for the win-loss is finding out when they are one and two. As I’ve testified, we don’t know who’s two, so I conditioned on incumbency.”). In response, Dr. Israel insisted that it was important to consider all instances where one of the carriers bid and lost instead of just those situations when an incumbent was unseated. He characterized Dr. Dranove’s diversion analysis as a switching study that used too small a sample and inappropriately assumed that the incumbent was always the customer’s second best option. Meanwhile, Dr. Dranove observed that Dr. Israel’s regression analysis, which was based on the ASO [administrative services only] fees in Anthem bids, did not take into account occasions when Anthem may have made other concessions to improve its offer without reducing its fees.

Faced with these differences of opinion, the Court notes that these were both highly qualified and articulate economists. As Dr. Israel was wont to emphasize, he has been retained by the Department of Justice in other merger cases. *Sysco*, 113 F. Supp. 3d at 34. Putting aside the technical differences in the two approaches, one thing the diversion analyses had in common was that they were predicated on economic assumptions underlying the various methodologies, and not on the internal communications that shaped and chronicled these events in real time. And, here again, Anthem’s ordinary course documents tell a consistent story that contravenes the firm’s litigation position.

The documentary record shows that Anthem unquestionably competes directly and aggressively against Cigna for national accounts. In 2011, Anthem found itself losing national accounts to Cigna. In 2012, Anthem specifically set out to win national

²⁰⁰ In the Court’s view, neither economic model provides a perfect analogy. Dr. Dranove’s criticism that customers would not have the level of information assumed in Dr. Israel’s model has some force; notwithstanding the evidence that customers were aided by brokers who gather considerable intelligence concerning discounts and other factors, the notion that customers would be certain of a carrier’s bottom line was not established by the evidence. But there was testimony from brokers in Phase II to support Dr. Israel’s supposition that at least in some instances, the customer may initiate another round of negotiation after the final two bids have been submitted and ranked

accounts from Cigna and Aetna by offering zero percent trend guarantees to customers moving to Anthem from either company. And in 2014, Anthem encouraged this direct competition by offering “strategic alignment bonuses” to national accounts team members who were able to fully replace Cigna, Aetna, or United business with Anthem. As late as February of 2016, Anthem’s head of sales for national accounts proclaimed, “we are viewing Cigna as a competitor until we are not.”²¹ In light of this evidence, and the considerable volume of material presented at trial that exposed the ongoing, direct competition between Anthem and Cigna, the Court finds that Dr. Dranove’s analysis is more persuasive, and the merger will in fact result in the loss of head-to-head competition between Cigna and Anthem for national accounts in the fourteen Anthem states.²²

²¹ The Phase II evidence told similar story. The Vice President and General Manager of California large group business exhorted her sales team to go after Cigna (“Wanted—Dead or Alive!”) at both the 2015 and 2016 Annual sales and management workshops, as Cigna was identified as a top competitor and Cigna’s level funded plan posed a “new competitive threat.”

²² Because the Court is enjoining the merger on the basis of the national accounts market in the fourteen Anthem states, it does not need to consider and its decision does not turn on a finding related to the national accounts market for the entire United States. The Court notes that while it does credit the testimony of Anthem representatives that they look forward to competing under the Cigna brand without needing to obtain a cede, there is no question that merger will also eliminate some head-to-head competition in the thirty-six non-Anthem states as Anthem has historically sought cedes to sell to prospective customers headquartered there. It was also established that there are important aspects of Blue Cross Blue Shield Association membership—in particular, the mutuality and cooperation involved in the cedes, the potential for Blue Card revenue, and the best efforts rules—that redound to the benefit of the Association as a whole, and that these give rise to an inherent conflict of interest that could affect Cigna’s competitive conduct in the 36 states.

**NEW YORK V. DEUTSCHE TELEKOM AG,
439 F. Supp. 3d 179, 237-39 (S.D.N.Y. 2020)
(excerpt on unilateral effects¹)**

VICTOR MARRERO, J.

[Thirteen states and the District of Columbia brought an action alleging that the proposed 4-to-3 merger of T-Mobile US, Inc. and Sprint Corporation, the third and fourth largest wireless telecommunications service providers in the United States, would substantially lessen competition in the national and various local markets for retail mobile wireless telecommunications services (RMWTS), in violation of Section 7 of the Clayton Act. Before the filing of the states' complaint, the U.S. Department of Justice and seven states had entered into a settlement with the merging parties under which they would sell Sprint's prepaid business and some wireless spectrum to Dish Network to form an additional competitor. The instant action attacked the DOJ divestiture settlement as insufficient to preserve competition in the various RMWTS markets. The state plaintiffs alleged, among other things, that the arrangement would create highly concentrated markets and increase the likelihood of coordinated effects in these markets.]

. . .

2. Unilateral Effects

Unilateral effects refer to "[t]he elimination of competition between two firms that results from their merger[, which] may alone constitute a substantial lessening of competition," and like coordinated effects are analyzed primarily under the Merger Guidelines. *See* [2010] Merger Guidelines § 6. Other courts have noted that unilateral anticompetitive effects are more likely if "the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms" or if "the merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market." [United States v.] Aetna [Inc.], 240 F. Supp. 3d [1] at 43 [(D.C.C. Oct. 23, 2017)] (internal quotation marks and citations omitted).

Shapiro calculates that the unilateral effects of the Proposed Merger would result in annual consumer harms of \$4.6 billion. As is the case regarding coordinated effects, Shapiro's rationale is that New T-Mobile would either raise prices or at least, as the opportunity arises, not lower prices or offer high quality services at the same rate that T-Mobile has pursued in the past, effectively delaying or denying consumers the benefits of more aggressive offers. Shapiro calculated this harm by using a "diversion ratio," which measures how many customers would switch between T-Mobile and Sprint (or their prepaid subsidiaries Metro and Boost) in response to price increases by

¹ Record citations omitted.

the carrier they are using at the time. Shapiro gathered this switching data from a combination of sources, including the FCC and Facebook. Using the diversion ratios, as well as the competitors' prices and profit margins, Shapiro calculated "upward pricing pressure," which roughly reflects the incentive for the companies to increase prices after the merger. To translate this upward pricing pressure into consumer harm, Shapiro assumed that half of the upward pricing pressure would be passed on to consumers in the form of higher prices.

Defendants claim numerous deficiencies in Shapiro's data and upward pricing pressure analysis. They first challenge the reliability of the underlying switching data, arguing that because Facebook users are apparently younger than the average wireless subscriber, Shapiro's use of Facebook data may overstate the importance of T-Mobile as a direct competitor of Sprint. Defendants also challenge upward pricing pressure analysis more generally, noting that it does not account for the repositioning of products, new entry, reputation, or changes in business strategy.

The Court does not doubt that Sprint and T-Mobile are now direct competitors, as the evidence at trial reflected. The Court hesitates, however, to place too much stock in Shapiro's upward pricing pressure analysis given the numerous aspects of the market that it does not capture, as well as the potential that the underlying data may not be sufficiently reliable. Reliance on Shapiro's methodology is further complicated by the theory of consumer harm that Shapiro advances. It essentially asks the Court to assess how slowly or quickly T-Mobile would lower its prices or offer non-price benefits such as high-definition Netflix with or without the merger, regardless of what other competitors do. It is already difficult to assess the competitive effects of a merger in such a rapidly changing industry; asking the Court to assess whether consumers would receive high-definition Netflix in 2020 or 2021 only compounds the necessarily speculative quality of this inquiry.

Without discounting the possibility that upward pricing pressure analysis is a valid form of quantifying the potential unilateral anticompetitive effects of a merger, the Court nevertheless finds that more traditional judicial methods of assessing a merged company's likely future behavior are more reliable and useful in this particular context. As T-Mobile's future CEO Sievert noted at trial, New T-Mobile would be taking a very significant risk by raising prices or slowing its competitive pace, because consumers in the market still generally believe that AT&T and Verizon have superior quality networks; if T-Mobile does not continue to differentiate itself through lower prices and innovative offerings, many consumers might very well choose to pay AT&T and Verizon slightly higher prices for what they believe are better networks and improved service quality. The Court concludes that rather than New T-Mobile assuming the risk entailed by changing a successful business strategy, the merged company would instead more likely prefer to leverage the capacity benefits provided by the Proposed Merger to continue its successful business strategy on a greater scale.

The Court's conclusion in this regard is also bolstered by Sprint's poor condition and DISH's likely entry. While unilateral effects analysis appears particularly concerned with the potential loss of an aggressive maverick firm, there is very little

evidence to support a reliable finding that Sprint can be an aggressive and disruptive maverick in the future. On the contrary, the evidence suggests that Sprint will instead be forced to raise its prices. Moreover, DISH is poised to enter the RMWTS Markets as a new maverick and may compete more sustainably in the long term. Considering also that DISH will acquire Boost, there will be no loss of competition between New T-Mobile and the most successful segment of Sprint's business. The Court thus concludes that the loss of direct competition between T-Mobile and Sprint is insufficient to make reasonable the probability that the Proposed Merger would substantially lessen competition through unilateral effects.

**UNITED STATES V. BERTELSMANN SE & CO. KGAA,
646 F. Supp. 3d 1, 38-42 (D.D.C. 2022)
(excerpt on unilateral effects¹)**

FLORENCE Y. PAN, United States Circuit Judge

[Simon & Schuster, Inc. (“S&S”), owned by Paramount Global (formerly ViacomCBS), is the third-largest publisher in the United States. S&S publishes about 1,000 new titles yearly and reported over \$760 million in net sales in 2020. Penguin Random House (“PRH”), owned by Bertelsmann SE & Co. KGaA (“Bertelsmann”), is the largest book publisher in the United States. PRH annually publishes over 2,000 new books in the U.S. and generates nearly \$2.5 billion in revenue. In March 2020, ViacomCBS announced plans to sell S&S. In November 2020, Bertelsmann agreed to purchase S&S for \$2.175 billion. The acquisition of S&S would have significantly increased PRH’s position as the leading publisher in the United States, increasing its retail market share to almost three times that of its closest competitor.

[In November 2021, the Department of Justice filed a complaint against PRH, S&S, and their parent companies alleging that the merger of PRH and S&S would increase the “monopsony” (buyer) power of the merged company in the market for the acquisition of U.S. publishing rights to anticipated top-selling books and seeking a permanent injunction to block the deal. After a 12-day trial in August 2022, the court concluded that PRH’s acquisition of S&S was likely to substantially lessen competition the DOJ’s alleged relevant market and enjoined the proposed merger.]

...

2. Other Evidence

The government does not rely solely on the high degree of market concentration that would result from the merger, and the attendant presumption of anti-competitive harm; instead, the government also “bolster[s] its prima facie case by offering additional evidence.” [*FTC v. Wilh. Wilhelmsen [Holding ASA]*, 341 F. Supp. 3d [27] at 59 [(D.D.C. 2018)]. The government presents evidence that (1) the merger will cause anticompetitive effects from the elimination of competition between PRH and S&S, and (2) the higher concentration in the post-merger market will increase the risk of coordinated anticompetitive conduct by the largest publishers.

i. Unilateral Effects

Mergers necessarily eliminate the competition between the merging companies. See [*FTC v. H.J. Heinz [Co.]*, 246 F.3d [708] at 717 [(D.C. Cir. 2001)]. The government contends that PRH and S&S currently compete “fiercely” to publish anticipated top-selling books, and that eliminating direct competition between them is

¹ Footnotes and record citations omitted.

likely to harm authors. Indeed, “[c]ourts have recognized that a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition.” *FTC v. Sysco [Corp.]*, 113 F. Supp. 3d [1] at 61 [(D.D.C. 2015)]. *see also Wilhelmsen*, 341 F. Supp. 3d at 59. “Unilateral effects” are those that result directly from the elimination of competition between the merging parties. [*United States v. Anthem, [Inc.]* 236 F. Supp. 3d [171] at 216 (D.D.C.) [, *aff’d*, 855 F.3d 345 (D.C. Cir. 2017)]. As explained by the [2010] Merger Guidelines, “[a] merger can enhance market power simply by eliminating competition between the merging parties. This effect can arise even if the merger causes no changes in the way other firms behave.” [2020] Merger Guidelines § 1. Unilateral effects may be especially acute in a “highly concentrated market.” *Staples I [FTC v. Staples, Inc.]*, 970 F. Supp. [1066] at 1083 [(D.D.C. 1997)].

a. Head-to-Head Competition

The analysis of unilateral effects focuses on how closely the merging firms currently compete, in order to extrapolate the effects of eliminating that competition. *See* [2010] Merger Guidelines § 6.2. Evidence in the record demonstrates that PRH and S&S are close competitors for anticipated top-selling books. Specifically, PRH is the publisher against which S&S competes the most frequently and to which S&S loses the most. Meanwhile, S&S is a significant competitor to PRH, and makes a particularly strong showing in biographies, memoirs, political nonfiction, and books about current events.

The government’s expert, Dr. Hill,^[1] conducted a variety of economic analyses that assess how closely PRH and S&S compete. Dr. Hill used four different methods to calculate “diversion ratios,” which measure head-to head competition between the merging parties by asking the following question: If one merging party lowered advance levels, what percentage of its authors would “divert” their business to the other merging party, as opposed to diverting to other firms in the industry? A higher diversion ratio indicates that the merging parties are close competitors and that the merger is more likely to lead to harm.

Dr. Hill calculated diversion ratios based on: (1) diversion proportional to market shares, which is the largest data set; (2) win/loss data, which examines which publishers the merging parties lose to the most often; (3) runner-up data, which shows how often the other party was the “runner-up” when one of the merging parties won an acquisition; and (4) minutes from the parties’ editorial meetings, which provide a window into how frequently one merging party bid on a book and lost to the other party. Recognizing that each methodology has limitations, Dr. Hill performed multiple

[1] Dr. Nicholas D. Hill is a partner at Bates White Economic Consulting in Washington, D.C. He received his Ph.D. in economics in 2006 from Johns Hopkins University. From 2006 to 2013, Dr. Hill was an economist in the Antitrust Division. From 2013 to 2014, he was an economist at the Federal Trade Commission. Dr. Hill returned to the Antitrust Division as an assistant section chief from 2014 to 2017, when he joined Bates White. While in private practice, Dr. Hill has testified on behalf of the Antitrust Division, the FTC, and private parties, on both the plaintiff and defense sides.

tests “to get a holistic understanding of what diversion might look like.” All the methodologies employed by Dr. Hill pointed to the same conclusion: that PRH is S&S’s closest competitor, and that S&S is a significant competitor to PRH. Specifically, Dr. Hill’s diversion ratios indicate that if PRH lowered advances, between 19 and 27 percent of its authors would divert to S&S; and that if S&S lowered advances, between 42 and 59 percent of its authors would divert to PRH. The government summarized the results of the four studies as follows:

Figure 7. Summary of Dr. Hill’s Diversion Estimates (PX 70)

Type of Analysis	Diversion from PRH to S&S	Diversion from S&S to PRH
Diversion according to share	19%	42%
Win/loss data	19%	59%
Runner-up shldy	27%	59%
Editorial minutes	21%	54%

The defendants’ expert, Professor Snyder,^[2] calculated his own diversion ratios, using a less reliable data set assembled from the records of eighteen agents who responded to subpoenas (“agency data”). Although Professor Snyder’s ratios were lower, he also found that PRH is S&S’s closest competitor. Professor Snyder determined that the diversion ratio from PRH to S&S is 20 percent, and the diversion ratio from S&S to PRH is 27 percent.

The competition between PRH and S&S benefits authors by increasing advances paid for their books, and industry participants predict that the loss of that competition would be harmful to authors. Kensington’s CEO, Steven Zacharius, testified, “I personally would expect that [advances] would go down since there will be less competition for those authors.” Macmillan’s CEO Don Weisberg testified, “My guess is less competition will . . . long-term probably bring the advance levels down.” Agent Ayesha Pande testified, “I think overall [the merger] will limit the choice, the number of editors and imprints and publishing houses that would ... be a good home for my clients And I believe overall advances for my clients would be suppressed.”

The merger would cause an inarguable loss of competition from the elimination of situations where PRH and S&S would have been the top two or the only two bidders for an anticipated top seller. Dr. Hill calculates that this should happen in approximately 12 percent of book transactions based on market share, while Professor

[2] Edward A. Snyder is the William S. Beinecke Professor of Economics and Management at the Yale School of Management. He received Ph.D. in economics in 1984 from the University of Chicago. Prof. Snyder has served as dean at both the Booth School of Business at the University of Chicago and the Yale School of Management. He testifies frequently in antitrust cases.

Snyder calculates that it happened only 6 to 7 percent of the time in his data set. The government’s evidence included 27 summaries of competitive episodes, over three and a half years, in which PRH and S&S drove up advances through direct, head-to-head competition. For example, as the only two bidders for one book, PRH and S&S drove the advance offered from \$6 million to \$8 million. As the last two bidders for another book, PRH and S&S drove the advance offered from \$685,000 to \$825,000. The loss of such head-to-head match-ups undoubtedly would harm the authors whose advances would have been bid up by the direct competition. *See generally* [2010] Merger Guidelines § 6.2. The defendants argue, however, that the incidence of harm would be too infrequent to be considered substantial.

Even when the merging parties were not the top two bidders, S&S’s participation strengthened competition across all auction formats—round-robin, best-bid, and hybrid. Hachette CEO Michael Pietsch testified that a larger number of bidders leads to “more upward pressure” so that “in general . . . the price paid at auction can increase because of the number of participants.” Dr. Hill confirmed that when a large number of imprints participate in an auction, all of them understand that they need to be more aggressive in their bidding to prevail. [*See also Anthem*, 236 F. Supp. 3d at 220-21 (“reducing the number of national carriers from four to three is significant” because of its likely effect on bidding behavior). A higher number of bidders also increases the chances that an author will receive an “outlier” high bid. A book’s perceived value may vary significantly among different editors and publishers, and an unusually high bid for a book is likelier when there are more bidders. In one notable example, one bidder offered an advance four times higher than the next closest bidder, reflecting the winner’s unique view of the book’s potential. The loss of S&S as an independent bidder would weaken bidding incentives and reduce the frequency of events like these.

As previously noted, competition among publishers influences advances even in individual negotiations between an agent and one publisher. That is because publishers know that agents can shop the book to other publishers if the publisher’s offer is not high enough. Therefore, the loss of PRH as an outside competitor would weaken authors’ leverage in one-on-one negotiations with S&S, and the loss of S&S as an outside competitor would weaken authors’ leverage in one-on-one negotiations with PRH. This conclusion is consistent with Dr. Hill’s expert testimony, as well as the [2010] Merger Guidelines. *See* [2010] Merger Guidelines § 6.2 (“A merger between two competing [buyers] prevents [sellers] from playing those [buyers] off against each other in negotiations.”).

Finally, the evidence suggests that the acquisition of S&S would reduce PRH’s motivation to compete for publishing rights. PRH CEO Markus Dohle testified that there are two ways to increase market share in the industry: publish more successful books or acquire other companies that publish successful books. PRH has most recently pursued a strategy of bidding more aggressively and acquiring more “big books” to organically increase its market share. The acquisition of S&S would give PRH an alternative means of increasing its market share that would remove the pressure on PRH to acquire more books. Thus, accomplishing its goal of increasing

market share through the merger would cause PRH to bid less aggressively for books than it otherwise would.

NOTES

1. Following the court's decision, on November 21, 2022, Paramount Global announced that the \$2.2 billion sale of Simon & Schuster to Penguin Random House had been terminated. As a result, Paramount paid a \$200 million termination fee to Bertelsmann. In June 2023, Paramount Global reached a new agreement to sell Simon & Schuster to KKR, a private equity firm, for \$1.62 billion in an all-cash deal. This transaction is expected to close in 2024, subject to regulatory approvals and customary closing conditions.

**UNITED STATES V. JETBLUE CORP.,
712 F. Supp. 3d 109, 122-23, 151-52 (D. Mass. 2024)
(excerpt on unilateral effects¹)**

YOUNG, JUDGE of the United States¹

. . .

I. INTRODUCTION

On July 28, 2022, Jet Blue Airways Corporation (“JetBlue”) and Spirit Airlines, Inc. (“Spirit”) (collectively, the “Defendant Airlines”) executed a final merger agreement. JetBlue, the sixth largest airline in the United States, agreed to pay \$3.8 billion to acquire Spirit, the seventh largest airline in the United States. The proposed merger would create the nation’s fifth largest airline, accounting for 10.2% of the domestic market. Immediately after the merger agreement was signed, speculation began regarding the merger’s antitrust implications.

JetBlue is a so-called low-cost carrier (“LCC”), relying on point-to-point flying using fewer types of aircraft. Spirit is known as an “Ultra-Low-Cost Carrier” (“ULCC”), meaning that its offerings target budget-conscious passengers with low-cost, often unbundled flight options. The proposed merger would transfer all Spirit’s assets to JetBlue and remove Spirit from the market.

Invoking the Clayton Act, 15 U.S.C. § 18, the United States Department of Justice, joined by the District of Columbia, the Commonwealth of Massachusetts, and the states of California, Maryland, New Jersey, New York, and North Carolina (collectively hereinafter, “the Government”), filed this action to enjoin the Defendant Airlines from proceeding with the merger. The resulting 17-day bench trial on the merits featured testimony by twenty-two witnesses, over 900 exhibits, and thousands of pages of evidence. The Court also traveled to a nearby location to take in a view of both Defendant Airlines’ seat configurations. The trial transcript exceeds 2,500 pages, accompanied by over eighty binders containing exhibits presented to witnesses. Post-trial submissions exceed 700 pages.

The parties’ thorough presentation, as well as a careful review of the parties’ voluminous submissions, illumines certain key findings: The airline industry is an oligopoly that has become more concentrated due to a series of mergers in the first decades of the twenty-first century, with a small group of firms in control of the vast majority of the market. *See In re Dom. Airline Travel Antitrust Litig.*, 691 F. Supp. 3d

¹ Record citations omitted.

¹ This is how my predecessor, Peleg Sprague (D. Mass. 1841-1865), would sign official documents. Now that I’m a Senior District Judge I adopt this format in honor of all the judicial colleagues, state and federal, with whom I have had the privilege to serve over the past 45 years.

175, 192-94 (D.D.C. 2023). JetBlue and Spirit are not two of the largest airlines, though were they to merge, they would grow in size to further compete with the larger airlines.

From the Defendant Airlines’ perspective, organic growth is too slow, as there are too few new aircraft available to meet industry demand. JetBlue’s inorganic growth through acquisition of Spirit’s sizable fleet of retrofittable aircraft—of the same type—largely solves this problem and is a tried-and-true growth strategy in this industry.

A post-merger, combined firm of JetBlue and Spirit would likely place stronger competitive pressure on the larger airlines in the country. At the same time, however, the consumers that rely on Spirit’s unique, low-price model would likely be harmed. The Defendant Airlines currently compete head-to-head throughout the country, and that competition, particularly Spirit’s downward pressure on prices, benefits all consumers. Spirit’s unique position in the domestic scheduled passenger airline industry would be exceedingly difficult for another airline, or a combination of other airlines, to replicate, even with low barriers to entry and the dynamic nature of the industry inasmuch as they face the same, industry-wide aircraft sourcing issues.

The Clayton Act was designed to prevent anticompetitive harms for consumers by preventing mergers or acquisitions the effect of which “may be substantially to lessen competition, or tend to create a monopoly.” 15 U.S.C. § 18. Summing it up, if JetBlue were permitted to gobble up Spirit—at least as proposed—it would eliminate one of the airline industry’s few primary competitors that provides unique innovation and price discipline. It would further consolidate an oligopoly by immediately doubling JetBlue’s stakeholder size in the industry. Worse yet, the merger would likely incentivize JetBlue further to abandon its roots as a maverick, low-cost carrier. While it is understandable that JetBlue seeks inorganic growth through acquisition of aircraft that would eliminate one of its primary competitors, the proposed acquisition, in this Court’s attempt to predict the future in murky times, does violence to the core principle of antitrust law: to protect the United States’ markets—and its market participants—from anticompetitive harm.

Accordingly, for the reasons below, the Court rules that the proposed merger, as it stands, would substantially lessen competition in violation of the Clayton Act. The July 28, 2022 proposed merger, therefore, is enjoined.

...

2. Direct Evidence of Anticompetitive Effects

a. Elimination of Head-to-Head Competition Between JetBlue and Spirit

First, the Government has clearly demonstrated that the merger will cause unilateral anticompetitive effects, as JetBlue and Spirit currently compete head-to-head on multiple routes. “The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral effects.” *ProMedica [Health Sys. v. FTC]*, 749 F.3d [559] at 569 [(6th Cir. 2014)] (quoting [2010] *Horizontal*

Merger Guidelines § 6.1).⁵¹ Acquisitions “that eliminate head-to-head competition between close competitors often result in a lessening of competition.” *F.T.C. v. Staples, Inc.*, 190 F. Supp. 3d 100, 131 (D.D.C. 2016) (“*Staples II*”) (citing Horizontal Merger Guidelines § 6); *see also, e.g., [FTC v. H.J.] Heinz [Co.]*, 246 F.3d [708] at 716-17 [(D.C. Cir. 2001)] (ruling that the Government’s prima facie case was “bolstered by the indisputable fact that the merger will eliminate competition between the two merging parties”); *H&R Block*, 833 F. Supp. 2d at 81–82 (noting the likelihood of unilateral anticompetitive effects given evidence of H & R Block lowering its prices in response to direct competition from TaxACT, including H & R Block documents that “appear to acknowledge that TaxACT has put downward pressure on HRB’s pricing ability”).

If the collaborating parties are particularly close competitors, the unilateral effects are especially acute. *See [United States v.] Bertelsmann [SE & Co. KGaA]*, 646 F. Supp. 3d [1] at 39 [(D.D.C. Nov. 15, 2022)] (“The analysis of unilateral effects focuses on how closely the merging firms currently compete, in order to extrapolate the effects of eliminating that competition.”); *F.T.C. v. Libbey*, 211 F. Supp. 2d 34, 47-48 (D.D.C. 2002) (discussing evidence of head-to-head competition between the merging parties, including taking customers from each other); *F.T.C. v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000) (“[T]he weight of the evidence demonstrates that a unilateral price increase by Swedish Match is likely after the acquisition because it will eliminate one of Swedish Match’s primary direct competitors.”). The parties need not be each other’s closest competitors to raise a threat to competition; being close competitors is enough for an acquisition to result in upward pricing pressure. *[United States v.] Anthem [Inc.]*, 236 F. Supp. 3d [171] at 216 [(D.D.C. 2017)] (“Anthem’s insistence that United, not Cigna, is its ‘closest’ competitor, is beside the point. The acquired firm need not be the other’s closest competitor to have an anticompetitive effect; the merging parties only need to be close competitors.”).

The loss of Spirit’s influence on JetBlue as a head-to-head competitor would likely result in less competition to both discipline the prices and spur the innovation of JetBlue as a smaller, maverick—more competitive—market participant.

⁵¹ The Court is aware that after the trial concluded, on December 18, 2023, the F.T.C. and DOJ issued a revised set of Merger Guidelines. *See* Justice Department and Federal Trade Commission Release 2023 Merge Guidelines, U.S. Dep’t of Just., Off. of Pub. Affs., <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-2023-merger-guidelines> (last visited Jan. 12, 2024); 2023 Merger Guidelines, U.S. Dep’t of Just., Antitrust Div., <https://www.justice.gov/atr/2023-merger-guidelines> (last visited Jan. 12, 2024).

Ease of Entry Defenses

Horizontal Merger Guidelines



U.S. Department of Justice
and the
Federal Trade Commission

Issued: August 19, 2010

Buyer characteristics and the nature of the procurement process can affect coordination. For example, sellers may have the incentive to bid aggressively for a large contract even if they expect strong responses by rivals. This is especially the case for sellers with small market shares, if they can realistically win such large contracts. In some cases, a large buyer may be able to strategically undermine coordinated conduct, at least as it pertains to that buyer's needs, by choosing to put up for bid a few large contracts rather than many smaller ones, and by making its procurement decisions opaque to suppliers.

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

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.

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



Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

Issued: December 18, 2023

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 repositioning⁶⁵ 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

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 evidence⁶⁹ 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.

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.

UNITED STATES V. ENERGY SOLUTIONS, INC
265 F. SUPP. 3D 415, 443-44 (D. DEL. 2017)
(excerpt¹)

ROBINSON, Senior District Judge

[The DOJ challenged the acquisition by Energy Solutions, Inc. of Waste Control Specialists LLC (“WCS”), alleging that the acquisition would violate Section 7 of the Clayton Act by substantially lessening competition for disposal of low-level radioactive waste (“LLRW”) generated by commercial entities. In a bench trial, Judge Robinson found that the two companies competed directly with each other and that, for certain categories of radioactive waste, they were the only two viable options for customers. The companies defended in part with an ease of entry/expansion defense.]

1. Ease of entry and expansion

Defendants may rebut the government’s prima facie case by showing that new firms can easily enter or existing firms can easily expand into the relevant product market in response to supracompetitive pricing. *Fed. Trade Comm’n v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 54-55 (D.D.C. 1998); [*United States v.*] *Anthem*, 236 F. Supp. 3d [171] at 221-22 [(D.D.C. 2017), *aff’d* 855 F.3d 345 (D.C. Cir. 2017)]. How easily firms may enter or expand is determined by the barriers to entry. [*FTC v.*] *Cardinal Health*, 12 F. Supp. 2d [34] at 55 [(D.D.C. 1998)]. Barriers to entry include, among other things, regulatory requirements, high capital costs, or technological obstacles. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007). The entry or expansion must be “timely, likely and sufficient in its magnitude, character, and scope.” [*United States v.*] *H & R Block*, 833 F. Supp. 2d [36] at 73 [(D.D.C. 2011)]. Entry is timely only if it is rapid enough to deter or render insignificant the anticompetitive effects of the merger. *Anthem*, 236 F. Supp. 3d at 221-22. Entry is likely only if it would be profitable and feasible, accounting for all the attendant costs and difficulties. *Id.* And entry is sufficient only if it can “affect pricing” and “scale to compete on the same playing field” as the merged firm. *Id.*

There is no dispute that the barriers to entry in LLRW disposal are incredibly high. The defendants themselves recognize that these high entry barriers insulate them from competition. Building and operating a LLRW disposal facility requires, among other things, legislative approval, a radioactive waste license from the environmental protection agency, a multi-million dollar upfront capital investment, a site with unique geological features, and employees trained in a multitude of subjects related to radioactive waste and radiation safety.

1. Record citations and footnotes omitted

“[T]he history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future.” *Anthem*, 236 F.Supp.3d at 222. WCS’s entry cost was over \$700 million and took 17 years. WCS is the only firm in the last three decades to successfully enter and obtain a license for commercial disposal of Class A, B, or C LLRW. No other firm is currently pursuing licensing or construction of a commercial LLRW disposal facility. Accordingly, entry of new firms is unlikely.

Recognizing that new entrants were unlikely, defendants instead have argued that existing firms could expand into the relevant product market. Specifically, defendants argue that existing RCRA facilities could expand into LLRW disposal and/or US Ecology could improve its competitive position in a manner to sufficiently offset the anticompetitive effects of the merger. This too, however, is unlikely. [redacted] has three RCRA facilities within the relevant states that currently do not accept LLRW. Accordingly, the court finds expansion by existing RCRA facilities into the market for disposal of lower-activity LLRW to be highly unlikely.

The other competitors currently active in the relevant product market (US Ecology at its Grandview, Idaho facility and BSFR) are also unlikely to expand in a manner sufficient to offset the anticompetitive effects of the merger. Neither have a license to dispose of radioactive waste. Both are, therefore, limited to LLRW that qualifies for disposal under their exemptions which are below the radioactive concentration limits for WCS’s exempt cell. Moreover, US Ecology is constrained by its reliance on the NRC’s 20.2002 exemption, which involves a significant time lag. The court concludes that defendants have not rebutted the government’s prima facie case by demonstrating ease of entry or expansion into the relevant product market. If anything, the government has bolstered its own prima facie case by demonstrating the opposite. [*FTC v.*] *Heinz*, 246 F.3d [708] at 717 [(D.C. Cir. 2001)]; [*FTC v.*] *Univ. Health, Inc.*, 938 F.2d [1206] at 1220 [(11th Cir. 1991)].

FTC v. SANFORD HEALTH
926 F.3d 959, 965 (8th Cir. June 13, 2019)
***aff'g*, No. 1:17-CV-133 (D.N.D. Dec. 15, 2017)**

STEVEN M. COLLOTON, United States Circuit Judge

[The FTC and the State of North Dakota filed a complaint alleging that the proposed acquisition by Sanford Health of Mid Dakota Clinic, P.C. (MDC) would likely substantially lessen competition in four relevant medical service markets (adult primary care physician (PCP) services, pediatric services, OB/GYN services, and general surgery physician services) in the four-county Bismarck, ND Metropolitan Statistical Area. Sanford Health is an integrated healthcare system operating in North Dakota and several other states. In the Bismarck-Mandan region of North Dakota, Sanford operates an acute care hospital, eight primary care clinics, and several specialty clinics. MDC is a multispecialty for-profit physician group with nine clinics and one ambulatory surgery center in the region. Among other things, the complaint alleged that the proposed transaction would create by far the largest—and in one case, the only—group of physicians offering these services in Bismarck MSA. The district found for the FTC on the merits and the Eight Circuit affirmed.]

. . .

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, he also explained that it would take up to twice as long to establish a name and reputation that could compete with Sanford. 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.

NOTES

1. At trial, evidence was showing challenges to recent physician recruitment of Sanford, MDC, and Catholic Health in the Bismarck-Mandan area, including the area's geographic location, its perceived adverse weather conditions, and lack of OB/GYN and pediatrics residency programs in North Dakota. The evidence also

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showed that it is more difficult to recruit physicians who do not have prior connections to the area, and, because of call coverage requirements for OB/GYN physicians, pediatricians, and general surgeons, it is difficult to recruit to groups of fewer than four physicians in each of those specialties.

2. The district found that the evidence does not demonstrate that Catholic Health would be able to recruit enough physicians to replace the MDC physicians currently referring to Catholic Health. Catholic Health potential expansion therefore cannot be considered timely, likely, or sufficient to counter the anticompetitive effects of the proposed transaction.

**UNITED STATES V. BERTELSMANN SE & CO. KGAA,
646 F. Supp. 3d 1, at 51-53 (D.D.C. Nov. 15, 2022)
(excerpt on entry¹)**

FLORENCE Y. PAN, United States Circuit Judge

[The Department of Justice brought an action alleging that the proposed \$2.18 billion acquisition by Bertelsmann, the owner of Penguin Random House, of Simon & Schuster from ViacomCBS. The DOJ alleged that the acquisition would substantially lessen competition in the input market for the U.S. publishing rights to anticipated top-selling books (defined to be books with advances over \$250K). Penguin Random House and Simon & Schuster are two of the “Big Five” largest book publishers in the United States, with market shares of 37% and 12%, respectively. The court sustained the DOJ’s market definition, found that the merger was likely to substantially harm competition through both unilateral and coordinated effects, and rejected the defenses of the merging parties.]

. . .

2. Barriers to Entry and Expansion

The defendants argue that there are few barriers to entry that would prevent new or existing publishers from competing effectively with the merged company. New entrants to the market would presumably give authors alternative outlets to publish their books, thereby preventing the merged entity from lowering advances. “The existence and significance of barriers to entry are frequently . . . crucial considerations in a rebuttal analysis. In the absence of significant barriers, a company probably cannot maintain [sub]competitive pricing for any length of time.” [*United States v. Baker Hughes, [Inc.]*, 908 F.2d [981] at 987 [(D.C. Cir. 1990)]. To constrain the new entity, “entry [by new competitors] must be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.” [*FTC v. Wilh. [Wilhelmsen [Holding ASA]*, 341 F. Supp. 3d [27] at 66-67 [(D.D.C. 2018)] (quotations omitted). “The expansion of current competitors is regarded as essentially equivalent to new entry, and is therefore evaluated according to the same criteria.” *Id.* at 66 (quotations omitted).

Contrary to the defendants’ contentions, the evidence demonstrates that there are substantial barriers to entry and expansion in the publishing market for anticipated top-selling books. Established publishers have many advantages that are not easily replicated, including: (1) back lists that generate substantial and consistent revenue, which in turn supports risky acquisitions of high-advance books; (2) large and effective marketing, sales, and distribution teams that have relationships with media and retailers; (3) excellent reputations and track records of success that attract authors; and

¹ Record citations, internal cross-references, and footnotes omitted.

(4) lower variable costs due to economies of scale. In addition, numerous publisher witnesses expressed concern about a lack of access to sufficient printing capacity, which limits the number of books that publishers can physically produce and thus limits opportunity for expansion. Industry insiders, including PRH executives, candidly acknowledged in trial testimony and ordinary-course documents that barriers to entry are high in the publishing business.

The best proof that would-be new competitors face formidable barriers to entry is the stability of market shares in the industry: No publisher has entered the market and become a strong competitor against the Big Five in the past thirty years. Moreover, the Big Five's market share in acquiring anticipated top-selling books has remained stable for the past three years. Thus, there is little evidence that new or existing publishers will grow at a pace and magnitude that would allow them to discipline a merged PRH and S&S. *See Wilhelmsen*, 341 F. Supp. 3d at 68 (“The fact that the merging parties have been able to maintain high margins and market shares without witnessing notable entry and expansion suggests that . . . the market . . . is characterized by significant barriers to entry.” (cleaned up)); Merger Guidelines § 5.3 (“The Agencies give more weight to market concentration when market shares have been stable over time . . .”). The Big Five's market shares are built on “decades of credibility and success,” and they cannot be easily challenged by less-established publishers.

Although the defendants argue that social media like “BookTok” and Amazon's online bookstore level the playing field for smaller publishers, those platforms are not new and are far from “game-changing.” Despite the current availability of “BookTok” and virtual storefronts, the Big Five still consistently acquire the publishing rights for 91 percent of anticipated top-selling books, demonstrating that the playing field has not been leveled in any meaningful way. For example, PRH utilizes its superior resources to maximize sales even on Amazon.

The defendants nevertheless point to new entrants like Zando, Spiegel & Grau, and Astra House, which have had some success in acquiring publishing rights to anticipated top-selling books. Although those publishing houses are associated with successful and well-respected editors, they lack many of the other advantages enjoyed by the Big Five: big back lists; extensive marketing, sales, and distribution teams; and scale. As a result, those new entrants have barely made a dent in the relevant market—their collective share is less than one percent, and no one in the industry views them as substantial competitors to the Big Five. Moreover, the growth of those new competitors was accompanied by a countervailing shrinkage in the market shares of other non-Big Five publishers: The stability of the overall market share of non-Big Five publishers indicates that the new entrants have done little to change the competitive landscape, and that barriers to entry and expansion remain high.

The defendants contend that Big Five rivals like HarperCollins and well-funded companies like Disney are poised to expand in the relevant market. To be sure, Big Five rivals face low barriers to expansion because they have many of the same advantages that PRH and S&S have. But there is no evidence that HarperCollins, Hachette, or Macmillan could or would compete more aggressively with the merged company. The distribution of market shares among PRH, S&S, and the other Big Five

publishers, has remained relatively constant in recent years. The Court has every reason to believe that all the industry players are already doing their best to compete; it is therefore unlikely that the non-merging Big Five publishers could suddenly expand sufficiently to prevent the anticipated competitive harm.

Two well-funded companies outside the Big Five highlighted by the defendants are Amazon and Disney. Amazon acquired several high-priced books when it first started its publishing business about a decade ago, but it has failed to make significant headway in the industry. From 2019 to 2021, Amazon's share in acquiring the publishing rights to anticipated top-selling books declined from under [Redacted] to under [Redacted]. Amazon also struggles with selling its books outside of its own platform. The Court therefore is not convinced that Amazon is a significant competitive constraint in the relevant market. The defendants argue that [Redacted]. While Disney may have the motivation and financial resources to execute the alleged plan, it will still face many of the previously discussed barriers to entry. There is no evidence to suggest that Disney is better equipped than Amazon to succeed in the relevant market. In addition, it is a strain to characterize Disney's five-year aspirational plan as evidence of “timely” market entry. *See Staples II [FTC v. Staples, Inc.]*, 190 F. Supp. 3d [100] at 133 [(D.D.C. 2016)] “The relevant time frame for consideration in this forward looking exercise is two to three years.”)

**FTC v. IQVIA HOLDINGS INC.,
710 F. Supp. 3d 329, 393 (S.D.N.Y. 2024)
(excerpt on entry¹)**

[EDGARDO] RAMOS, United States District Judge

[On July 18, 2023, the FTC filed a Section 13(b) complaint alleging that the acquisition by IQVIA Holdings Inc. (IQVIA), the world’s largest health care data provider, of Propel Media, Inc. (PMI) 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 buying and selling of digital ad space using software and data-driven technologies. Unlike traditional ad buying, which involves manual negotiations and requests for proposals, programmatic advertising uses algorithms and real-time bidding (RTB) to place ads in front of targeted audiences—in this case, healthcare professionals—across 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 complaint also alleges that the acquisition would increase IQVIA’s incentive to withhold key information to prevent rival companies and potential entrants from effectively competing, the complaint states. After the court found that the FTC had made out its prima facie case, the court turned to the defendants’ rebuttal arguments.]

...

b. Ease of Entry

Defendants’ second rebuttal argument focuses on ease of entry into the market. A defendant may attempt to rebut the government’s prima facie case by introducing evidence “that entry by new competitors will ameliorate the feared anticompetitive effects of a merger.” [*United States v. Aetna [Inc.]*, 240 F. Supp. 3d [1] at 52 [(D.D.C. Jan. 23, 2017)]. The [2010] Merger Guidelines require consideration of whether “entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.” [2010] Merger Guidelines § 9. Defendants take issue with this standard, Doc. 288 at 83, but it has been applied by several courts in similar cases, *see, e.g., [New York v.] Deutsche Telekom [AG]*, 439 F. Supp. 3d [179], 226 [(S.D.N.Y. 2020)] (“[T]he Merger Guidelines provide that new market entry may counteract concerns about anticompetitive effects if entry would be ‘timely, likely, and sufficient in its magnitude, character, and scope’ to address those concerns.” (quoting [2010] Merger Guidelines § 9)); *United States v. Visa USA*,

¹ Record citations, internal cross-references, and footnotes omitted.

Inc., 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001) (“The higher the barriers to entry, and the longer the lags before new entry, the less likely it is that potential entrants would be able to enter the market in a timely, likely, and sufficient scale to deter or counteract any anticompetitive restraints.”); *see also Aetna*, 240 F. Supp. 3d at 52–53 (collecting cases). That is true with respect to expansion as well as entry. *See, e.g., [FTC v. Wilh.] Wilhelmsen [Holding ASA]*, 341 F. Supp. 3d [27], 67 [(D.D.C. 2018)] (“The expansion of current competitors is regarded as ‘essentially equivalent to new entry,’ and is therefore evaluated according to the same criteria.” (citation omitted)); *H&R Block*, 833 F. Supp. 2d at 73 (invoking same standard in discussing “the likelihood of expansion by existing competitors rather than new entry into the market”).

In this case, internal documents from both DeepIntent and Lasso recognize substantial barriers to entry. PX2581-24 (DeepIntent presentation listing several “primary barriers to entry” including “technical and regulatory complexity of integrating healthcare data within advertising”; “talent scarcity at intersection of healthcare and programmatic”; “deep agency and client integrations and contracts”; and “patents” (capitalization omitted)); PX2504-18 (DeepIntent presentation stating that “barrier to entry remains high for healthcare”); PX1128-12 (Lasso presentation stating that “Lasso’s unique and industry-leading healthcare marketing and analytics platform provides significant barriers-to-entry,” including that “[i]nfrastructure takes years and millions of dollars to build”). These documents are probative of the significant barriers that a new entrant would face. *See [FTC v.] CCC Holdings [Inc.]*, 605 F. Supp. 2d [26,] at 49-50 [(D.D.C. 2009) (relying on documents in which defendants had repeatedly touted barriers to entry); *see also [United States v.] Bazaarvoice, [Inc., No. 13-CV-00133-WHO,]* 2014 WL 203966, at *49 [(N.D. Cal. Jan. 8, 2014)] (citing defendant’s pre-acquisition statements about barriers to entry).

Industry participants confirmed in their testimony that new entrants face significant challenges. One witness from a generalist DSP—AdTheorent—explained that, since 2020, he was “not aware of any new entrants that we come up against when we are competing for budgets in the market today other than PulsePoint, DeepIntent, and Lasso.” He elaborated:

There is a pretty steep learning curve, data curve, and a number of other factors that make it harder for a new company to get into the space: Access to their correct data, expertise around the proxy laws that are relevant to targeting advertisements to, for example, patients.... Generalists don’t have the types of expertise and knowledge in products and solutions tailored to help, based on top of the health-specific data relevant to health-specific [key performance indicators] for campaign goals.

Similarly, PulsePoint’s testimony highlighted the expertise that is required for firms providing HCP programmatic advertising: “From a capability perspective, the generalist DSPs are lacking certain platform capabilities as they relate to targeting, optimization, that are important for executing HCP digital marketing at a competitive price and scale.” [S]ee also Tr. [Redacted] (ad agency witness noting that DeepIntent, Lasso, and PulsePoint all specialize in healthcare and that “[t]he healthcare field is

highly regulated so working with somebody that knows that space, whether it was HCP or patient, gave myself, the team a great deal of comfort and confidence in relying on their platforms versus others in the market”).

Attempting to downplay these barriers to entry, Defendants point to Lasso’s rapid ascent as evidence that new firms can easily enter the market and find success. Doc. 288 at 80. While Lasso’s trajectory demonstrates that entry is possible, it fails to establish that future entry will be timely, likely, and sufficient to counteract the anticompetitive effects of the proposed acquisition. The weight of the evidence indicates that barriers to entry are significant and that firms may face unique challenges in attempting to break into the HCP programmatic advertising space. Defendants have not offered any reason to think that Lasso’s rise to its prominent market position is likely to be replicated. *Cf. Wilhelmsen*, 341 F. Supp. 3d at 68 (defendants’ contention that merging party’s business was “simple and capable of replication in a short period of time is at odds with inferences drawn from the state of the current market and with documentary and testimonial evidence from customers and suppliers”).

Nor is it sufficient that generalist DSPs such as [Redacted] have “aspirations” to expand their HCP programmatic advertising business. Consistent with the barriers to entry already discussed, customer testimony indicates that generalist DSPs currently lack some of the capabilities needed to succeed in HCP programmatic advertising. Tr. [Redacted] (ad agency witness explaining that the agency did not include [Redacted] in a recent RFP due to “their capability in the health care professional focused marketplace” and that he would not currently consider [Redacted] to be a viable substitute for the agency’s business with Lasso and PulsePoint); *see Staples*, 190 F. Supp. 3d at 134 (rejecting defendants’ ease of entry argument in part because customers did not view the potential entrant “as a viable alternative to [the merging parties]”). As Dr. Hatzitaskos put it: “[I]f we see [some of these players] making only a tiny fraction of the revenues of the merging parties, and some of them have been in the market since 2019 or early on, that means that they are lacking in capabilities, sort of the proof is in the pudding.”

Defendants also suggest that the mere threat of entry into the market or expansion by existing firms is enough to provide a competitive constraint and rebut the FTC’s prima facie case. As discussed above, the standard is that entry must be “timely, likely, and sufficient.” But even setting that aside, the Court is not persuaded by Defendants’ argument that firms like Google, Yahoo, and Microsoft pose a competitive threat merely because they are “already involved in HCP programmatic advertising to varying degrees.” “The marketplace may be filled with many strong and able companies in adjacent spaces. But that does not mean that entry barriers become irrelevant or are somehow more easily overcome.” *Bazaarvoice*, 2014 WL 203966, at *71.

Finally, Defendants place significant emphasis on the Second Circuit’s decision in *Waste Management*, but the circumstances in that case are not analogous to those present here. At issue was a proposed acquisition involving two companies in the waste disposal business. *See [United States v. Waste Mgmt., Inc.]*, 743 F.2d [976], at 977-78 [(2d Cir. 1984)]. The district court concluded that the relevant product market included

all trash collection, except for collection at certain residences. *Id.* at 978. After affirming that finding, the Second Circuit turned to the defendants' rebuttal arguments. *Id.* at 980–81. The court held that “entry into the relevant product and geographic market by new firms or by existing firms in the Fort Worth area is so easy that any anti-competitive impact of the merger before us would be eliminated more quickly by such competition than by litigation.” *Id.* at 983. In fact, the district court had found that “individuals operating out of their homes can acquire trucks and some containers and compete successfully ‘with any other company.’ ” *Id.* There were “examples in the record of such entrepreneurs entering and prospering.” *Id.* Entry by larger companies, likewise, would be “relatively easy” because “Fort Worth haulers could easily establish themselves in Dallas if the price of trash collection rose above the competitive level.” *Id.* Thus, the merged firm would not be able to exercise market power due to “the ease with which new competitors would appear.” *Id.* at 983–84. In this case, by contrast, the record makes clear that market entry is not nearly as simple as individuals “operating out of their homes” being able to compete with established players. That much should be clear from the fact that IQVIA has proposed [Redacted] to complete the consolidation of DeepIntent and Lasso.

Efficiencies Defense

Horizontal Merger Guidelines



U.S. Department of Justice
and the
Federal Trade Commission

Issued: August 19, 2010

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.

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

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.

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.



Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

Issued: December 18, 2023

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 evidence⁶⁹ 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.

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.

SAINT ALPHONSUS MED. CTR.-NAMPA INC. v. ST. LUKE'S HEALTH SYS.
778 F.3d 775, 791-92 (9th Cir. 2015)
(excerpt¹⁵)

On November 12, 2012, Saint Alphonsus Medical Center and three other area hospitals filed a complaint in federal district court challenging the acquisition by St. Luke's Health Systems, Ltd., an Idaho-based, not-for-profit health care system, of the Saltzer Medical Group, P.A., the largest independent multi-specialty physician group in Idaho and sought preliminary and permanent injunction relief to block the acquisition. The plaintiffs alleged that the merger would violate Section 7 of the Clayton Act by substantially lessening competition in the relevant markets for "primary care physician services," "general acute-care inpatient services," "general pediatric physician services," and "outpatient surgery services" in Nampa, Idaho. The plaintiffs' theory of competitive harm was vertical foreclosure: once St. Luke's acquired Saltzer, Saltzer physicians would no longer refer patients to the plaintiff-hospitals. Premerger, a large percentage of the plaintiff-hospital business was referred by Saltzer physicians, and the loss of these referrals would threaten the financial viability of the plaintiff-hospitals and reduce competition in the Nampa area.

On December 20, 2012, the district court denied the plaintiff's motion for a preliminary injunction and the merger closed. Essentially, the district court found that the plaintiffs failed to establish a imminent threat of irreparable harm as required by *Winter*, finding that: "(1) This case will proceed on a fast track to trial; (2) Prior to trial, there will be no measurable reduction in referrals to St. Al's from Saltzer physicians; (3) The integration of St. Luke's and Saltzer will proceed gradually; and (4) The acquisition can be unwound and divestiture ordered if St. Al's prevails on its antitrust claims."¹⁶ On December 31, 2012, following the denial of the preliminary injunction, St. Luke's acquired Saltzer's assets and obtained the power to manage Saltzer's day-to-day operations, negotiate health plan contracts on Saltzer's behalf, establish rates and charges for services provided by Saltzer physicians, manage Saltzer employees, and control purchasing, billings, collections, payables, accounting, and other financial matters relating to Saltzer's operations. Saltzer's physicians also entered into a five-year professional service agreement ("PSA") with St. Luke's.

15. Record citations and footnotes omitted.

16 See Memorandum Decision and Order, Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., No. 1:12-cv-00560-BLW-REB, 2012 WL 6651167, at *4 (D. Idaho Dec. 20, 2012). [WDC: As a general rule, federal district courts historically have been reluctant to enjoin mergers on complaints by private entities, and the lack of irreparable harm is frequently the grounds for denying injunctive relief. It appears that the courts view the federal and state antitrust authorities as the principal enforcers of the merger antitrust laws in the public interest and view private parties as acting too much in their private interest and not the public interest.]

On March 26, 2013, the FTC and the State of Idaho filed a complaint in the district court alleging that the merger violated Section 7 of the Clayton Act and Idaho state antitrust law by leading to higher healthcare costs and the loss of non-price competition in the provision of primary care physician (PCP) services to commercially insured patients in Nampa and seeking divestiture of the Saltzer practice.

The district court consolidated this case with the one filed by the private hospitals, and after a nineteen-day bench trial, found the merger violated federal and state antitrust law. The court adopted the relevant market alleged by the government plaintiffs and found that the merger was *prima facie* anticompetitive under the *Philadelphia National Bank* presumption with a post-merger HHI of 6,219 and an increase in HHI of 1,607. The court also found that it was highly likely that the combined entity would use its substantial market share (1) to negotiate higher reimbursements with health plans, and (2) charge more services at the higher hospital billing rates. St. Luke's defended in part with an efficiencies defense, arguing that the merger will create an integrated team of unified physicians with a shared electronic patient health records enabling St. Luke's to provide patients with the highest quality of care and lower costs. The district court rejected the defense and concluded:

The Acquisition was intended by St. Luke's and Saltzer primarily to improve patient outcomes. The Court believes that it would have that effect if left intact, and St. Luke's is to be applauded for its efforts to improve the delivery of health care in the Treasure Valley. But there are other ways to achieve the same effect that do not run afoul of the antitrust laws and do not run such a risk of increased costs. For all of these reasons, the Acquisition must be unwound.¹⁷

St. Luke's appealed.

HURWITZ, Circuit Judge

...

2. The St. Luke's Efficiencies Defense

St. Luke's argues that the merger would benefit patients by creating a team of employed physicians with access to Epic, the electronic medical records system used by St. Luke's. The district court found that, even if true, these predicted efficiencies were insufficient to carry St. Luke's' burden of rebutting the *prima facie* case. We agree.

It is not enough to show that the merger would allow St. Luke's to better serve patients. 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. *See [FTC v.] Univ. Health, [Inc.],* 938 F.2d [1206] at 1222

¹⁷ Saint Alphonsus Med. Ctr. v. St. Luke's Health Sys., Ltd., No. 1:12-cv-00560-BLW-REB, 2014 WL 407446, at *2 (D. Idaho June 25, 2014), *aff'd*, 778 F.3d 775 (9th Cir. 2015).

[(11th Cir. 1991)] (finding efficiencies relevant to the prediction of “whether the acquisition would substantially lessen competition”). Although the district court believed that the merger would eventually “improve the delivery of health care” in the Nampa market, the judge did not find that the merger would increase competition or decrease prices. Quite to the contrary, the court, even while noting the likely beneficial effect of the merger on patient care, held that reimbursement rates for PCP services likely would increase. Nor did the court find that the merger would likely lead to integrated health care or a new reimbursement system; the judge merely noted the desire of St. Luke’s to move in that direction.

The district court expressly did conclude, however, that the claimed efficiencies were not merger-specific.¹⁵⁵ The court found “no empirical evidence to support the theory that St. Luke’s needs a core group of employed primary care physicians beyond the number it had before the Acquisition to successfully make the transition to integrated care,” and that “a committed team can be assembled without employing physicians.” The court also found that the shared electronic record was not a merger-specific benefit because data analytics tools are available to independent physicians.

These factual findings were not clearly erroneous. Testimony highlighted examples of independent physicians who had adopted risk-based reimbursement, even though they were not employed by a major health system. The record also revealed that independent physicians had access to a number of analytic tools, including the St. Luke’s Epic system.

But even if we assume that the claimed efficiencies were merger-specific, the defense would nonetheless fail. At most, the district court concluded that St. Luke’s might provide better service to patients after the merger. That is a laudable goal, but the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations. *See [FTC v.] Procter & Gamble [Co.]*, 386 U.S. [568] at 580 [(1967)]. The district court did not clearly err in concluding that whatever else St. Luke’s proved, it did not demonstrate that efficiencies resulting from the merger would have a positive effect on competition.

155. St. Luke’s argues that once a defendant comes forward with proof of efficiencies, the burden shifts to the plaintiff to show that there are ways of achieving those efficiencies without the merger. This tracks the Sherman Act analysis. *See, e.g., Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1412-14 (9th Cir.1991). But, in Clayton Act § 7 cases, after a plaintiff has made a prima facie case that a merger is anticompetitive, the burden of showing that the claimed efficiencies cannot be “attained by practical alternatives,” Merger Guidelines § 10 n. 13, is properly part of the defense, *see Olin [Corp. v. FTC]*, 986 F.2d [1295] at 1305 [(9th Cir. 1993)] (explaining that it is the defendant’s “burden to rebut a prima facie case of illegality”). That burden, moreover, is not unduly onerous, as the defendant need not disprove alternatives that are “merely theoretical.” Merger Guidelines § 10.

QUESTIONS

1. Did the Ninth Circuit apply the proper legal analysis to the efficiencies defense propounded by St. Luke's? In the first instance, was the court's allocation of the burden of as described in footnote 15 consistent with the three-step burden-shifting approach of *Baker Hughes*? If not, did it have to be?

2. The Ninth Circuit concluded that even if the claimed efficiencies were merger specific, they would nonetheless fail. In reaching this result, the court of appeals noted that the district court found "[a]t most . . . St. Luke's might provide better service to patients after the merger. That is a laudable goal, but the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations." To the Ninth Circuit, what exactly was the failure here? Was it that there was an insufficiency likelihood that St. Luke's "might" provide better services to patients? Or was it that even if St. Luke's did provide patients better services that would not matter? Can we tell from the opinion? As far as it goes, was the Ninth Circuit's opinion complete and correct in its analysis of the efficiencies defense? You have the complete section where the efficiencies defense was addressed.

3. The Ninth Circuit's opinion illustrates both the skepticism and the lack of analytical rigor in which courts (and the agencies, for that matter) address efficiencies defenses. Commissioner Joshua Wright of the Federal Trade Commission commented on this in his dissent to the Commission's order in the *Ardagh/St. Gobain* transaction. Commissioner Wright's dissent applies below, followed by the majority commissioners' response.

**UNITED STATES V. ANTHEM, INC.,
855 F.3d 345, 348-50, 352-64 (D.C. Cir. 2017)
(excerpt on efficiencies¹)**

JUDITH W. ROGERS, United States Circuit Judge

This expedited appeal arises from the government’s successful challenge to “the largest proposed merger in the history of the health insurance industry, between two of the four national carriers,” Anthem, Inc. and Cigna Corporation. In July 2015, Anthem, which is licensed to operate under the Blue Cross Blue Shield brand in fourteen states, reached an agreement to merge with Cigna, with which Anthem competes largely in those fourteen states. The U.S. Department of Justice, along with eleven States and the District of Columbia (together, the “government”), filed suit to permanently enjoin the merger on the ground it was likely to substantially lessen competition in at least two markets in violation of Section 7 of the Clayton Act. Following a bench trial, the district court enjoined the merger, rejecting the factual basis of the centerpiece of Anthem’s defense, and focus of its current appeal, that the merger’s anticompetitive effects would be outweighed by its efficiencies because the merger would yield a superior Cigna product at Anthem’s lower rates. The district court found that Anthem had failed to demonstrate that its plan is achievable and that the merger will benefit consumers as claimed in the market for the sale of medical health insurance to national accounts in the fourteen Anthem states, as well as to large group employers in Richmond, Virginia.

Anthem and Cigna (hereinafter, Anthem) challenge the district court’s decision and order permanently enjoining the merger on the principal ground that the court improperly declined to consider the claimed billions of dollars in medical savings. Specifically, Anthem maintains the district court improperly rejected a consumer welfare standard—what it calls “the benchmark of modern antitrust law,” *id.*—and generally abdicated its responsibility to balance likely benefits against any potential harm. According to Anthem, the merger’s efficiencies would benefit customers directly by reducing the costs of customer medical claims through lower provider rates, without harm to the providers. The government has not challenged Anthem’s reliance on an efficiencies defense *per se*. Rather, it points out that Anthem neither disputes that the merger would be anticompetitive but for the claimed medical cost savings, nor challenges the district court’s findings on the relevant market definition, ease of entry, the effect of sophisticated buyers, or innovation. Instead, Anthem’s appeal focuses principally on factual disputes concerning the claimed medical cost savings, which the government maintains were not verified, not specific to the merger, and not even real efficiencies.

¹ Record citations omitted.

For the following reasons, we hold that the district court did not abuse its discretion in enjoining the merger based on Anthem’s failure to show the kind of extraordinary efficiencies necessary to offset the conceded anticompetitive effect of the merger in the fourteen Anthem states: the loss of Cigna, an innovative competitor in a highly concentrated market. Additionally, we hold that the district court did not abuse its discretion in enjoining the merger based on its separate and independent determination that the merger would have a substantial anticompetitive effect in the Richmond, Virginia large group employer market. Accordingly, we affirm the issuance of the permanent injunction on alternative and independent grounds.

II.

[On July 21, 2016, the United States, along with California, Colorado, Connecticut, Georgia, Iowa, Maine, Maryland, New Hampshire, New York, Tennessee, Virginia, and the District of Columbia, sued to enjoin the merger. Following a six-week bench trial, the district court permanently enjoined the merger on the basis of its likely substantial anticompetitive effect in the market for the sale of health insurance to national accounts in the Anthem states, as well as in the market for the sale of health insurance to large group employers in Richmond, Virginia.]

...

III.

Our review of the district court’s decision whether to issue a permanent injunction under the Clayton Act is limited to determining whether there was an abuse of discretion. *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); *see FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) (“Heinz”). The district court’s conclusions of law are reviewed de novo, and its findings of fact must be affirmed unless clearly erroneous. *Heinz*, 246 F.3d at 713. If a finding of fact rests on an erroneous legal premise, then the court “must examine the decision in light of the legal principles [it] believe[s] proper and sound.” *Id.* (quoting *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982)).

A.

It is undisputed that the government met its burden to demonstrate a highly concentrated post-merger market, which would be reduced from four to just three competing companies. Anthem also does not dispute the definition of the national accounts market, nor that such a market will be even more highly concentrated post-merger. Anthem’s appeal instead hinges on the district court’s treatment of its efficiencies defense. The premise of its defense was explained by its expert, Mark Israel, Ph.D. According to Anthem, Dr. Israel quantified the medical cost savings that the combined company could achieve post-merger using a “best of best” methodology, based on the economic theory that the combined company, with its greater volume, would be able to obtain discount rates that are no worse than either of the companies could achieve separately. Using claims data from Anthem and Cigna, he calculated

that the merger would generate \$2.4 billion in medical cost savings through improved discount rates, 98% of which he predicted would be passed through to customers, the large national employers with which Anthem and Cigna contract. Of the \$2.4 billion in claimed savings, Dr. Israel projected that \$1.517 billion would result from Cigna customers accessing Anthem's lower rates, while \$874.6 million would result from Anthem customers accessing Cigna's lower rates; when viewed in terms of self-insured versus fully-insured customers, the former would purportedly see \$1.772 billion of the claimed \$2.4 billion, while the latter would see \$619.8 million. Using merger simulation models, he balanced these projected savings against potential anticompetitive effects from the loss of the rivalry between the two companies and found the savings easily outweighed any potential harm. But, as Anthem tends to ignore, the government offered its own evidence and experts to challenge these conclusions, as we discuss below.

Despite, however, widespread acceptance of the potential benefit of efficiencies as an economic matter, see, e.g., Guidelines § 10, it is not at all clear that they offer a viable legal defense to illegality under Section 7. In *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), the Supreme Court enjoined a merger without any consideration of evidence that the combined company could purchase advertising at a lower rate. It held that “[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.” *Id.* at 580. In his concurrence, Justice Harlan criticized this attempt to “brush the question aside,” and he “accept[ed] the idea that economies could be used to defend a merger.” *Id.* at 597, 603 (Harlan, J., concurring). No matter that Justice Harlan's view may be the more accepted today, the Supreme Court held otherwise, *id.* at 580, and no party points to any subsequent step back by the Court.

Nor does our dissenting colleague, despite his wishful assertion that *Procter & Gamble* can be disregarded by this court because it preceded the “modern approach” adopted in cases like *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), and *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). *See* Dis. Op. 375–77, 378–79. The Supreme Court made no mention of *Procter & Gamble* in *General Dynamics*, 415 U.S. 486, and it cannot be read to have implicitly overruled the earlier decision because it did not involve efficiencies. *See id.* at 494–504; *see also* 4A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 976c2, at 115 (2016) (“Areeda & Hovenkamp”) (distinguishing between an efficiencies defense and *General Dynamics*' “competitive significance” defense). And whatever significance *Continental T. V.* may have in the area of vertical restraints on trade, 433 U.S. at 54–59, it did not do the yeoman's work that the dissent apparently ascribes to it here, for it did not involve efficiencies, mergers, or Section 7 of the Clayton Act. Even stranger is the dissent's suggestion that our decision in *Baker Hughes*, 908 F.2d at 986, blessed an efficiencies defense, *see* Dis. Op. 376–77, because *Baker Hughes* did not concern efficiencies and, like *Heinz*, 246 F.3d at 720, it could not overrule Supreme Court precedent. Nor has this court even hinted, as the dissent proclaims, that *General Dynamics* overruled *Procter & Gamble*'s efficiencies holding. *See Baker Hughes*,

908 F.2d at 988 (citing *Procter & Gamble* favorably); *Heinz*, 246 F.3d at 720 & n.18 (interpreting *Procter & Gamble*'s efficiencies holding). Put differently, our dissenting colleague applies the law as he wishes it were, not as it currently is. Even if "the Supreme Court has not decided a case assessing the lawfulness of a horizontal merger under Section 7 of the Clayton Act" since 1975, Dis. Op. 376, it still is not a lower court's role to ignore on-point precedent so as to adhere to what might someday become Supreme Court precedent.

Despite the clear holding of *Procter & Gamble*, 386 U.S. at 580 two circuit courts, and our own, have subsequently recognized the use of efficiencies evidence in rebutting a prima facie case. *Heinz*, 246 F.3d at 720 (citing, inter alia, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991)); see also *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 571 (6th Cir. 2014). The Eighth Circuit, in holding that the government had produced insufficient evidence of a well-defined market, acknowledged that the district court may have properly rejected the efficiencies defense, while observing evidence of enhanced efficiencies should be considered in the context of the competitive effects of the merger. *Tenet Health Care Corp.*, 186 F.3d at 1053–55. The Eleventh Circuit similarly concluded 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," *University Health, Inc.*, 938 F.2d at 1222, while noting both that "[i]t is unnecessary . . . to define the parameters of this defense now," and that "it may further the goals of antitrust law to limit the availability of an efficiency defense," *id.* at 1222 n.30. Other circuits have remained skeptical and simply assumed efficiencies can rebut a prima facie case, before finding that the merging parties had not clearly shown the merger would enhance rather than hinder competition. See, e.g., *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 348 (3d Cir. 2016); *Saint Alphonsus Med. Ctr.—Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015). These very recent decisions put to rest the dissent's notion that "no modern court" recognizes the continued viability of *Procter & Gamble*, see *Penn State Hershey Med. Ctr.*, 838 F.3d at 348; *Saint Alphonsus Med. Ctr.*, 778 F.3d at 789, while even a cursory reading of the court's opinion today puts to rest any suggestion that it "espouses the old . . . position that efficiencies might be reason to condemn a merger." Dis. Op. 379 (emphasis added) (quoting Ernest Gellhorn et al., *Antitrust Law and Economics in a Nutshell* 463 (5th ed. 2004)).

"Of course, once it is determined that a merger would substantially lessen competition, expected economies, however great, will not insulate the merger from a [S]ection 7 challenge." *Univ. Health*, 938 F.2d at 1222 n.29. Notably, Professors Areeda and Hovenkamp have observed that "Congress may not have wanted anything to do with an efficiencies defense asserted by a firm that was already large or low cost within the market and to whom the efficiencies would give an even greater advantage over rivals." Areeda & Hovenkamp, *supra*, ¶ 950f, at 42; *id.* ¶ 970c, at 31. As our subsequent analysis shows, this court, like our sister circuits, can simply assume the availability of an efficiencies defense to Section 7 illegality because Anthem fails to show that the district court clearly erred in rejecting Anthem's efficiencies defense.

This court was satisfied in *Heinz*, in view of the trend among lower courts and secondary authority, that the Supreme Court can be understood only to have rejected “possible” efficiencies, while efficiencies that are verifiable can be credited. 246 F.3d at 720 & n.18 (discussing 4 Phillip Areeda & Donald Turner, Antitrust Law ¶ 941b, at 154 (1980)). The issue in *Heinz* was whether under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), preliminary injunctive relief would be in the public interest. 246 F.3d at 727. The court held that the district court “failed to make the kind of factual findings required to render that defense sufficiently concrete to rebut the government’s prima facie showing,” *id.* at 725, and, upon weighing the equities, remanded for entry of a preliminary injunction. *Id.* at 726–27. The court expressly stated however: “It is important to emphasize the posture of this case. We do not decide whether . . . the defendants’ claimed efficiencies will carry the day.” *Id.* at 727. These are not the issues in Anthem’s appeal from the grant of a permanent injunction. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*).

Consequently, the circuit precedent that binds us allowed that evidence of efficiencies could rebut a prima facie showing, *Heinz*, 246 F.3d at 720–22, which is not invariably the same as an ultimate defense to Section 7 illegality. *Cf. generally Saint Alphonsus Med. Ctr.*, 778 F.3d at 789–90 (and authorities cited therein). In this expedited appeal, prudence counsels that the court should leave for another day whether efficiencies can be an ultimate defense to Section 7 illegality. We will proceed on the assumption that efficiencies as presented by Anthem could be such a defense under a totality of the circumstances approach, *see Baker Hughes*, 908 F.2d at 984–85 (citing *General Dynamics*, 415 U.S. at 498, 94 S.Ct. 1186), because Anthem has failed to show the district court clearly erred in rejecting Anthem’s purported medical cost savings as an offsetting efficiency. Guidelines § 10; *cf. Heinz*, 246 F.3d at 720–22. Additionally, because the district court could permissibly conclude that the efficiencies defense failed, because the amount of cost saving that is both merger-specific and verifiable would be insufficient to offset the likely harm to competition, this court has no occasion to decide whether the type of redistributive savings claimed here are cognizable at all under Section 7. It bears noting, though, that all of those other issues pose potentially substantial additional obstacles to this merger.

One further preliminary analytical point. Amici supporting Anthem invite the court to disregard the merger-specificity and verifiability requirements on the ground they place an asymmetric burden on merging parties that could doom beneficial mergers. *See Br. for Antitrust Economists and Business Professors as Amicus Curiae in Support of Appellant and Reversal (“Amici Economists”)* at 5–7. Anthem itself has not adopted this argument. *See Burwell v. Hobby Lobby Stores, Inc.*, [573] U.S. [682, 721] (2014); *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001). We note, however, that Amici Economists misapprehend the nature of Anthem’s claimed efficiencies as “direct price reductions,” *id.* at 6–7, rather than as potential price reductions subject to a number of uncertainties. For customers to realize any price reduction, Anthem would first have to succeed in reducing providers’ rates, and to that extent the purported reductions would not be a direct effect of the merger. By contrast, the merger would immediately give rise to upward pricing pressure by eliminating a competitor, and Anthem could

unilaterally raise its prices in response. Further, Amici Economists ignore that fully-insured customers, and potentially self-insured customers depending on the terms of their contracts with Anthem, will not see any savings until Anthem takes a second action, renegotiating the customers' contracts to pass through the savings. This illustrates the reason for the verifiability requirement: Perhaps Anthem is certain to take those actions, and there will be no impediments to the savings' realization, but that showing is still necessary for a court to conclude that the merger's direct effect (upward pricing pressure) is likely to be offset by an indirect effect (potential downward pricing pressure). See Guidelines § 10. As for merger-specificity, Amici Economists point to no logical flaw in the policy that consumers should not bear the loss of a competitor if the offsetting benefit could be achieved without a merger. See *Heinz*, 246 F.3d at 722.

B.

Any claimed efficiency must be shown to be merger-specific, meaning that it “cannot be achieved by either company alone because, if [it] can, the merger’s asserted benefits can be achieved without the concomitant loss of a competitor.” *Heinz*, 246 F.3d at 722. The Guidelines frame the issue slightly differently: an efficiency is said to be merger-specific if it is “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.” Guidelines § 10. Anthem faults the district court for considering whether the efficiencies “could” be achieved absent the merger, without regard to likelihood, Appellant Br. 24, even though in *Heinz*, 246 F.3d at 722, this court spoke repeatedly in terms of possibility (“can” or “could”).

Heinz, 246 F.3d at 721-22, cited the Guidelines with approval in describing the standard for merger-specificity. Both the current and then-current Guidelines refer to “practical” alternatives to achieving the efficiency short of merger, alternatives that are more than “merely theoretical.” Guidelines § 10 (2010); Guidelines § 4 (1997). Similarly, in *Heinz*, 246 F.3d at 722, the court considered whether it was practical for the company to obtain better baby food recipes by investing more money in product development, or whether that would cost more money than the merger itself. The real question is whether the alternatives to merger are practical and more than merely theoretical, *see id.*; Guidelines § 10. Even assuming there is any difference between the two standards, it would not affect the outcome here on this factual record. Viewed under either articulation, certain of Anthem’s claimed efficiencies fall away.

[Details of the Court’s merger-specificity analysis omitted]

C.

Under the Guidelines, projected efficiencies will not be credited “if they are vague, speculative, or otherwise cannot be verified by reasonable means.” Guidelines § 10. Anthem maintains that the district court clearly erred because the \$2.4 billion in projected post-merger savings was verified by two independent sources (Dr. Israel and

an integration planning team from McKinsey & Company, which had access to each company's internal files). In Anthem's view, the district court also erred as a matter of law by imposing a "virtually insurmountable burden" of persuasion, when all that is required is to show "probabilities, not certainties," *Baker Hughes*, 908 F.2d at 984.

[Details of the Court's merger-specificity analysis omitted]

The savings projected by McKinsey & Co. and Dr. Israel—uncritically relied on by the dissent, e.g., Dis. Op. 373–75, 380—were without a doubt enormous. The problem is, those projections fall to pieces in a stiff breeze. If merging companies could defeat a Clayton Act challenge merely by offering expert testimony of fantastical cost savings, Section 7 would be dead letter.

...

NOTES

1. The dissent in *Anthem* was written by then-Judge, now-Justice Brett Kavanaugh. No doubt he will remember Judge Rogers biting criticism when the Supreme Court has an opportunity—and no doubt it will—to examine the efficiencies defense in a merger case. Indeed, I suspect that Justice Kavanaugh, among others on the Court, are looking forward to reconsidering the treatment of efficiencies in *Procter & Gamble*. Obtaining four votes for a writ of certiorari should not be a problem.

2. Judge Rogers (joined in the majority opinion by Patricia A. Millet) correctly explained the *Procter & Gamble* precedent, and the Supreme Court has not abrogated it. But remember, *Procter & Gamble* was decided in 1967, the year after *Von's Grocery* and *Pabst*, two of the most restrictive horizontal merger cases ever decided by the Supreme Court. This was a time when merger antitrust law prevented the concentration of industry and protected small firms and the local control of business.¹ Even if efficiencies reduced prices, lower prices would not serve as a defense when a merger substantially lessened competition along the dimensions of these policy goals.

3. Properly interpreted today, *Procter & Gamble* stands for the proposition that efficiencies are not an *affirmative* defense to an anticompetitive merger. But as you know from Unit 3, the lens through which courts interpreted the antitrust laws changed in the late 1970s into the 1980s to first to the promotion of productive efficiency and then to the promotion of consumer welfare. Under this interpretation, lower prices from a merger that increased in consumer welfare would mean the merger was not anticompetitive within the meaning of Section 7 in the first place. While efficiencies still would not be an affirmative defense to the merger, in the right circumstances they could be a *negative* defense. Modern courts treat the efficiencies defense in this sense, which unfortunately remains all too misunderstood by the bench and the bar today.

¹ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 311-23 (1962). The Unit 3 reading materials excerpt the relevant portion of the opinion (pp. 19-23).

FTC v. WILH. WILHELMSSEN HOLDING ASA
341 F. SUPP. 3D 27, 72-73 (D.D.C. 2018)
(excerpt on efficiencies¹)

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.]

...

c. Efficiencies

1. LEGAL STANDARD

As the Merger Guidelines explain, “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 services, or new products.” Merger Guidelines § 10. Though the Supreme Court has never recognized the so-called “efficiencies” defense in a Section 7 case, other courts and the Horizontal Merger Guidelines acknowledge that evidence of efficiencies may prove “relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition,” [*FTC v. Arch Coal, [Inc.],* 329 F.Supp.2d [109,] at 151 [(D.D.C. 2004)], and accordingly that efficiencies produced by a merger can form part of a defendant’s rebuttal of the FTC’s prima facie case. [*FTC v. Sysco, [Corp.],* 113 F.Supp.3d [1,] at

1. Record citations omitted.

81 [(D.D.C. 2015)]; [*FTC v. Heinz [Co.]*, 246 F.3d [708,] at 720 [(D.C. Cir. 2001)]. This is true even though “[c]ourts have rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies.” [*FTC v. CCC Holdings, [Inc.]*, 605 F.Supp.2d [26,] at 72 [(D.D.C. 2009)].

Potential efficiencies require close judicial scrutiny—“the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those ‘efficiencies’ represent more than mere speculation and promises about post-merger behavior,” *Heinz*, 246 F.3d at 721, and a defendant must prove “extraordinary efficiencies” where market concentration levels are high. *Id.* at 720-21. An efficiencies analysis must demonstrate that the claimed efficiencies are (1) merger-specific, and (2) verifiable—meaning that efficiency claims “must represent a type of cost saving that could not be achieved without the merger and the estimate of the predicted saving must be reasonably verifiable by an independent party.” *United States v. H&R Block, Inc.*, 833 F.Supp.2d 36, 89 (D.D.C. 2011); *see also Sysco*, 113 F.Supp.3d at 82. Moreover, “it is incumbent upon the merging firms to substantiate efficiency claims,” as “much of the information relating to efficiencies is uniquely in the possession of the merging firms.” Merger Guidelines § 10.

2. ANALYSIS

Defendants claim that the proposed merger will result in significant merger-specific efficiencies in the form of cost savings of [redacted] and that these efficiencies will be realized in four ways: (1) production cost reductions from eliminating duplicative product lines, (2) customer-facing cost reductions from eliminating duplicative account managers and customer service operations, (3) reductions from eliminating duplicative back-office and administrative costs, and (4) price reductions as part of a plan to address expected revenue dis-synergies, in order to compensate for the possibility of lost customers who oppose the merger.

The FTC engaged an expert, Dr. Dov Rothman, to evaluate whether Defendants had substantiated their estimated cost efficiencies, and whether such efficiencies were merger-specific. Dr. Rothman reviewed data and documentation from the merging parties, and the parties’ consultants provided him with spreadsheets relevant to their claimed cost savings. Dr. Rothman concluded in his report and his testimony at the evidentiary hearing that the merging parties had failed to provide sufficient information for him to verify the likelihood and magnitude of the claimed cost savings. In particular, Dr. Rothman found that the alleged cost savings in each of the categories were based on a series of significant assumptions—percentage reductions in cost, percentage increases in productivity, or assumed cost/product equivalencies—that were “doing all the work” in calculation of the estimates. Dr. Rothman further pointed out that Wilhelmsen failed to provide any information that would have allowed him to confirm whether those assumptions are reasonable. *See, e.g., Rothman Hrg. Tr.* at 1039:19–1040:5 (“So what Wilhelmsen has provided here, it’s provided a description of the process by which these cost savings were estimated. So it’s explained that it had functional teams and Cardo Partners go around and identify and assess areas of duplicative overlap. And Wilhelmsen has . . . provided information that describes the

output of the analysis. What Wilhelmsen hasn't provided is information about the analysis itself. And I think there's an important distinction between describing the process of estimating cost savings and describing the actual analysis, the assumptions that go into that analysis.").

In response to these criticisms, Defendants note that WSS has a history of acquiring companies that produce MWT chemicals—specifically Unitor and Nalfleet—that demonstrates that WSS has previously achieved the cost savings it projected. Defendants also note that the efficiency estimates went through many rounds of internal vetting, and rely on the testimony and report of Dr. [Mark] Israel, who contended that the estimates are verifiable insofar as WSS identified the potential bases for cost savings, performed its own vetting and due diligence, and has a track record of realizing projected cost savings.

The court finds that Defendants have failed to carry their burden to demonstrate the verifiability of their claimed efficiencies. In reaching this decision, the court stresses that the determinative issue is neither the presence of assumptions nor the absence of completely precise estimates. Instead, the critical issue is that because the bases for the assumptions Dr. Rothman identified and their role in the efficiencies analysis is unclear, the reasonableness of those assumptions, along with the ultimate determinations of likelihood and magnitude, cannot be verified with any degree of rigor. *Heinz*, 246 F.3d at 721 (“[G]iven the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those ‘efficiencies’ represent more than mere speculation and promises about post-merger behavior.”) (emphasis added); *see also id.* (scrutinizing quantitative basis for claimed efficiencies). Nor can reference to the merging parties’ past practices, managerial expertise and incentives, or internal verification processes serve to substantiate any efficiencies. The court cannot substitute Defendants’ assessments and projections for independent verification. *H & R Block*, 833 F.Supp.2d at 91 (“While reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable by the Court. If this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise.”). The court concludes that Defendants have failed to provide enough information about their estimated efficiencies to render them “reasonably verifiable by an independent party.” *Id.* at 89. Given this conclusion, the court need not address the question of merger-specificity.

...

**FTC v. HACKENSACK MERIDIAN HEALTH, INC.,
30 F.4th 160, 164, 175-79 (3d Cir. 2022)
(excerpt on efficiencies)**

D. MICHAEL FISHER, Circuit Judge

Englewood Healthcare Foundation, a local New Jersey hospital, and Hackensack Meridian Health, Inc., New Jersey’s largest healthcare system, agreed to a multi-million-dollar merger. The Federal Trade Commission opposes their merger and filed an administrative complaint alleging it violates Section 7 of the Clayton Act because it is likely to substantially lessen competition. To prevent the parties from merging before the administrative adjudication could occur, the FTC filed suit in the District of New Jersey under Section 13(b) of the Federal Trade Commission Act, requesting a preliminary injunction pending the outcome of the administrative adjudication. The District Court granted the preliminary injunction, holding that the FTC established that there is a reasonable probability that the merger will substantially impair competition. For the reasons that follow, we will affirm

. . .

B. The Hospitals failed to rebut the FTC’s prima facie case

Once the FTC establishes a prima facie case that a merger may substantially lessen competition, the burden shifts to the Hospitals to rebut the FTC’s case. “[T]he Hospitals 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. Penn State Hershey [Med. Ctr.]*, 838 F.3d [327,] at 347 [(3d Cir. 2016)]. The “linchpin of any efficiencies defense” is the language of the Clayton Act, which “speaks in terms of ‘competition.’” *Id.* at 349 (quoting *St. Alphonsus*, 778 F.3d at 790). The defense “requires proof that a merger is not, despite the existence of a prima facie case, anticompetitive” because “the prima facie case portrays inaccurately the merger’s probable effects on competition.” *Id.* (quoting *St. Alphonsus [Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.]*, 778 F.3d [775,] at 790 [(9th Cir. 2015)]). This defense recognizes that efficiencies created by a merger can “enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.” Merger Guidelines, § 10, at 29.

To combat the likely anticompetitive harms the FTC established, the Hospitals offer a panoply of procompetitive benefits that may be reaped from the merger: upgrades and increased capacity limits at Englewood, the expansion of complex tertiary and quaternary care at HUMC, cost-savings that will result from service optimization between the Hospitals, and quality improvements at both Hospitals. They argue that these benefits, which the District Court recognized, show that the FTC did not establish a likelihood that the merger would substantially lessen competition. They

claim they are not making an efficiencies defense, thus the stringent standard developed in other circuits need not apply. They say, instead, that procompetitive effects must simply be weighed in the balance together with anticompetitive effects when considering whether they have rebutted the FTC's prima facie case.

The existence of procompetitive benefits does not mean the absence of anticompetitive harms. The Hospitals' argument that there "would not likely be a substantial lessening of competition when both pro- and anti-competitive effects were duly considered," is merely a different way of saying there would not likely be a substantial lessening of competition because the procompetitive effects offset the anticompetitive effects of the merger. Thus, the Hospitals' procompetitive benefits argument is an efficiencies defense.

Neither this Court nor the Supreme Court has formally adopted the efficiencies defense. See *Hershey*, 838 F.3d at 347. Other Circuits have at least been tentatively willing to recognize the defense, though none have held that it was successfully invoked. See *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 571 (6th Cir. 2014); *St. Alphonsus*, 778 F.3d at 788–92; [*FTC v. H.J. Heinz [Co.]*, 246 F.3d [708], at 720 [(D.C. Cir. 2001)]; *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991). In *Hershey*, we explained that we were skeptical such a defense exists. 838 F.3d at 348. Although we have yet to see an efficiency so great as to justify a presumptively anticompetitive merger, we do not rule out that the efficiencies defense may be viable. But as in *Hershey*, we are not forced to confront that possibility. *Id.* Although this case is much closer than *Hershey*, the efficiencies defense, as adopted by other Circuits, is clearly not met here. Nonetheless, we address the defense and each of the Hospitals' claimed procompetitive benefits to clarify any ambiguity in *Hershey*.

For the efficiencies defense to be cognizable, the efficiencies must (1) "offset the anticompetitive concerns in highly concentrated markets"; (2) "be merger-specific" (i.e., the efficiencies cannot be achieved by either party alone); (3) "be verifiable, not speculative"; and (4) "not arise from anticompetitive reductions in output or service." *Hershey*, 838 F.3d at 348–49 (internal quotation marks and citations omitted).

In *Hershey*, we expounded on the first element—whether efficiencies offset anticompetitive concerns—in the context of HHI numbers. *Id.* at 350. We stated that even if the hospitals could show an efficiency was verified, was merger-specific, and did not arise from anticompetitive reduction in output, the HHI numbers were so great as to "eclipse any others we have identified in similar cases." *Id.* Therefore, the merger was "so likely to be anticompetitive that 'extraordinarily great . . . efficiencies [were] necessary to prevent the merger from being anticompetitive.'" *Id.* (quoting Merger Guidelines, § 10, at 31). The District Court seems to have interpreted *Hershey* to mean that "extraordinary" efficiencies must be found in every case where a prima facie case is established, regardless of the HHI numbers. *Hackensack*, 2021 WL 4145062, at *26, *30. We now clarify our earlier statements.

Efficiencies are best understood as a sliding scale. The magnitude of the efficiencies needed to overcome a prima facie case depends on the strength of the likely adverse competitive effects of a merger. At a minimum, the defendant must show that "the intended acquisition would result in significant economies and that [those]

economies would ultimately benefit competition and, hence, consumers.” See *Univ. Health*, 938 F.2d at 1223. *Hershey* examined the high end of the spectrum. There, the market had an HHI of 5,984—more than twice the highly-concentrated-market threshold—and an increase in HHI of 2,582—more than twelve times the 200-point increase that triggers a presumption of anticompetitive harm when the resulting market is highly concentrated. *Hershey*, 838 F.3d at 347. Recognizing that the HHI numbers were extraordinary, we declared that any efficiencies would have to be equally extraordinary to overcome the likely anticompetitive effects. *Id.* at 350. But not every invocation of the efficiencies defense will require that showing. Courts must take their cues from the HHI numbers and direct evidence presented by the government in each case.

Here, the District Court analyzed the Hospitals’ claimed procompetitive benefits as efficiencies and concluded that they were insufficient to overcome the FTC’s prima facie case. Although we agree with that conclusion, to the extent the District Court required a showing of extraordinary procompetitive effects, it would have been incorrect. The presumption of anticompetitive effects established by the FTC here does not rise to the level seen in *Hershey*. Nonetheless, we review conclusions of law de novo, *id.* at 335, and our review leads us to the same conclusion. Some procompetitive benefits may exist, but they are not significant enough to offset the likely anticompetitive effects of the merger. Most of the Hospitals’ claimed benefits were speculative or non-merger-specific. And the few procompetitive effects that the Hospitals did establish do not constitute significant economies that will ultimately benefit competition and, hence, the patients in Bergen County.

The District Court found that most of the Hospitals’ commitments to increase Englewood’s capacity and improve its clinical offerings were merely speculative. What the Hospitals called “hard commitments” were only commitments to “explore, assess, and collaborate.” *Hackensack*, 2021 WL 4145062, at *26. Furthermore, many of these commitments were not Englewood-specific or enforceable. On the other hand, the Court noted that Hackensack’s significant capital contribution could likely amount to a procompetitive benefit to Bergen County in a few ways, such as upgrading some physical facilities and providing Englewood with robotic technology, both of which would offer Bergen County patients more or upgraded services. But these modest upgrades alone are not significant enough to overcome the strong evidence of anticompetitive harms.

The District Court held that cost savings due to post-merger service optimization were also too speculative to be meaningful. The Court found that the \$38 million figure the Hospitals relied on failed to account for the \$439 million capital contribution by Hackensack. Additionally, the Court found more persuasive the evidence, or rather lack of evidence, presented about cost savings in past Hackensack mergers. Hackensack has previously acquired other hospitals in New Jersey, yet the Hospitals provided no evidence that consumers benefitted from cost savings due to service optimization between the merging parties. Whatever savings the merging entities may have cashed in on, there was no evidence the savings ever flowed through to patients.

The District Court held that the benefit of expanded complex tertiary and quaternary care was both non-merger-specific and speculative. To embark on this expansion, Hackensack claims it must relieve capacity restraints at HUMC. But the District Court found that the only thing preventing HUMC from transferring patients to Englewood was financial or competitive motive. As the District Court stated, this motive may be legitimate, but it nonetheless undercuts the Hospitals' argument that the expansion can only occur if the merger moves forward. The District Court also noted that HUMC is currently expanding capacity and quaternary services through an ongoing upgrade project. Finally, the District Court rightly pointed out that Hackensack has three hospitals near HUMC that are not at capacity and likely could help alleviate HUMC's capacity restraints. The Hospitals have offered nothing to combat these findings.

Furthermore, the District Court found that any procompetitive benefit gained by easing HUMC's capacity restraints is speculative. First, the Hospitals provided no evidence that they have a plan to transfer patients from HUMC to Englewood. At best, the Hospitals have a sense of the number of patients they would like to transfer. Second, the Hospitals failed to account for the fact that many hospital referrals come from physicians not employed by HUMC and those physicians may not recommend their patients seek services at Englewood. Thus, even the Hospitals' transfer goals are speculative. Finally, assuming the capacity restraint problems were confirmed, the expansion of quaternary services is speculative. State approval is required for any such expansion and the process to gain that approval is expensive and time-consuming. Thus, the District Court correctly found that the expansion of services at HUMC is not a cognizable efficiency.

As for the Hospitals' claim that the merger will provide quality improvements to both Englewood and HUMC, the District Court found these too were not merger-specific. Although the Court did not doubt that Hackensack's capital commitment would improve facilities and equipment at Englewood, it explained that such quality improvements were likely to happen regardless of a merger. Englewood is a high-quality hospital. It consistently performs well in multiple quality assessments and is motivated to maintain this quality of care because of its competition with HUMC. Therefore, Englewood would likely make similar quality improvements even if it did not merge with Hackensack. Furthermore, Englewood scores better than HUMC on multiple important performance measures, such as hospital safety, patient experience, timely and effective care, nursing recognition, and healthcare-associated infection rates. If the merger occurs, consumers would likely be disadvantaged because Englewood would no longer have an incentive to outperform HUMC and HUMC would have no reason to strive for improvement in those areas.

The District Court did not directly address the New Jersey Attorney General's finding that the merger is in the public interest under the New Jersey Community Health Care Assets Protection Act. Under the Act, the New Jersey Attorney General and the New Jersey Department of Health evaluate whether a nonprofit hospital transaction is in the public interest. Relevant to their inquiry, they evaluate whether the proposed transaction is "likely to result in the deterioration of quality, availability or

accessibility of health care services in the affected communities.” N.J.S.A. 26:2H-7.11(b). Here, New Jersey concluded that Hackensack made commitments to enhance Englewood’s offerings to the community. Although that finding is independent of any antitrust analysis federal courts may perform, we would be remiss not to consider a state’s assessment of the effects of a merger within its borders. Therefore, the District Court should have included the interests of the community, as assessed by the New Jersey Attorney General, in analyzing the likely effects of the merger.

Nonetheless, when we consider this assessment of the community’s interests along with the modest quality improvements and upgrades likely to occur because of this merger, they are not significant enough to overcome the FTC’s strong *prima facie* case. We thus conclude that the District Court did not err in holding that the Hospitals failed to rebut the *prima facie* case that the merger is likely to substantially lessen competition. Therefore, no additional evidence is necessary for the FTC to carry its ultimate burden of persuasion. *See Hershey*, 838 F.3d at 337.

III.

For these reasons, we will affirm the District Court’s grant of preliminary injunctive relief.

NOTES

1. On October 15, 2019, Hackensack Meridian Health and Englewood Health, two not-for-profit systems, announced the signing of a definitive agreement to merge.¹ The merger would have combined Hackensack’s 16-hospital system, including two hospitals in Bergen County, NJ, with Englewood’s community hospital located in the county. As a result of the merger, Hackensack would control three of the six inpatient general acute care hospitals in Bergen County. In the announcement, Hackensack Meridian Health reported that it had committed to a \$400 million capital investment at Englewood Health.

2. The District Court found the relevant product market to be the “cluster of inpatient [general acute care] services” offered by Englewood and Hackensack’s Bergen County hospitals and sold to commercial insurers. *FTC v. Hackensack Meridian Health, Inc.*, No. CV 20-18140, 2021 WL 4145062, at *15 (D.N.J. Aug. 4, 2021) (not for publication), *aff’d*, 30 F.4th 160, 166 (3d Cir. 2022). As in most hospital merger cases, the merging parties did not meaningfully dispute the relevant product market. *Id.*

3. Also as in most hospital merger cases, the relevant geographic market was one of the main points of contention at trial and on appeal. The FTC defined the relevant geographic market in terms of patient location rather than hospital location and sought to prove that a proper relevant market to assess the transaction’s competitive effects was all hospitals used by commercially insured patients who reside in Bergen County. The FTC’s expert, Dr. Leemore Dafny, chose Bergen County as the

¹ Press Release, Hackensack Meridian Health, [Englewood Health and Hackensack Meridian Health Sign Definitive Agreement to Merge](#) (Oct. 15, 2019).

proposed market for three principal reasons: “(1) Englewood and HUMC are in Bergen County; (2) the majority of Bergen County residents receive care in Bergen County; and (3) Bergen County is an economically significant area for insurers.” *Id.* at 16. Moreover, commercial insurers testified that they cannot offer a marketable plan in Bergen County that does not include a Bergen County hospital. Recognizing the unique commercial realities of the healthcare market and relying heavily on insurer testimony, the District Court accepted the FTC’s proposed geographic market. On appeal, the Third Circuit affirmed.

4. On March 22, 2022, the Third Circuit affirmed the district court’s entry of a preliminary injunction enjoining the transaction until the conclusion of an adjudication of the merits in an FTC administrative proceeding. On April 5, 2022, the parties notified the FTC that they had terminated their merger agreement and moved for the dismissal of the administrative complaint.² Complaint counsel opposed, arguing that the Commission should instead withdraw the matter from adjudication to enable it to discuss with the staff whether the Commission should seek further relief from the merging parties.³ Over the opposition of the merging parties,⁴ the Commission denied the motion to dismiss and withdrew the matter from adjudication.⁵ A month later, the Commission determined that no further relief was warranted, returned the matter to adjudication, and dismissed the complaint.⁶

² See [Respondents’ Motion To Dismiss Complaint, Hackensack Meridian Health, Inc.](#), No. 9399 (F.T.C. Apr. 5, 2022).

³ See [Complaint Counsel’S Opposition To Respondents’ Motion To Dismiss, Hackensack Meridian Health, Inc.](#), No. 9399 (F.T.C. Apr. 13, 2022). Complaint counsel cited *Coca-Cola* for the proposition that the action was not moot even though the parties had abandoned the deal. See *Coca-Cola Co.*, 117 F.T.C. 795 (F.T.C. 1994) (continuing to litigate the merits of an abandoned deal to determine whether the commission should enjoin Coca-Cola from making future acquisitions in the soft-drink industry without the prior written approval of the Commission).

⁴ See [Respondents’ Reply in Support of their Motion to Dismiss Complaint, Hackensack Meridian Health, Inc.](#), No. 9399 (F.T.C. Apr. 20, 2022).

⁵ See [Order Withdrawing Proceeding from Adjudication, Hackensack Meridian Health, Inc.](#), No. 9399 (F.T.C. May 24, 2022).

⁶ See [Order Returning Matter To Adjudication And Dismissing Complaint, Hackensack Meridian Health, Inc.](#), No. 9399 (F.T.C. June 27, 2022).

**UNITED STATES V. BERTELSMANN SE & Co. KGAA,
646 F. Supp. 3d 1, 35 (D.D.C. Nov. 15, 2022)
(excerpt on efficiencies)**

FLORENCE Y. PAN, United States Circuit Judge

[The Department of Justice brought an action alleging that the proposed \$2.18 billion acquisition by Bertelsmann, the owner of Penguin Random House, of Simon & Schuster from ViacomCBS. The DOJ alleged that the acquisition would substantially lessen competition in the input market for the U.S. publishing rights to anticipated top-selling books (defined to be books with advances over \$250K). Penguin Random House and Simon & Schuster are two of the “Big Five” largest book publishers in the United States, with market shares of 37% and 12%, respectively. The court sustained the DOJ’s market definition, found that the merger was likely to substantially harm competition through both unilateral and coordinated effects, and rejected the defenses of the merging parties.]

. . .

ii. Efficiencies

The defendants argued at trial that efficiencies would limit the merger’s anticipated competitive harm. Efficiencies alone might not suffice to rebut a *prima facie* case, but they “may nevertheless be relevant to the competitive effects analysis on the market required to determine whether the proposed transaction will substantially lessen competition.” *Sysco*, 113 F. Supp. 3d at 82 (quotations omitted). The Court, however, precluded the defendants’ evidence of efficiencies, after determining that the defendants had failed to verify the evidence, as required by law. *See* Trial Tr. at 2749:12–2772:24. Efficiencies therefore play no role in the instant analysis.

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA

3 THE UNITED STATES OF AMERICA, Civil Action
4 Plaintiff(s), No. 21-02886
5 vs.

6 BERTELSMANN SE & CO. KGAA, Washington, D.C.
7 et al, August 17, 2022
8 Defendant(s). 9:30 a.m.
Morning Session

9 TRANSCRIPT OF BENCH TRIAL
10 BEFORE THE HONORABLE FLORENCE Y. PAN
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES:

13 FOR THE PLAINTIFF: John R. Read, Esquire
14 Ihan Kim, Esquire
15 Melvin A. Schwarz, I, Esquire
16 Ethan Stevenson, Esquire
United States Department of Justice
Antitrust Division
450 Fifth Street, Northwest
Washington, D.C. 20530

17 FOR THE DEFENDANTS Daniel M. Petrocelli, Esquire
18 BERTELSMANN and M. Randall Oppenheimer, Esquire
19 PENGUIN RANDOM HOUSE: Megan Smith, Esquire
O'Melveny & Myers, LLP
1999 Avenue of the Stars
Eighth Floor
20 Los Angeles, California 90067

1 THE COURT: I understand that. Thank you.

2 MR. FRACKMAN: Thank you.

3 THE COURT: Anything else from you, Mr. Schwarz?

4 MR. SCHWARZ: No, Your Honor. Just for the record I
5 would like to say that the Peabody Energy case, which he cited,
6 there was an expert in that case, and the court still rejected
7 most of the efficiencies in any event.

8 And I think the law is clear from the D.C. Circuit in
9 Anthem on the fact that these cannot be vague, speculative, or
10 otherwise cannot be verified by reasonable means. That's at
11 359. And I don't think this is reasonable at all.

12 THE COURT: Okay. Thank you.

13 The Court has heard the evidence on this issue and the
14 arguments of the parties and is prepared to rule.

15 Dr. Snyder is an expert witness for the defendants who
16 is offered to testify on merger-related efficiencies. His
17 expert opinion relies on a projection of synergies produced in
18 November of 2020 by Manuel Sansigre, a senior vice president at
19 Penguin Random House who's in charge of mergers and
20 acquisitions.

21 Mr. Sansigre produced his synergy projections to help
22 Random House evaluate whether it should acquire Simon &
23 Schuster.

24 Dr. Snyder's expert report offers three primary
25 conclusions about Mr. Sansigre's projections.

1 First, that the projected synergies are the type that
2 economists would recognize given the features of the publishing
3 industry.

4 Second, that the projected synergies are
5 merger-specific efficiencies.

6 Third, that the projected synergies would benefit
7 authors through higher income and consumers through greater
8 availability of books.

9 Significantly, however, Dr. Snyder concedes that he
10 did not, quote, independently verify specific dollar amounts,
11 unquote, and did not, quote, independently derive estimates,
12 unquote, of Mr. Sansigre's projected synergies. Thus, the
13 parties agree and stipulate that Dr. Snyder did not verify the
14 projections from the November 2020 model that form the basis of
15 his expert opinion on efficiencies.

16 The government filed a motion in limine to exclude
17 Dr. Snyder's testimony on efficiencies under Federal Rule of
18 Evidence 702. The government argued, among other things, that
19 Dr. Snyder's reliance on unverified projections rendered his
20 efficiencies testimony inadmissible under Rule 702, the
21 horizontal merger guidelines, and cases applying the horizontal
22 merger guidelines.

23 The Court essentially deferred ruling on the motion to
24 preclude the expert testimony on efficiencies determining that
25 it should hear the evidence about Mr. Sansigre's projections

1 before deciding whether the alleged efficiencies are verifiable
2 and verified as required by the horizontal merger guidelines
3 and persuasive case law.

4 The Court decided to hear the evidence during the
5 trial given that this is a bench trial but instructed the
6 parties to arrange the presentation of evidence so that the
7 verifiability of Mr. Sansigre's projected synergies could be
8 considered and argued and the Court could then rule on the
9 government's motion before hearing the totality of Dr. Snyder's
10 expert testimony on efficiencies.

11 The Court determined that it would be more efficient
12 to proceed in this fashion because if defendants were unable to
13 meet their burden to show that the efficiencies were
14 substantiated, verifiable, and verified under the horizontal
15 merger guidelines, then it would be unnecessary to consider any
16 of the other aspects of the efficiencies evidence.

17 The Court has now heard the evidence on the projected
18 efficiencies and arguments from the parties, and it will grant
19 the motion to preclude the efficiencies evidence because the
20 efficiencies projected by Penguin Random House are not
21 substantiated and verified.

22 Although many of the projections may be verifiable,
23 some are not verifiable. Moreover, the efficiencies have not,
24 in fact, been independently verified by anyone, and they,
25 therefore, are not cognizable under the horizontal merger

1 guidelines and are not reliable under Rule 702.

2 Finally, the Court concludes that the efficiencies
3 projections in the November 2020 model are unreliable because
4 they are out of date and include 2021 projections that have
5 been proved to be inaccurate.

6 The applicable legal standards are as follows:

7 Federal Rule of Evidence 702 concerning testimony by
8 expert witnesses provides, quote, a witness who is qualified as
9 an expert by knowledge, skill, experience, training, or
10 education may testify in the form of an opinion or otherwise
11 if, A, the expert's scientific, technical, or other specialized
12 knowledge will help the trier of fact to understand the
13 evidence or to determine a fact in issue; B, the testimony is
14 based on sufficient facts or data; C, the testimony is the
15 product of reliable principles and methods; and D, the expert
16 has reliably applied the principles and methods to the facts of
17 the case, unquote.

18 Rule 702 incorporates the Supreme Court's guidance in
19 Daubert versus Merrell Dow Pharmaceuticals, Inc. which called
20 upon trial judges to serve a gatekeeping role in ensuring that
21 an expert's testimony both rests on a reliable foundation and
22 is relevant to the task at hand.

23 Also in Kumho Tire Company, Limited versus Carmichael,
24 the Supreme Court clarified that the gatekeeper role extends to
25 all expert testimony.

1 And this is confirmed by Rule 702's advisory committee
2 note to the 2000 amendment.

3 The party seeking to introduce expert testimony must
4 demonstrate its admissibility by a preponderance of the
5 evidence. Courts take a flexible approach to deciding Rule 702
6 motions and have broad discretion in determining whether to
7 admit or exclude expert testimony.

8 Horizontal merger guideline section 10.

9 The horizontal merger guidelines outline the analysis
10 and enforcement practices of the Department of Justice and the
11 Federal Trade Commission with respect to horizontal mergers
12 under the federal antitrust laws including section 7 of the
13 Clayton Act. See horizontal merger guideline section 1.

14 Federal courts frequently use the guidelines to
15 develop legal standards in antitrust litigation. See, for
16 example, FTC versus H.J. Heinz Company, 246 F.3d 708. That's a
17 D.C. Circuit case from 2001.

18 Section 10 of the horizontal merger guidelines
19 discusses efficiencies. The guidelines observe that
20 efficiencies are difficult to verify and quantify in part
21 because much of the information relating to efficiencies is
22 uniquely in the possession of the merging firms. Moreover,
23 efficiencies projected reasonably and in good faith by the
24 merging firms may not be realized.

25 Therefore, the merger guidelines say, it is incumbent

1 upon the merging firms to substantiate efficiency claims so
2 that the agencies can verify by reasonable means the likelihood
3 and magnitude of each asserted efficiency.

4 Courts interpret this requirement of substantiation
5 and verification to encompass, quote, how and when each
6 efficiency would be achieved and any costs of doing so, how
7 each efficiency would enhance the merged firm's ability and
8 incentive to compete, and why each would be merger specific,
9 end quote. That's from United States versus H&R Block, 833
10 F.Supp.2d 36 at 89. That's a D.D.C. case from 2011, and it is
11 quoting the horizontal merger guidelines section 10.

12 Under the guidelines, projected efficiencies are
13 generally less credible when generated outside the usual
14 business planning process, and they are more credible when
15 substantiated by analogous past experience.

16 Ultimately, efficiencies must be cognizable to be
17 considered under the guidelines. Quote, cognizable
18 efficiencies are merger-specific efficiencies that have been
19 verified and do not arise from anticompetitive reductions in
20 output or service.

21 A cognizable efficiency claim must represent a type of
22 cost saving that could not be achieved without the merger, and
23 the estimate of the predicted saving must be reasonably
24 verifiable by an independent party. And that's quoting the
25 horizontal merger guidelines and also, I believe, H&R Block.

1 Case law provides that the Court must undertake a
2 rigorous analysis of the kinds of efficiencies being urged by
3 the parties in order to ensure that those efficiencies
4 represent more than mere speculation and promises about
5 post-merger waiver. That's H&R Block at 89.

6 So, thus, in sum, the foregoing legal standards and
7 precedents place the burden on defendants to establish that the
8 projected efficiency relied upon by Dr. Snyder are
9 substantiated, that they are reasonably verifiable by an
10 independent party, and that they are, in fact, verified.

11 Where efficiencies are not independently verifiable
12 and verified, no court in this jurisdiction has ever given any
13 weight to such efficiencies evidence. See H&R Block, 833
14 F.Supp.2d 36, D.D.C. 2011; United States versus Aetna, 240
15 F.Supp.3d, D.D.C. 2017; FTC versus Sysco Corporation, 113
16 F.Supp.3d, 1, D.D.C. 2015; FTC versus Wilhelmsen Holding, ASA,
17 341 F.Supp.3d 27, D.D.C. 2018; FTC versus Staples, 970 F.Supp
18 1066, D.D.C. 1997.

19 This is because it is the parties' interest to be
20 aggressive and optimistic in the projection of efficiencies to
21 justify their own merger. Because courts are not
22 well-positioned to verify such projections, independent
23 verification is critical in order to allow a court to determine
24 whether such projections are reliable.

25 Without verification, the efficiencies analysis could

1 swallow the analytical framework required by the Clayton Act.
2 See H&R Block at 91.

3 The Court's findings and conclusions are as follows:

4 Number one, many of the projected efficiencies in the
5 November 2020 model may be verifiable, but at least some are
6 not verifiable.

7 According to the testimony of Mr. Sansigre, he and his
8 team worked very hard to derive the efficiencies model. They
9 began in March 2020 by including detailed data about Penguin
10 Random House. When data became available from Simon & Schuster
11 in September 2020, he added that data to the model. When
12 additional data became available in October 2020, he included
13 that data as well. The data and assumptions in the model were
14 closely checked by executives in the Bertelsmann M&A group and
15 the ZI risk management group including Markus Dohle and Nihar
16 Malaviya.

17 Mr. Sansigre estimates that the model was revised a
18 hundred times before it became final. All of Mr. Sansigre's
19 judgments and assumptions were based on his broad experience in
20 M&A and in particular in M&A in the publishing industry.

21 And the Court has no doubt that Mr. Sansigre is very
22 competent, an expert in these matters.

23 Mr. Sansigre uses the term synergies and efficiencies
24 interchangeably. His model identified four categories of
25 synergies; real estate, operating expenses, variable costs, and

1 revenue.

2 The real estate efficiencies were largely based on
3 expected consolidation of Simon & Schuster's New York
4 headquarters with Penguin Random House's New York headquarters.
5 Mr. Sansigre consulted with managers within Penguin Random
6 House and determined that the personnel of Simon & Schuster
7 could be accommodated in Penguin Random House's New York office
8 space. He then examined Simon & Schuster's lease and consulted
9 with real estate experts who advised him that he could sublet
10 Simon & Schuster's office space for 50 percent of the rental
11 payments owed under the lease. He also examined other real
12 estate holdings and estimated some additional savings from
13 allowing other leases to expire. Based on those calculations,
14 he projected approximately \$10 million in savings per year,
15 almost all of which are from consolidating the New York office
16 space.

17 The operating expense synergies reflect efficiencies
18 in headcount and non-headcount expenses, essentially personnel
19 costs.

20 Mr. Sansigre's November 2020 model projected
21 \$ [REDACTED] in annual operating expense synergies in 2025.

22 You know, I didn't think of this before, parties, but
23 I do have numbers in this. Is it okay for me to be reading
24 this publicly?

25 MR. FRACKMAN: As the Court knows, we actually made

1 quite an effort to keep the numbers confidential. And I think
2 both Simon & Schuster and Penguin Random House believe they are
3 confidential. They affect personnel issues and subsequent
4 events.

5 THE COURT: I am going to black out the numbers then,
6 and we will issue a blacked out -- I will just black out the
7 numbers and then read on the record. Thank you. I'm sorry
8 about that.

9 Okay. So Mr. Sansigre's November 2020 model projected
10 a certain amount in annual operating expense synergies in 2025.
11 Mr. Sansigre began by predicting a percentage decrease in
12 operating expenses. And this figure was based on prior
13 operating expense synergies in 26 prior acquisitions including
14 the 2013 Penguin Random House merger which had operating
15 expense synergies of a certain percentage as well as
16 consultation with Penguin Random House executives like
17 Mr. Malaviya and Mr. Dohle.

18 Then Mr. Sansigre looked at the data examining costs
19 department by department to identify where operating expense
20 synergies actually might be achieved.

21 In some departments such as sales, IT, and
22 administration, Mr. Sansigre looked at specific employee roles
23 and third party contracts to determine which kinds of positions
24 or contacts might be redundant to estimate headcount and
25 non-headcount savings.

1 In some other departments such as fulfillment,
2 Mr. Sansigre used his judgment to project a percentage of
3 savings based on considerations like Penguin Random House's
4 ability to scale its distribution to meet a portion of Simon &
5 Schuster's distribution demand.

6 After reviewing the department-by-department data,
7 Mr. Sansigre compared the cumulative projected synergies of
8 that analysis with the expected percentage of synergies that he
9 had used based on prior transactions and management judgment,
10 and the two projected synergies number matched.

11 Mr. Sansigre's November 2020 model projected a
12 certain amount of annual variable cost synergies in 2025. As
13 part of the variable costs, Mr. Sansigre considered return
14 rates. He found that Penguin Random House had lower return
15 rates than Simon & Schuster by certain percentage points
16 between 2017 and 2021. He reviewed records of improved rates
17 from the 2013 merger from Penguin and Random House, the
18 acquisition of smaller publishers like Little Tiger, and
19 experiences of Penguin Random House's third party distribution
20 clients. He also consulted Simon & Schuster and Penguin Random
21 House management.

22 Based on those considerations, Mr. Sansigre used his
23 judgment to predict a certain percentage of improvement in
24 Simon & Schuster's post-merger return rate by 2025. Penguin
25 Random House's investments in a supply chain were a significant

1 factor in those projections.

2 Mr. Sansigre's November 2020 model projected a certain
3 amount of annual revenue synergies in 2025. The most
4 significant projected revenue synergies came from gross
5 physical sales and audio. After accounting for certain rising
6 costs, most significantly royalties and advance write-offs, he
7 came up with a particular number that was a projected increase
8 in sales. And the sales projections are based on
9 Mr. Sansigre's judgment and experience.

10 Penguin Random House's large sales force was a
11 significant factor in Mr. Sansigre's gross physical sales
12 projections. He believed this large sales force would get
13 Simon & Schuster books into more stores and, thus, increase
14 sales, namely in independent books stores, specialty stores,
15 and international retailers.

16 Simon & Schuster relies on its top customers for a
17 greater proportion of its sales than Penguin Random House does.
18 Mr. Sansigre interpreted this to mean that Penguin Random House
19 could improve Simon & Schuster's sales among it's non-top
20 customers.

21 Considering past acquisitions, Mr. Sansigre noted that
22 Penguin Random House doubled the sales of Little Tiger's
23 imprints within two years after acquiring the smaller
24 publisher.

25 Notably, however, Mr. Sansigre's sales projections do

1 not align with the historical data from the 2013 merger of
2 Penguin and Random House which is more similar in scale to the
3 proposed merger of Penguin Random House and Simon & Schuster.

4 After the 2013 merger, sales declined. Mr. Sansigre
5 discounts the sales results of the 2013 merger because of
6 changed market conditions including the decline of commercial
7 fiction around 2013 in which Penguin was heavily invested at
8 the time.

9 In audio Mr. Sansigre predicted that Penguin Random
10 House's significant investments in in-house audio production
11 would let it improve Simon & Schuster's audio revenue because
12 Simon & Schuster relied on third parties for much of its audio
13 revenue.

14 Mr. Sansigre used his judgment to predict that Simon &
15 Schuster would have a certain percentage increase in audio
16 revenue post merger through essentially growing with the market
17 and benefiting from Penguin Random House's in-house
18 capabilities.

19 Mr. Sansigre discounted Simon & Schuster's
20 management's relatively high predictions for a Simon & Schuster
21 standalone future audio revenue because he wanted to
22 independently analyze the value of the merger.

23 So in sum, Mr. Sansigre's projected synergies are
24 based on educated management judgments mostly based on past
25 experience and applied to whatever detailed data about the

1 businesses of Penguin Random House and Simon & Schuster that
2 was available to him.

3 Many of the projections about cost savings are
4 arguably verifiable because theoretically an independent party
5 could look at all the underlying data about the costs of each
6 entity that Mr. Sansigre compiled and inputted into his
7 spreadsheets. They could get detailed explanations about the
8 assumptions that Mr. Sansigre made in coming up with his
9 percentage estimates of savings, and they could determine
10 whether those assumptions were reasonable and based on past
11 experience. Relying on past experience is favored by the
12 horizontal merger guidelines.

13 Some of the projections, however, most notably the
14 revenue projections, are not verifiable and are not based on
15 past experience.

16 The November 2020 model projects sales synergies after
17 the merger even though past experience does not support any
18 sales synergies because after Penguin and Random House merged
19 in 2013, they experienced a decrease in sales.

20 There were other merger experiences of Penguin Random
21 House that supported the idea of sales synergies, but
22 Mr. Sansigre picked and chose among the different precedents
23 and he justified his sales projections not relying on Penguin
24 and Random House merger based on his evaluation of changed
25 marketing conditions.

1 Therefore, the actual percentages that Mr. Sansigre
2 chose to apply to revenues as synergies are not verifiable.

3 Indeed, the defendants have conceded that revenue
4 synergies are the least easy to predict, and one of
5 Mr. Sansigre's own emails in the record acknowledges that the
6 sales efficiencies are difficult to predict.

7 Ultimately, however, the projected sales synergies are
8 derived from Mr. Sansigre's personal judgment, and they are not
9 consistent with the most prominent past experience and, thus,
10 the projected sales synergies in particular are not verifiable.

11 Number two, none of the efficiencies are independently
12 verified.

13 The parties agree and stipulate that, regardless of
14 whether the model was verifiable, it was not, in fact, verified
15 by anyone outside of Penguin Random House. Thus, there was no
16 independent verification as the horizontal merger guidelines
17 and prior case law contemplate.

18 Defendants argue that the Court may verify the
19 projections by hearing how they were derived and satisfying
20 itself that Mr. Sansigre put in a lot of work and made
21 reasonable assumptions, but the Court strongly disagrees that
22 this is what is contemplated by horizontal merger guidelines
23 and the case law.

24 The Court is not in a position to fact-check what
25 Mr. Sansigre says that he did or to determine whether his

1 assumptions were reasonable. Notably, none of the cases that
2 have considered this issue support the notion that the Court
3 should provide the independent verification necessary to
4 support efficiencies evidence proffered by defendants.

5 Defendants have said that there's no case that says an
6 expert is necessary. And I think that's true. Nobody has said
7 that explicitly. But the defendants have the burden to
8 establish that these efficiencies were independently verified,
9 and they assume a risk in litigation in arguing to a court that
10 a court should do that work that in many precedents was
11 performed by experts with much more knowledge about the
12 industry and expertise in dealing with financial models and
13 assumptions than a court could reasonably be expected to have.

14 This Court notes that in the Sysco case, that court
15 found that the expert had not verified whether efficiencies
16 predicted by a consulting company were merger specific and for
17 that reason among others declined to consider the efficiencies
18 evidence. That court did not attempt to verify the merger
19 specificity on its own. And this Court is not aware of any
20 other precedent where a court has undertaken the kind of
21 rigorous verification that is necessary in order to rely on
22 efficiencies in an antitrust case.

23 Number three, subsequent updates of the November 2020
24 model undermine its reliability.

25 After the November 2020 model was created,

1 Mr. Sansigre continued to update and refine the model. Most
2 notably, new iterations of the model were created in June 2021
3 and January 2022. The new iterations have some drastically
4 different projections with respect to efficiencies. The Court
5 focuses on the January 2022 model because defendants contend
6 that the June 2021 model was about a special circumstance, a
7 possible large infusion of cash to the business.

8 Looking at the January 2022 model, that model predicts
9 an increase in gross physical sales of [REDACTED] as
10 compared to [REDACTED] in the November 2022 model.

11 The January 2022 model predicts -- I'm sorry, I should
12 not have said those numbers.

13 The January '22 model predicts a certain number in
14 fulfilling savings as compared to a much larger number
15 predicted in November 2020, and savings on administration in
16 the 2022 model is far larger as compared to the number in the
17 November 2020 model. And I understand that that includes
18 editorial and art, but the additions of those lines does not
19 account for the magnitude of the change.

20 Furthermore, certain projections of the November 2020
21 model were proved inaccurate by the actual performance of
22 Simon & Schuster in 2021.

23 While the November 2020 model made certain predictions
24 of synergies for a merged company based on inputs regarding
25 Simon & Schuster's expected performance as a standalone

1 company, the actual standalone performance of Simon & Schuster
2 exceeded the predictions.

3 This indicates that the November 2020 model is both
4 out of date because it does not include actual updated
5 performance numbers and also that the November 2020 model
6 relied on proveably wrong projections and predictions.

7 Mr. Sansigre testified that the November 2020 model is
8 still the most reliable because it reflects pre-pandemic market
9 conditions. It appears to be his judgment that the future will
10 look more like the pre-pandemic world than the present world.

11 The Court rejects that testimony because Mr. Sansigre
12 cannot possibly know what the post-pandemic world will be like
13 and whether the book industry will revert to pre-pandemic
14 levels of sales and costs. Even with the benefit of industry
15 expertise, it is clear to this Court that we are in uncharted
16 waters.

17 Thus, the Court concludes that the November 2020 model
18 is unreliable because its inputs are not updated and its
19 projections are proveably inconsistent with actual numbers for
20 Simon & Schuster in 2021. The Court finds that Mr. Sansigre's
21 justifications for continuing to use the November 2020 model
22 are unpersuasive.

23 The Court, thus, finds that the November 2020
24 efficiencies model contains some projected efficiencies that
25 are not verifiable and that, in any event, none of the

1 efficiencies have been verified as required by the horizontal
2 merger guidelines and persuasive case law.

3 Moreover, the model is unreliable because it is not
4 updated and makes proveably inaccurate projections. As a
5 result, Dr. Snyder's expert report based on the November 2020
6 model is not based on sufficient facts and data under Rule 702
7 and must be excluded.

8 Five precedents in this jurisdiction unanimously
9 support this conclusion. Those precedents are H&R Block,
10 Wilhelmsen, Staples, Aetna, and Sysco.

11 In United States versus H&R Block, the court rejected
12 efficiencies evidence where the projected efficiencies, quote,
13 were largely premised on defendant's managers' experiential
14 judgment about likely costs rather than a detailed analysis of
15 historical data.

16 The court noted that, while reliance on the estimation
17 and judgment of experienced executives about costs may be
18 perfectly sensible as a business matter, the lack of a
19 verifiable method of factual analysis resulting in the cost
20 estimates renders them not cognizable by the court.

21 If this were not so, then the efficiencies defense
22 might well swallow the whole of section 7 of the Clayton Act
23 because management would be able to present large efficiencies
24 based on its own judgment and the court would be hard pressed
25 to find otherwise.

1 In this case, many of the efficiencies projections are
2 also premised on management expectations and judgment.

3 In FTC versus Wilhelmsen Holding ASA, the court
4 rejected efficiencies evidence where the projected efficiencies
5 were based on, quote, a series of significant assumptions,
6 percentage reductions in cost, percentage increases in
7 productivity, or assumed cost product equivalencies that were
8 doing all the work in calculation of the estimates.

9 There the critical issue was that because the bases
10 for the assumptions the expert identified and their role in the
11 efficiencies analysis were unclear, the reasonableness of the
12 assumptions along with the ultimate determinations could not be
13 verified with any degree of rigor.

14 Significantly, the court in that case noted that,
15 quote, references to the merging parties' past practices,
16 managerial expertise, and incentives or internal verification
17 processes, unquote, could not, quote, serve to substantiate any
18 efficiencies, unquote, because a court cannot substitute
19 defendants' assessments and projections for independent
20 verification.

21 So here, while Penguin Random House's internal process
22 was rigorous, that internal process cannot substitute for
23 independent verification.

24 In FTC versus Staples, the court rejected efficiencies
25 evidence where, quote, the defendants' projected base case

1 savings of \$5 billion were in large part unverified or at least
2 the defendants failed to produce the necessary documentation
3 for verification, unquote.

4 Here the efficiencies also are unverified. And
5 although the defendants will say that they produced the
6 documentation for verification, as the Court has already
7 stated, the Court does not have the capability, the time, or
8 resources to perform the verification.

9 In United States versus Aetna, the court rejected
10 efficiencies evidence where the defendants' experts failed to
11 review the underlying provider contracts after the merging
12 parties approached -- after the merging parties projected
13 efficiencies based on the contracts, and that was criticized.

14 Instead, the expert noted simply that a third party
15 consultant had taken a large haircut to the total savings
16 estimated and without much analysis concluded that the savings
17 were verifiable.

18 The court deemed that insufficient. The court said,
19 without a more robust analysis which the companies have not
20 provided, the court cannot conclude that these network
21 efficiencies are verifiable and likely to be passed on to
22 consumers.

23 Here, like in that case, Dr. Snyder also failed to
24 look closely at the underlying data and did not do any robust
25 analysis to verify the efficiencies.

1 Finally, in FTC versus Sysco, the court rejected
2 efficiencies evidence where defendants' expert relied on
3 synergy projections made by McKinsey, the consulting firm which
4 was hired by Sysco to determine the prospective value of
5 acquiring U.S. Foods.

6 The court there did not question the rigor and scale
7 of the analysis conducted by McKinsey but noted that the expert
8 had not verified that the synergies were merger specific.

9 The court stated that it was not clear what
10 independent analysis the expert did to reduce McKinsey's
11 projected savings to merger-specific savings.

12 The court also noted that in one example, the expert
13 relied exclusively on documents created by either McKinsey or
14 defendants. He performed no independent analysis to verify
15 those numbers.

16 Again, similarly in this case, Dr. Snyder did not
17 perform any independent analysis to verify the numbers. And in
18 that case, the court did not undertake to do the verification
19 itself.

20 As a result, the Court will exclude Dr. Snyder's
21 testimony on efficiencies. No independent party could
22 reasonably verify the magnitude of at least some of the
23 asserted efficiencies in Mr. Sansigre's projected model,
24 especially the sales synergies, and Dr. Snyder made no attempt
25 to provide a quantitative verification of the synergies.

1 Because Dr. Snyder's testimony was not based on sufficient
2 facts and data, that testimony cannot help the trier of fact to
3 determine a fact at issue and, therefore, is not admissible
4 under Rule 702.

5 Although the Court's reasoning is firmly grounded in
6 precedents applying the horizontal merger guidelines, it bears
7 mentioning that the Court's analysis under Rule 702 is also
8 consistent with the application of that rule in other contexts.
9 It is well established that expert testimony may be excluded
10 under Rule 702 where the expert relies uncritically on
11 information provided to them by the party or parties for whom
12 they are working.

13 In the Title VII case, Campbell versus National
14 Railroad Passenger Corporation, the court excluded the
15 testimony of plaintiffs' expert who relied on a summary of
16 testimony prepared by plaintiffs' counsel to form his opinions
17 without independently reviewing or verifying that testimony.
18 That case is at 311 F.Supp.3d 281 from 299 to 300. That's
19 D.D.C. 2018.

20 The court reasoned, quote, such blind reliance on
21 facts provided by plaintiff's counsel combined with his failure
22 to review other sources of information renders his expert
23 report unreliable, unquote. That's at 300.

24 See also McReynolds versus Sodexo Marriott Services,
25 Inc., 349 F.Supp.2d 30 at 38, D.D.C. 2004, allowing in a

1 Title VII case testimony of plaintiffs' expert who relied on
2 data prepared by the opposing party instead of by the same
3 party who retained the expert.

4 And see also United States ex rel Morsell versus
5 NortonLifeLock, Inc. That's 568 F.Supp.3d 248 at 276, D.D.C.
6 2021, where expert and false claims case explicitly disclaimed
7 verification of assumptions, the expert was allowed to opine
8 only conditionally assuming the government succeeds in proving
9 the assumptions upon which the opinions rely.

10 All of these cases support the proposition that an
11 expert's opinion may be excluded as unreliable when the opinion
12 blindly rests on evidence provided by the party that retains
13 the expert. A party may not cloak unexamined assumptions in
14 the authority of expert analysis. See Ask Chemicals, LP versus
15 Computer Packages, Inc, 593 F.Appx. 506, 510, Sixth Circuit,
16 2014.

17 For all the foregoing reasons, the Court grants the
18 government's motion to exclude the defendants' efficiencies
19 evidence.

20 Does any party want any additional findings or
21 conclusions for the record?

22 MR. SCHWARZ: No, Your Honor.

23 MR. FRACKMAN: I think that covers it, Your Honor.

24 THE COURT: Okay. Thank you.

25 So we were in the midst of Dr. Snyder's testimony.

Dissenting Statement of Commissioner Joshua D. Wright
*In the Matter of Ardagh Group S.A., and Saint-Gobain Containers, Inc.,
and Compagnie de Saint-Gobain*

FTC File No. 131-0087

April 11, 2014

The Commission has voted to issue a Complaint and Decision & Order (“Order”) against Ardagh Group (“Ardagh”) to remedy the allegedly anticompetitive effects of Ardagh’s proposed acquisition of Saint-Gobain Containers Inc. and Compagnie de Saint-Gobain (jointly, “St. Gobain”). I dissented from the Commission’s decision because the evidence is insufficient to provide reason to believe Ardagh’s acquisition will substantially lessen competition in glass containers manufactured and sold to beer brewers and spirits distillers in the United States, in violation of Section 7 of the Clayton Act. FTC staff and their economic expert should be commended for conducting a thorough investigation of this matter, working diligently to develop and analyze a substantial quantity of documentary and empirical evidence, and providing thoughtful analyses of the transaction’s potential competitive effects. Indeed, I agree with the Commission that there is evidence sufficient to give reason to believe the proposed transaction would likely result in unilateral price increases. After reviewing the record evidence, however, I concluded there is no reason to believe the transaction violates Section 7 of the Clayton Act because any potential anticompetitive effect arising from the proposed merger is outweighed significantly by the benefits to consumers flowing from the transaction’s expected cognizable efficiencies. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

I write separately today to explain my reasoning for my vote in the matter and to highlight some important issues presented by this transaction relating to the burden of proof facing merging parties seeking to establish cognizable efficiencies.

I. Potential Anticompetitive Effects Are Small At Best Relative to Cognizable Efficiencies

The Commission alleges both unilateral and coordinated price effects will arise from the proposed transaction. The economic logic of the unilateral effects theory is straightforward: If the merger combines the two glass manufacturers who are the most preferred for a set of customers, there is the potential for a price increase arising from the loss of competition between those two firms. This is because sales previously

diverted to the next closest competitor in response to a price increase will now be internalized by the post-merger firm. When analyzing the potential for unilateral price effects, the 2010 Merger Guidelines indicate the Agencies will consider “any reasonably available and reliable information,” including “documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys.”¹ The Merger Guidelines also contemplate a number of quantitative analyses to facilitate the analysis of potential unilateral effects including calculating diversion ratios and the value of diverted sales. Where sufficient data are available, the Merger Guidelines indicate “the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger.”² In my view, the totality of record evidence supports an inference – though a fragile one – that the merger is likely to result in very modest unilateral price effects at best.

With respect to the potential coordinated price effects, I find successful coordination in this market highly unlikely.³ However, even if coordination was a more plausible concern, I am not persuaded record evidence is probative of the effects that would arise as a result of *this* merger. My view and analysis of the record evidence relied upon to assess the magnitude of any potential coordinated effects is that it is suspect and cannot identify price differences attributable to changes in post-merger incentives to coordinate that would result from the proposed transaction rather than other factors. In addition, even if coordinated effects were likely, any estimated expected effect would need to be discounted by a probability of successful coordination that is less than one.

In summary, given the totality of the available evidence, I am persuaded that the proposed transaction is likely to generate, at best, small unilateral price effects.

The key question in determining whether the proposed transaction is likely to violate Section 7 of the Clayton Act is thus whether any cognizable efficiencies “likely

¹ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 6.1 (2010), *available at* <http://www.justice.gov/atr/public/guidelines/hmg-2010.html> [hereinafter MERGER GUIDELINES].

² *Id.*

³ Although coordinated effects may be more likely with two rather than three key competitors, I do not find evidence sufficient to conclude coordination is likely. For example, I find that prices are individually negotiated and not particularly transparent, and the incentive to cheat without detection would likely undermine a collusive outcome. In the ordinary course of business, competitive firms collect information and monitor one another’s behavior. There is no evidence that the information collected by firms in the glass container market is accurate or that coordination based upon that information has taken place to date.

would be sufficient to reverse the merger's potential to harm customers in the relevant market."⁴ The 2010 Merger Guidelines and standard cost-benefit principles teach that efficiencies should matter most when competitive effects are small.⁵ The Commission's view of the record evidence is apparent in the Complaint, which alleges that "nearly all" of the efficiencies proffered by the parties are non-cognizable.⁶ However, my own review of the record evidence leads me to disagree with that conclusion. In fact, I find that given reasonable assumptions, cognizable efficiencies are likely to be substantial and more than sufficient to offset any anticompetitive price increase. While reasonable minds can differ with respect to the magnitude of cognizable efficiencies in this case, I do not find the allegation of zero or nearly zero efficiencies plausible. Indeed, my own analysis of the record evidence suggests expected cognizable efficiencies are up to six times greater than any likely unilateral price effects. The relative magnitude of the expected cognizable efficiencies set forth is dispositive of the matter under my own analysis.

⁴ MERGER GUIDELINES § 10.

⁵ MERGER GUIDELINES § 10 ("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."). It is sometimes argued, pointing to language in the Merger Guidelines that "efficiencies almost never justify a merger to monopoly or near-monopoly," that the Merger Guidelines rule out or render the burden facing merger parties practically insurmountable in the case of mergers to monopoly or "three-to-two" situations. In my view, this is a misreading of the Merger Guidelines in letter and spirit. The sentence prior notes that "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great." The Merger Guidelines' reference to mergers to monopoly or near-monopoly are illustrations of cases in which likely adverse effects might be large. The Merger Guidelines themselves do not rule out an efficiencies defense when a merger with small anticompetitive effects, with any market structure, generates cognizable efficiencies that are sufficient to prevent the merger from being anticompetitive. Nor do the Merger Guidelines suggest that a merger in a market with many firms that exhibits significant unilateral price effects should face a less serious burden in order to establish an efficiencies defense. The Merger Guidelines' more general shift toward effects over market structure is also consistent with this analysis and undermines the logic of a position that the comparison of anticompetitive harms to cognizable efficiencies should be conducted differently depending upon the number of firms in the relevant market. To the extent the Commission believes the judicial decisions cited in note 5 of their statement endorse the notion that extraordinary efficiencies are required to justify a merger to monopoly or duopoly even when the anticompetitive effects from that merger are small, this is the analytical equivalent of allowing the counting of the number of firms within a market to trump analysis of competitive effects. The Commission should reject that view as inconsistent with the goal of promoting consumer welfare.

⁶ See, e.g. Complaint, In the Matter of Ardagh Group S.A., F.T.C. Docket No. 9356 (June 28, 2013), *available at* <http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmt.pdf>.

II. When Is There an Efficiencies Defense at the FTC?

I would like to highlight some important issues presented by this transaction as they relate to how the Commission analyzes parties' efficiencies claims, and in particular, whether the burden of proof facing parties seeking to establish cognizable efficiencies is or should be meaningfully different than the burden facing the agency in establishing that a proposed merger is likely to substantially lessen competition.

My view is that the burden facing the agency with respect to the likelihood of anticompetitive effects should be in parity to that faced by the parties with respect to efficiencies. I recognize that this view is at least superficially in tension with the 2010 Merger Guidelines, which appear to embrace an asymmetrical approach to analyzing harms and benefits. Indeed, the 2010 Merger Guidelines declare that "the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies."⁷ This tension is easily resolved in the instant case because the efficiencies substantially outweigh the potential harms, but it merits greater discussion.

To begin with, it is important to define which issues are up for discussion and which are not with some precision. The issue is not whether the burden-shifting framework embedded within Section 7 of the Clayton Act is a useful way to structure economic and legal analysis of complex antitrust issues.⁸ It is. Nor is the pertinent question whether the parties properly bear the burden of proof on efficiencies. They do.⁹

The issues here are twofold. The first issue is whether the magnitude of the burden facing merging parties attempting to demonstrate cognizable efficiencies *should* differ from the burden the Commission must overcome in establishing the likelihood of anticompetitive effects arising from the transaction *in theory*. The second is whether the magnitudes of those burdens differ *in practice*. The Commission appears to answer the first question in the negative.¹⁰ With respect to the second question, the Commission points to some evidence that the Agency does in fact consider efficiencies claims when

⁷ MERGER GUIDELINES § 10.

⁸ See, e.g., *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

⁹ See MERGER GUIDELINES § 10.

¹⁰ Statement of the Commission, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131-0087 (April 11, 2014) ("We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims").

presented in many investigations. There is little dispute, however, that the Commission gives some form of consideration to efficiency claims; the relevant issue is over precisely *how* the Commission considers them. More specifically, must merging parties overcome a greater burden of proof on efficiencies in practice than does the FTC to satisfy its prima facie burden of establishing anticompetitive effects? This question, in my view, merits greater discussion.

Even when the same burden of proof is applied to anticompetitive effects and efficiencies, of course, reasonable minds can and often do differ when identifying and quantifying cognizable efficiencies as appears to have occurred in this case. My own analysis of cognizable efficiencies in this matter indicates they are significant. In my view, a critical issue highlighted by this case is whether, when, and to what extent the Commission will credit efficiencies generally, as well as whether the burden faced by the parties in establishing that proffered efficiencies are cognizable under the Merger Guidelines is higher than the burden of proof facing the agencies in establishing anticompetitive effects. After reviewing the record evidence on both anticompetitive effects and efficiencies in this case, my own view is that it would be impossible to come to the conclusions about each set forth in the Complaint and by the Commission – and particularly the conclusion that cognizable efficiencies are nearly zero – without applying asymmetric burdens.

Merger analysis is by its nature a predictive enterprise. Thinking rigorously about probabilistic assessment of competitive harms is an appropriate approach from an economic perspective. However, there is some reason for concern that the approach applied to efficiencies is deterministic in practice. In other words, there is a potentially dangerous asymmetry from a consumer welfare perspective of an approach that embraces probabilistic prediction, estimation, presumption, and simulation of anticompetitive effects on the one hand but requires efficiencies to be *proven* on the other.

There is ample discretion in the 2010 Merger Guidelines to allow for this outcome in practice. For example, the merger-specificity requirement could be interpreted narrowly to exclude any efficiency that can be recreated with any form of creative contracting. While the Merger Guidelines assert that Agencies “do not insist upon a less restrictive alternative that is merely theoretical,” there is little systematic evidence as to how this requirement is applied in practice. Verifiability, on the other hand, could be interpreted to impose stricter burden of proof than the agency is willing to accept when it comes to predictions, estimates, presumptions, or simulations of anticompetitive effects. There is little guidance as to how these provisions of the

Merger Guidelines ought to be interpreted.¹¹ Neither is further guidance likely forthcoming from the courts given how infrequently mergers are litigated. None of this, of course, is to say that parties should not bear these burdens in practice. Efficiencies, like anticompetitive effects, cannot and should not be presumed into existence. However, symmetrical treatment in both theory and practice of evidence proffered to discharge the respective burdens of proof facing the agencies and merging parties is necessary for consumer-welfare based merger policy.

There are legitimate and widespread concerns that this has not been the case. Academics, agency officials, and practitioners have noted that although efficiencies are frequently a significant part of the business rationale for a transaction, receiving credit for efficiencies in a merger review is often difficult.¹² Professor Daniel Crane has analyzed the perceived asymmetries between competitive effects analysis and efficiencies discussed above and their implications for competition systems and consumer welfare.¹³ Others have pointed out that recent court cases reveal that “the efficiency defense faces an impossibly high burden.”¹⁴ Moreover, testimony from senior agency officials recognize the potential costs of imposing an unnecessarily high burden of proof to demonstrate cognizable efficiencies and states that symmetrical treatment of the evidence as they related to efficiencies versus competitive effects is warranted.

Placing too high a burden on the parties to quantify efficiencies and to show that they are merger-specific risks prohibiting transactions that would be efficiency-enhancing. On the other hand, we are not able simply to take the parties’ word that the efficiencies they have identified will actually materialize. Ultimately, we evaluate evidence related to

¹¹ The 2006 Merger Guidelines Commentary provides some guidance on efficiencies, but offer little guidance on the interpretation of these provisions and the type of substantiation required. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (Mar. 2006), available at <http://www.justice.gov/atr/public/guidelines/215247.htm#44>.

¹² See, e.g., Michael B. Bernstein & Justin P. Hedge, *Maximizing Efficiencies: Getting Credit Where Credit Is Due*, ANTITRUST SOURCE, Dec. 2012, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec12_hedge_12_20f.authcheckdam.pdf.

¹³ Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 386-87 (2011). Professor Crane argues that “as a matter of both verbal formulation in the governing legal norms and observed practice of antitrust enforcement agencies and courts, the government is accorded greater evidentiary leniency in proving anticompetitive effects than the merging parties are in proving offsetting efficiencies,” *id.* at 348, and rejects a variety of justifications for asymmetrical treatment of merger costs and benefits.

¹⁴ Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutional View*, 13 SUP. CT. ECON. REV. 230 (2005).

*efficiencies under the same standard we apply to any other evidence of competitive effects.*¹⁵

The lack of guidance in analyzing and crediting efficiencies has led to significant uncertainty as to what standard the Agency applies in practice to efficiency claims and led to inconsistent applications of Section 10 of the Merger Guidelines, even among agency staff.¹⁶ In my view, standard microeconomic analysis should guide how we interpret Section 10 of the 2010 Merger Guidelines, as it does the rest of the antitrust law. To the extent the Merger Guidelines are interpreted or applied to impose asymmetric burdens upon the agencies and parties to establish anticompetitive effects and efficiencies, respectively, such interpretations do not make economic sense and are inconsistent with a merger policy designed to promote consumer welfare.¹⁷ Application of a more symmetric standard is unlikely to allow, as the Commission alludes to, the efficiencies defense to “swallow the whole of Section 7 of the Clayton Act.” A cursory read of the cases is sufficient to put to rest any concerns that the efficiencies defense is a mortal threat to agency activity under the Clayton Act. The much more pressing concern at present is whether application of asymmetric burdens of proof in merger review will swallow the efficiencies defense.

¹⁵ Statement of Kenneth Heyer on Behalf of the United States Department of Justice, Antitrust Modernization Commission Hearings on the Treatment of Efficiencies in Merger Enforcement (Nov. 17, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-Heyer.pdf.

¹⁶ In a recent study examining agency analysis of efficiencies claims, an FTC economist and attorney found significant disparities. Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission: 1997-2007* (2009), *available at* <http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf>. Coate and Heimert find that “BE staff endorsed 27 percent of the claims considered, while BC accepted significantly fewer (8.48 percent) of the claims considered during the studied period.” The disparity also applies to rejection of efficiencies claims. The Bureau of Economics rejected 11.9 percent of the claims, while the Bureau of Competition rejected a significantly higher 31.9 percent of claims. *Id.* at 26.

¹⁷ For example, Professor Crane explains that “[i]f the government and merging parties were held to the same standard of proof—preponderance of the evidence, for example—then, conceptually, harms and efficiencies would be given equal weight despite the different allocations of burdens of proof.” In addition, “[i]f probabilities of harm are easier to demonstrate on an individualized basis than probabilities of efficiencies, even though in the aggregate both harms and efficiencies are similarly likely in the relevant categories of cases, then merger policy will display a bias in favor of theories of harm even if it adopts an explicit symmetry principle.” Crane, *supra* note 11, at 387-88.

III. Conclusion

There are many open and important questions with respect to the treatment of efficiencies at the Agencies. While the Agencies' analytical framework applied to diagnosing potential anticompetitive effects got an important update with the 2010 Merger Guidelines, there remains significant room for improvement with respect to the aligning agency analysis of efficiencies with standard principles of economic analysis. Primary among these important questions is whether the burden of proof required to establish cognizable efficiencies should be symmetrical to the burden the Agencies must overcome to establish anticompetitive effects. In my view, issues such as out-of-market efficiencies and the treatment of fixed costs also warrant further consideration.¹⁸

For the reasons set forth in this statement, I conclude that the harms from the transaction are small at best and, applying a symmetric standard to assessing the expected benefits and harms of a merger, the expected cognizable efficiencies are substantially greater than the expected harms. Accordingly, I believe the merger as proposed would have benefitted consumers. As such, I cannot join my colleagues in supporting today's consent order because I do not have reason to believe the transaction violates Section 7 of the Clayton Act nor that a consent ordering divestiture is in the public interest.

¹⁸ See, e.g., Jan M. Rybníček & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, in 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM (2014) (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411270; Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145 (2011).

Statement of the Federal Trade Commission¹
In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and
Compagnie de Saint-Gobain
File No. 131-0087
April 11, 2014

In June 2013, the Commission issued a complaint alleging that Ardagh Group, S.A.’s proposed \$1.7 billion acquisition of Saint-Gobain Containers, Inc. would reduce competition in the U.S. markets for glass containers for beer and spirits. Specifically, the Commission alleges that the acquisition would have eliminated head-to-head competition between the parties and resulted in a near duopoly in markets already vulnerable to coordination. If the Commission had not challenged the deal, the merged firm and its only remaining significant competitor, Owens-Illinois would have controlled more than 75 percent of the relevant markets. The Commission staff developed evidence to prove at trial that the acquisition would likely have substantially lessened competition in violation of Section 7 of the Clayton Act. After the start of litigation, the parties chose to settle the matter by divesting six of the nine U.S. plants currently owned by Ardagh. The Commission has now accepted the proposed consent order for public comment and believes it addresses the competitive issues here, as well as the widespread customer concerns expressed by brewers and distillers who depend on a steady and competitively-priced supply of glass containers. We outline below our concerns with this deal and the benefits of the proposed consent.

The 2010 Merger Guidelines explain that the Commission will likely challenge a transaction where “(1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct. . . ; and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.”² We have reason to believe each of these factors is present here. The transaction would have dramatically increased concentration in already highly-concentrated markets. The glass container markets for beer and spirits are vulnerable to post-acquisition coordination, exhibiting features such as low demand growth, tight capacity, high and stable market shares, and high barriers to entry that typify markets that have experienced coordination. The existing three major glass manufacturers already have access to a wealth of information about the markets and each other, including plant-by-plant production capabilities, profitability, the identities of each other’s customers, and details regarding each other’s contracts and negotiations with customers. Customers, industry analysts, public statements, and distributors all serve as conduits for market information. The Commission found evidence that companies in this industry understand their shared incentives to keep capacity tight, avoid price wars, and follow a “price over volume” strategy. We believe this transaction would have made it easier for the remaining two dominant manufacturers to coordinate with one another on

¹ Chairwoman Ramirez and Commissioners Brill and Ohlhausen join in this statement.

² U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 7.1 (2010) [hereinafter 2010 Horizontal Merger Guidelines], *available at* <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

price and non-price terms to achieve supracompetitive prices or other anticompetitive outcomes.

As noted in the 2010 Merger Guidelines, the Commission will also likely challenge a transaction producing harmful unilateral effects. For instance, this could occur where the merged firm would no longer have to negotiate against other competitors for customer supply contracts, or where the transaction would eliminate a competitor that otherwise could have expanded output in response to a price increase.³ The Commission charges that Ardagh's acquisition of Saint-Gobain would have eliminated head-to-head competition between the two merging firms, which are the second- and third-largest U.S. glass container manufacturers in the relevant product markets. Brewers and distillers have reaped substantial benefits from the rivalry between the two, often playing one against the other in supply negotiations.

Once a prima facie showing of competitive harm is made, the Commission will consider evidence from the parties of verifiable, merger-specific efficiencies that could offset this harm.⁴ In highly concentrated markets with high barriers to entry, as here, the parties can rebut the evidence of harm only with evidence of "extraordinary efficiencies."⁵ Efficiencies represent an important aspect of the Commission's merger analysis, with a recent study showing that over a ten-year period 37 of 48 closed investigations involved internal staff memoranda examining efficiencies.⁶ Similarly, a recent survey analyzing evidence considered by Commission staff prior to issuing second requests concluded that staff credited parties' detailed efficiency claims "[i]n most cases," even if they proved insufficient to offset competitive concerns about the transaction.⁷

In this matter, many of Ardagh's proffered synergies were not merger-specific and could have been achieved absent the acquisition. For instance, the parties claimed the merger would allow them to reduce overhead within the Saint-Gobain organization. However, this claim related to the staffing of the current Saint-Gobain organization alone and is separate from any additional savings to be reaped from eliminating staff positions made redundant by the combination of Ardagh and Saint-Gobain. Thus, the claim is not merger specific. In addition, Ardagh made broad claims of additional operational efficiencies, and likely would have achieved some. However, the parties put forward insufficient evidence showing that the level of synergies that could be substantiated and verified would outweigh the clear evidence of consumer harm.

³ See 2010 Horizontal Merger Guidelines §§ 6, 6.2-6.3.

⁴ See *id.* § 10.

⁵ *Fed. Trade Comm'n v. Heinz*, 246 F.3d 708, 720 (D.C. Cir. 2001); *In re Polypore Int'l, Inc.*, Initial Decision, No. 9327, 2010 WL 866178, at *184-85 (FTC Mar. 1, 2010).

⁶ Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission: 1997-2007* 14 n.31 (2009), available at <http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf>.

⁷ Darren S. Tucker, *A Survey of Evidence Leading to Second Requests at the FTC*, 78 Antitrust L.J. 591, 602 (2013).

For these reasons, we respectfully disagree with Commissioner Wright's conclusion that there is no reason to believe the transaction violates Section 7 of the Clayton Act. We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims here and believe he overlooks several important points in his analysis. We are mindful of our responsibility to weigh appropriately all evidence relevant to a transaction and, moreover, understand our burden of proof before a trier of fact.

Commissioner Wright expresses concern that competitive effects are estimated whereas efficiencies must be "proven," potentially creating a "dangerous asymmetry" from a consumer welfare perspective.⁸ We disagree. Both competitive effects and efficiencies analyses involve some degree of estimation. This is a necessary consequence of the Clayton Act's role as an incipency statute. In addition, while competitive effects data and information tends to be available from a variety of sources, the data and information feeding efficiencies calculations come almost entirely from the merging parties. Indeed, the 2010 Merger Guidelines observe that "[e]fficiencies 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."⁹ The need for independent verification of this party data animates the requirement that, to be cognizable, efficiencies must be substantiated and verifiable.

Courts have repeatedly emphasized that, "while reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable."¹⁰ This is for good reason. Indeed, "if this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act."¹¹ The merger analysis the Commission undertook in this case is thus entirely consistent with the 2010 Horizontal Merger Guidelines and established case law.

Finally, we also believe the proposed consent order addresses the competitive concerns we have identified. The proposed order requires Ardagh to sell six manufacturing plants and related assets to a single buyer within six months, thereby creating an independent third competitor that fully replaces the competition that would have been lost in both the beer and spirits glass container markets had the merger proceeded unchallenged. In sum, we have ample reason to believe that the proposed merger was anticompetitive and without appropriate efficiency justification, and that the proposed remedy will maintain competition in the market for glass containers for beer and spirits. We commend and thank Commission staff for their hard work on this matter.

⁸ Dissenting Statement of Commissioner Wright at 5.

⁹ 2010 Horizontal Merger Guidelines § 10.

¹⁰ *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 46 (D.D.C. 2011); *see also* 2010 Horizontal Merger Guidelines § 10 (noting that it is "incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify [them] by reasonable means.").

¹¹ *H&R Block*, 833 F. Supp. 2d at 46.